Date: 20060518

Docket: A-446-05

Citation: 2006 FCA 186

CORAM: **NOËL J.A.**
SHARLOW J.A.
MALONE J.A.

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellant

and

CLEOTILDE DELA FUENTE

Respondent

Heard at Winnipeg, Manitoba, on April 24, 2006.

Judgment delivered at Ottawa, Ontario , on May 18, 2006.

REASONS FOR JUDGMENT BY: NOËL J.A.

CONCURRED IN BY: SHARLOW J.A.
MALONE J.A.

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REASONS FOR JUDGMENT

NOËL J.A.

[1] This is an appeal from a decision of Harrington J. of the Federal Court (the "applications judge") setting aside a decision of the Immigration Appeal Division ("IAD") of the Immigration and Refugee Board ("IRB") which denied the Respondent's application to sponsor her spouse because she had failed to disclose her marital relationship when she landed in Canada back in 1992. (The decision under appeal is reported at 2005 FC 992.)

[2] In allowing the Respondent's application for judicial review, the applications judge certified the following two questions:

(a) Can the doctrine of legitimate expectations be relied upon to void the application of section 190 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ["IRPA" or "Act"]?

(b) Does the phrase "at the time of that application" in paragraph 117(9)(d) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 ["Regulations"], contemplate the time at which the application for permanent residence was made?

The facts

[3] The Respondent and her mother applied for a permanent resident visa in the family class back in 1992. A visa was issued to the Respondent on August 26, 1992, which was valid until December 18, 1992. The Respondent's visa was issued on the basis that she was an unmarried accompanying family member of her mother.

[4] The Respondent arrived in Canada on October 23, 1992, made an application for landing upon arrival, and was granted landing and permanent resident status following an examination. She indicated on her landing form that she was single (unmarried) and had no dependents. The Respondent has lived in Canada since 1992, and remains a permanent resident.

[5] The Respondent was engaged to be married in October 1986. She did not marry until October 12, 1992, approximately two weeks before entering Canada.

[6] The Respondent and her husband have a child born in Canada in September 1994. The Respondent applied to sponsor her husband by application dated January 27, 2002, which was received by Citizenship and Immigration Canada ("CIC") on January 30, 2002.

[7] After it was noted that the Respondent had not declared her marriage when she was examined on her application for landing, she was called in for a sponsorship interview which took place on April 9, 2002. The interviewer, after consultation with other officers, told her that she would be permitted to sponsor her husband in spite of the misrepresentation made on her application for landing.

[8] The Respondent subsequently received a letter dated April 17, 2002, which confirmed that her sponsorship application was approved. The letter stated that her relatives had two years in which to apply for landing under the terms of her sponsorship, otherwise her sponsorship would expire. Among other information, the letter stated that she would be responsible for distributing the applications for permanent residence to her relatives.

[9] On June 28, 2002, *IRPA* came into force, along with the Regulations. At the time relevant to this appeal, paragraph 117(9)(d) of the Regulations provided:

117(9) A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if …	117(9) Ne sont pas considérées comme appartenant à la catégorie du regroupement familial du fait de leur relation avec le répondant les personnes suivantes: […]

(d) the sponsor previously made an application for permanent residence and became a permanent resident and, at the time of that application, the foreign national was a non-accompanying family member or a former spouse or former common-law partner of the sponsor and was not examined.	(d) dans le cas où le répondant est devenu résident permanent à la suite d'une demande à cet effet, l'étranger qui, à l'époque où cette demande a été faite, n'a pas fait l'objet d'un contrôle et était un membre de la famille du répondant n'accompagnant pas ce dernier ou était un ex-époux ou ancien conjoint de fait du répondant.

[10] The Respondent's husband applied for a permanent resident visa by application dated July 23, 2002, which was received by the Canadian embassy in Manila on July 24, 2002.

[11] The visa officer reviewed the husband's file, and determined that he was excluded under paragraph 117(9)(d) of the Regulations because he was a spouse who was not declared at the time of the Respondent's entry to Canada. A refusal letter dated January 29, 2003 was sent to the husband. A letter was sent to the Respondent the same day informing her that her husband's visa application had been refused.

