Federal Court  Cour fédérale

Date: 20160229

Dockets: IMM-6828-12
IMM-1-13

Citation: 2016 FC 257

Ottawa, Ontario, February 29, 2016

PRESENT: The Honourable Mr. Justice Russell

Docket: IMM-6828-12

BETWEEN:

HAIYAN GONG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Docket: IMM-1-13

AND BETWEEN:

YOUNG MI BACK

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] These are applications pursuant to s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act] for a writ of *mandamus*, compelling the Respondent to process the Applicants' permanent residence applications under the Foreign Skilled Worker [FSW] class, which were terminated by s 87.4(1) of the Act.

II. BACKGROUND

A. *Legislative Amendments*

[2] Legislative amendments to the Act have eliminated the legal obligation of Citizenship and Immigration Canada [CIC] to process every FSW application and request received. The amendments, made by way of Bill C-50, also empowered the Minister of Citizenship and Immigration [Minister] to implement Ministerial Instructions in regards to processing priorities and requests in accordance with the Government of Canada's immigration goals, including reduced application processing times, and greater overall efficiency.

[3] The first of these Ministerial Instructions was published in the Canada Gazette on November 29, 2008 as s 87.3 of the Act [MI-1]. The subsection applied to applications and requests received on or after February 27, 2008 and served to limit the processing of new FSW applications to those who met specific eligibility criteria, including a priority occupation list.

[4] More recently, in April 2012, amendments have also included the insertion of s 87.4 into the Act. This subsection eliminated part of the backlog of FSW applications by cancelling those made prior to February 27, 2008, where no selection decision had been made before March 29, 2012.

B. *Litigation Background*

[5] Former counsel for the Applicants initiated a series of applications for leave and judicial review in 2011, seeking *mandamus* for a significant number of pending FSW applications. The applicants fell into two distinct groups: those who had submitted FSW applications prior to the coming into force of s 87.3 [Pre-Bill C-50 Group], and those who had submitted FSW applications after the coming into force of s 87.3, and were therefore subject to the conditions of MI-1 [MI-1 Group].

[6] The litigants were brought under case-management and *Emam v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1477 [*Emam*], was selected as the lead case. Under the direction of Justice Barnes, the parties prepared a protocol to promote expediency and better organize the litigation [the Protocol]. Setting out the "common lead issues to be resolved," the Protocol stated:

> 13. If the Court disposes of the representative case on the basis of the Ministerial Instructions, the Applicants agree that this would therefore result in applications being dismissed. Accordingly, the other Applicants will discontinue their applications should the Federal Court's decision not be appealed to the Federal Court of Appeal.
>
> 14. If the Respondent's arguments fail, the Respondent will be guided by the decisions in the representative cases, subject to appeal rights being exhausted, on the possible disposition of the remaining cases held in abeyance.

The Protocol was signed by the parties in February 2012 and two representative cases were chosen for the litigation: IMM-9634-11 [*Liang*] represented the Pre-Bill C-50 Group and IMM-137-12 [*Gurung*] represented the MI-1 Group: *Liang v Canada (Citizenship and Immigration)*, 2012 FC 758.

[7] In *Liang*, above, the Court found that the delay in processing Mr. Liang's application for a skilled worker visa exceeded, without any explanation or justification, the Minister's own projected time frame. Finding that there had been an implied refusal to perform a legal duty, Justice Rennie granted *mandamus*. In *Gurung*, above, the Court found that the Minister had provided justification for the delay by way of a concern regarding misrepresentation. As such, relief was declined.

[8] Following *Liang*, those litigants whose FSW applications had been terminated by s 