[12] The Respondent appealed to the IAD, which upheld the visa officer's decision, finding that paragraph 117(9)(d) was applicable and that the Respondent's husband was excluded from eligibility in the family class. The Respondent then applied for judicial review before the Federal Court.

Statutory provisions

[13] Aside from paragraph 117(9)(d) of the Regulations which I have already quoted, sections 28 and 51 of the Regulations are relevant:

28. For the purposes of subsection 15(1) of the Act, a person makes an application in accordance with the Act by	28. Pour l'application du paragraphe 15(1) de la Loi, la demande est faite au titre de la Loi lorsque la personne, selon le cas:
(a) submitting an application in writing; (b) seeking to enter Canada; (c) seeking to transit through Canada as provided in section 35; or (d) making a claim for refugee protection.	a) présente la demande par écrit; b) cherche à entrer au Canada; c) cherche à transiter par le Canada aux termes de l'article 35; d) demande l'asile.

51. A foreign national who holds a permanent resident visa and is seeking to become a permanent resident at a port of entry must	51. L'étranger titulaire d'un visa de résident permanent qui, à un point d'entrée, cherche à devenir permanent doit:
a) inform the officer if	a) le cas échéant, faire part à l'agent de ce qui suit :
(i) the foreign national has become a spouse or common-law partner or has ceased to be a spouse, common-law partner or conjugal partner after the visa was issued, or	(i) il est devenu un époux ou conjoint de fait ou il a cessé d'être un époux, un conjoint de fait ou un partenaire conjugal après la délivrance du visa,
(ii) material facts relevant to the issuance of the visa have changed since the visa was issued or were not divulged when it was issued; and	(ii) tout fait important influant sur la délivrance du visa qui a changé depuis la délivrance ou n'a pas été révélé au moment de celle-ci;
…	[…]

[14] The following provisions of *IRPA* are also relevant to the disposition of this appeal:

2.(1) The definitions in this subsection apply in this Act.

"permanent resident" means a person who has acquired permanent resident status and has not subsequently lost that status under section 46.

2.(1) Les définitions qui suivent s'appliquent à la présente loi.

«résident permanent» Personne qui a le statut de résident permanent et n'a pas perdu ce statut au titre de l'article 46.

3.(1) The objectives of this Act with respect to immigration are

(d) to see that families are reunited in Canada.

3.(1) En matière d'immigration, la présente loi a pour objet:

(d) de veiller à la réunification des familles au Canada.

15.(1) An officer is authorized to proceed with an examination where a person makes an application to the officer in accordance with this Act.

15.(1) L'agent peut procéder à un contrôle dans le cadre de toute demande qui lui est faite au titre de la présente loi.

18.(1) Every person seeking to enter Canada must appear for an examination to determine whether that person has a right to enter Canada or is or may become authorized to enter and remain in Canada.

18.(1) Quiconque cherche à entrer au Canada est tenu de se soumettre au contrôle visant à déterminer s'il a le droit d'y entrer ou s'il est autorisé, ou peut l'être, à y entrer et à y séjourner.

20.(1) Every foreign national, other than a foreign national referred to in section 19, who seeks to enter or remain in Canada must establish,

(a) to become a permanent resident, that they hold the visa or other document required under the regulations and have come to Canada in order to establish permanent residence; and

…

20.(1) L'étranger non visé à l'article 19 qui cherche à entrer au Canada ou à y séjourner est tenu de prouver:

a) pour devenir un résident permanent, qu'il détient les visa ou autres documents réglementaires et vient s'y établir en permanence;

[…]

21.(1) A foreign national becomes a permanent resident if an officer is satisfied that the foreign national has applied for that status, has met the obligations set out in paragraph 20(1)(a) and subsection 20(2) and is not inadmissible.	21.(1) Devient résident permanent l'étranger dont l'agent constate qu'il a demandé ce statut, s'est déchargé des obligations prévues à l'alinéa 20(1)a) et au paragraphe 20(2) et n'est pas interdit de territoire.
190. Every application, proceeding or matter under the former *Act* that is pending or in progress immediately before the coming into force of this section shall be governed by this *Act* on that coming into force.	190. La présente loi s'applique, dès l'entrée en vigueur du présent article, aux demandes et procédures présentées ou instruites, ainsi qu'aux autres questions soulevées, dans le cadre de l'ancienne loi avant son entrée en vigueur et pour lesquelles aucune décision n'a été prise.

Decision under appeal

[15] The applications judge granted the judicial review application and certified the two questions quoted at paragraph 2 of these reasons.

[16] With respect to the first question, the applications judge found that although section 190 of *IRPA* was applicable to the matter before him since the Respondent's husband made his application one month after *IRPA* came into force, he and his wife had a legitimate expectation that the application would be processed under the former *Immigration Act*, R.S.C. 1985, c. I-2.

[17] Applying this doctrine, he held that section 190 was inapplicable because the immigration authorities had failed to forewarn the Respondent that her husband might fall in an excluded class upon the coming into force of *IRPA*. Had this warning been given, the Respondent would have

taken “every conceivable step” to have the application processed in the two-and-one-half-month period that was open to them (Reasons, para. 18).

[18] In the alternative, the applications judge held that the phrase "at the time of that application" found in paragraph 117(9)(d) of the Regulations refers to the time when the Respondent’s application for visa was filed or at the very latest when she was issued her visa. As at that time she had yet to marry, her husband-to-be was not a family member, and paragraph 117(9)(d) had no application. According to the applications judge, this is the only conclusion that can be reached if effect is given to the ordinary meaning of the words (Reasons, paras. 24, 25 and 30).

Analysis and decision

The first question

[19] The issue raised by the first question can be disposed of rapidly. Section 190 of *IRPA* is clear and unambiguous. It provides that if an application is pending or in progress on June 28, 2002, *IRPA* applies without condition. The doctrine of legitimate expectations is a procedural doctrine which has its source in common law. As such it does not create substantive rights and cannot be used to counter Parliament’s clearly expressed intent (*Canada (M.E.I.) v. Lidder*, [1992] F.C.J. No. 212 (F.C.A.) at paras. 3 and 27).

[20] Moreover, the representations made to the Respondent were factually accurate. The argument advanced by the Respondent is that the officials had a positive duty to forewarn her and

her husband that pending legislation could impact on the husband's status. There is no basis in law for imposing such a duty.

[21] I would therefore answer the first certified question in the negative.

The second question

[22] The second question requires elaboration. The issue has given rise to a split in the Federal Court. In concluding as he did, the applications judge declined to follow the decision of Layden-Stevenson J. in *Dave v. Canada (M.C.I.)*, 2005 FC 510 (*Dave*) where she held that the "time of that application" in paragraph 117(9)(d) refers to the period that begins with the submission of the application for a visa and continues through the time when the foreign national is granted the right to enter Canada as a permanent resident at the port of entry. The gist of her reasoning in reaching this conclusion is set out at paragraphs 12 and 13 of her reasons:

> [12] Insofar as Mr. Dave's proposed interpretation of the phrase "at the time of that application" is concerned, he does not suggest that the words "that application" refer to anything other than an application for permanent residence. Nor does he dispute that a visa, in and of itself, does not confer a right of entry: *Canada (Minister of Employment and Immigration) v. De Decaro*, [1993] 2 F.C. 408 (C.A.) per Mr. Justice Marceau; *McLeod v. Canada (Minister of Citizenship and Immigration)*, [1999] 1 F.C. 257 (C.A.); *Wang v. Canada (Minister of Citizenship and Immigration)* (2002), 216 F.T.R. 223 (T.D.). Although this jurisprudence was concerned with provisions under the former legislation and the term "landing" is no longer found in IRPA, the rationale contained in the noted authorities remains apposite. One does not become a permanent resident until one is "landed". Consequently, the application process is not complete merely as a result of the processing of an application for a visa or because a visa is granted. The "time of that application" includes the period that begins with the submission of the application and continues through to the time when permanent residence is granted. Were it otherwise, any applicant could circumvent the provisions of the legislation by simply completing and submitting his or her application form prior to marrying.
>
> [13] In short, the application process for permanent residence encompasses not only the application for a visa, but also the application for admission at the

> port of entry (POE). Accordingly, the argument that the phrase "at the time of that application" comprises only the point in time when the application form was completed and submitted must fail.

[23] *Dave* was followed by Pinard J. in both *Benjelloun c. Canada (M.C.I.)*, 2005 CF 844 and *Canada (M.C.I.) c. Hernandez De Guzman*, 2005 CF 1255, and by Gibson J. in *Tallon v. Canada (M.C.I.)*, 2005 FC 1039. More recently, Shore J. came to the same conclusion in *Muhammad Javid Akhter v. Minister of Citizenship and Immigration*, 2006 FC 481, a decision in which he emphasized that limiting "the time of that application" to the time when the application was filed would deprive paragraph 117(9)(d) of any concrete or practical effect (*Akhter*, para. 36).

[24] The applications judge in this case challenged the assertion that a foreign national could circumvent paragraph 117(9)(d) by simply submitting the application form prior to marrying. He said at paragraph 30 of his reasons:

> I cannot agree that if the "time of application" is given its ordinary meaning any applicant could circumvent the Regulations by marrying after submitting his or her application. The answer lies in the landing form. Mrs. dela Fuente could have been removed under the old Act for misrepresentation. Likewise, section 40 of *IRPA* provides that a permanent resident or a foreign national is inadmissible for misrepresentation relating to a relevant matter, or for having been sponsored by a person who is deemed to be inadmissible for misrepresentation. The "mischief" could have been avoided by not forgiving Mrs. dela Fuente. She could have been removed, as could her husband as being sponsored by an inadmissible person.

[25] In *Tauseef v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1209, Phelan J. (whose reasoning was followed by Tremblay-Lamer J. in *Beauvais v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1408), adopted the views expressed by the applications judge in this instance and added comments of his own. He said at paragraph 20 "The provision at issue appears in the section of the regulations designed to regulate and thus foster the objective of

family unification [under paragraph 3(1)(d) of *IRPA*]". According to Phelan J., limiting the phrase to the time of the filing of the application is more consistent with that objective.

[26] Phelan J. added that under section 51 of the Regulations, foreign nationals have a continued obligation to report any change in their marital status right up to the time of entry. Construing "the time of that application" as proposed in *Dave* would make that provision redundant (*Tauseef*, para. 26).

[27] In a decision released shortly after the present appeal was heard (*Eli Abdo v. Minister of Citizenship and Immigration*, 2006 FC 533), Phelan J. reiterated this reasoning and certified essentially the same question as the one certified in this instance, except that it refers to the time at which the application was "submitted" rather than the time at which it was "made".

The novel approach

[28] To complicate matters, the Minister no longer relies on *Dave* or on any of the views espoused by the Federal Court to date. He asserts for the first time in this appeal that there are in reality two separate and distinct applications involved in the process of obtaining permanent resident status, one being the application for a visa which is filed at the visa office and the other being the application for permanent residence which takes place at a port of entry when the foreign national seeks to enter Canada. In so arguing, the Minister relies on the decision of the IAD of the IRB in *Carla Quintino Andrea v. Canada (Minister of Citizenship and Immigration)*, File No. VA4-01491, March 8, 2006, paras. 12 to 14.

[29] In my respectful view, the novel position advocated by the Minister is not supported by the legislation. The argument essentially rests on subsection 28(b) of the Regulations which provides that a person who seeks to enter Canada is considered to have made an application under the Act. Hence, it is argued that a person who seeks to enter Canada makes an application for permanent residence at that time. As the Respondent failed to disclose that she was married when she entered Canada, paragraph 117(9)(d) operates to exclude her husband from the family class.

[30] However, subsection 28(b) was promulgated "for the purposes of subsection 15(1) of the Act". It allows for examinations which are attendant to an application under the Act to take place whenever a person seeks to enter Canada. It does not apply for any other purpose. Moreover, even if section 28 was a provision of general application, subsection (b) speaks of an application to enter Canada. It has not been shown how this application metamorphosizes into an application for permanent residence.

[31] The new position advocated by the Minister also runs counter to his own understanding of the legislation when regard is had to the forms and publications printed under his authority. For instance, the authorized form for seeking permanent residence status (Form IMM 0008) is entitled "Application for Permanent Residence in Canada" and the Operations Procedures Manuals (Manuals OP1 and OP2) published by the Minister make it clear that this application is filed at the designated visa office (Manual OP1, Sections 5.16 and 7.5.8, and Appendix B, C, D, E to Chapter 16; Manual OP2, Sections 5.5, 9, 10, and 10.5). Nowhere is it suggested that an application for

permanent residence is initiated otherwise than by filing the authorized form at the designated visa office.

[32] The novel position would provide a quick and easy solution to the problem at hand from the perspective of the Minister, but it runs counter to his own understanding of the legislative scheme, and there is no statutory foundation for the proposition that an application for permanent residence is initiated at the port of entry.

The suggested approach

[33] In my respectful view, the issue must be addressed by answering the two questions identified by the Federal Court in the decisions rendered to date, i.e., what is the application to which reference is made in paragraph 117(9)(d), and what is meant by "the time of that application"?

[34] Paragraph 117(9)(d) identifies "that application" as being the "application for permanent residence" made by the sponsor. This last phrase only appears in paragraph 117(9)(d) and the Act does not provide for a definition. However, the term "permanent resident" is defined as a person who has acquired that status (subsection 2(1)), and the Act provides that a foreign national becomes a permanent resident by establishing to the satisfaction of an immigration officer at a port of entry that he or she has applied for that status (subsection 21(1)), holds a visa and has come to Canada in order to establish permanent residence (and is not inadmissible) (subsection 20(1)(a)).

[35] The actual steps involved in that process insofar as they can be gleaned from the authorized form to which I have referred and the Operations Procedures Manuals appear to mirror this scheme. Based on the procedure outlined, the process is initiated by the filing at the designated visa office of an "Application for Permanent Residence in Canada" form which is completed in contemplation of the issuance of a visa for travel to Canada within the specified category. Once the visa is issued, the foreign national is invited to appear at a port of entry, visa in hand, and satisfy the immigration officer that he or she has come to Canada in order to establish permanent residence. If the officer is so satisfied, the foreign national is granted the right to enter Canada in order to establish permanent residence. That is how permanent resident status is acquired.

[36] Thus, an application for permanent residence is initiated by the filing of the authorized form and the process ends at the port of entry when the foreign national is allowed to enter Canada as a permanent resident.

[37] The dispute in this case is not about the meaning of the word "application". The Respondent concedes so much at paragraph 67 of her Memorandum of Fact and Law. Indeed, all the Federal Court decisions rendered to date were reached on the basis that the word "application" in the phrase "time of that application" refers to the application for permanent residence which is initiated by filing the authorized form with the designated visa office.

[38] The question which needs to be clarified is the time that is referenced in the phrase "at the time of that application". Is it the time when the application is filed at the visa office as the

applications judge held, or is it the time that runs from the filing of the application to the time when permanent resident status is acquired as was held in *Dave*?

[39] Recognizing that the phrase can reasonably be read either way, I have concluded that the interpretation proposed in *Dave* is to be preferred for the following reasons.

[40] As was noted by Laydon Stevenson J. in *Dave* and as highlighted by this case, limiting the ambit of the provision to the time when the sponsor files the application at the visa office would allow foreign nationals to avoid paragraph 117(9)(d) altogether, by changing their marital status after having applied for a permanent resident visa.

[41] In discounting this concern, the applications judge said that the Respondent could still be removed for having misrepresented her status at the port of entry (see paragraph 24 above). No doubt this is so. However, the Act contemplates sanctions which are less drastic than removal and perhaps more appropriate. Indeed, given the fact that in this case the Respondent has been in Canada for some 15 years and has a Canadian-born child, her removal may not best achieve the objectives of *IRPA*. Preventing her from sponsoring a family member which she failed to disclose at the port of entry appears more measured.

[42] In my view, paragraph 117(9)(d) should be construed so as to achieve its intended effect, assuming of course that the words reasonably allow for this result. In this regard, it is useful to read the English and French text of paragraph 117(9)(d) together.

[43] The phrase "at the time of that application" is rendered in the French text by the words "à l’époque où cette demande a été faite". The word "époque" provides for an elastic notion of time measured by reference to the event to which it relates ("1. Point fixe et déterminé dans le temps, événement qui sert de point de départ à une chronologie particulière. ⇒ère (1°)" (*Le Petit Robert*)). The primary meaning of the word "époque" in English is: "1. epoch, era, age" (*Harrap’s New Shorter French-English Dictionary*).

[44] The phrase "at the time of" is used more than once in section 117 of the Regulations. For instance, in paragraph 117(3)(e) the phrase "at the time the adoption took place" is used; in paragraphs 117(4)(a) and (b) the phrase "at the time of the adoption" is used; in subparagraph 117(9)(c)(i) the phrase "at the time of their marriage" is used. In these three instances the corresponding French text uses the phrase "au moment" rather than "à l’époque" to provide for the intended meaning (i.e., "l’adoption était, au moment où elle a été faite" paragraph 117(4)(a); "au moment de l’adoption" paragraph 117(3)(e); "au moment de leur marriage" subparagraph 117(9)(c)(ii)).

[45] In the French language, the words "à l’époque où cette demande a été faite" convey an extended notion of time capable of embracing the life of the application whereas the words "au moment de l’adoption " or "du mariage" refer to the moment when the event occurred rather than its duration ("Moment. Petite partie du temps, temps fort court; instant."*Dictionnaire Quillet de la*

langue française). The fact that the two expressions appear in the same provision and are used in respect of different events suggests that they are used in contradistinction.

[46] The word "time" in the English language is capable of bearing these two meanings. It can mean "I. A space or extent of time. 1. A limited stretch or space of continued existence, as the interval between two successive events or acts, or the period through which an action, condition or state continues; 2. A particular period indicated or characterized in some way OE. 3. A period in the existence or history of the world; an age, an era.". It can also mean "II. Time when: a point of time; a space of time treated without reference to its duration" (*Shorter Oxford English Dictionary*).

[47] Applying the shared meaning rule to the construction of paragraph 117(9)(d) (see *Sullivan and Driedger on the Construction of Statutes*, 2002, at pages 80, 81 and the cases referred to therein), the phrase "at the time of that application" must be taken to refer to the life of the application, i.e., "the period through which an action, condition or state continues". This construction gives effect to the grammatical meaning of the words in both texts and achieves the intended result, which is to deter foreign nationals from concealing their family relationships in order to facilitate their own entry.

[48] It is also consistent with the objective of family reunification under *IRPA* (paragraph 3(1)(d)). In order to achieve this objective, the scheme requires that a prospective immigrant’s family members be identified so that the family unit may be assessed as a whole as well as the eligibility of each member. Reading the phrase "at the time of that application" as referring to the

life of the application allows foreign nationals to define their family unit and make appropriate changes right up to the moment when they seek to enter Canada, which in turn, facilitates the admission of disclosed family members who may seek to come to Canada in the future. This is how family unification is achieved under *IRPA*.

[49] Finally, I do not believe that reading paragraph 117(9)(d) in this manner renders section 51 of the Regulations redundant (*Tauseef*, para 26). It is true that section 51, like paragraph 117(9)(d), seeks to ensure full disclosure of the family unit. Section 51 does so by imposing on applicants an ongoing obligation to disclose any change in their marital status between the time when the visa is obtained and the time when entry is sought. That two provisions are aimed at ensuring that full disclosure of family members is made up to the time of entry highlights the importance of the timely definition of the family unit, but no redundancy arises when regard is had to the different means employed by these provisions to achieve this goal.

[50] In my view, construing the phrase "at the time of that application" as proposed in *Dave*, achieves the intended effect and promotes family unification within the scheme provided under *IRPA* towards that end.

[51] I would therefore answer the second certified question as follows: the phrase "at the time of that application" in paragraph 117(9)(d) of the Regulations contemplates the life of the application from the time when it is initiated by the filing of the authorized form to the time when permanent resident status is granted at a port of entry.

[52] Since the Respondent was married at that time and since she failed to disclose this relationship, her husband is excluded from the family class by virtue of paragraph 117(9)(d) of the Regulations.

[53] For these reasons, I would answer the two certified questions as proposed in paragraphs 21 and 51 of these reasons and given those answers, I would allow the appeal, set aside the decision of the applications judge and rendering the judgment which he ought to have rendered, I would dismiss the application for judicial review.

"Marc Noël "

J.A.

" I agree
K. Sharlow J.A."

" I agree
B. Malone J.A."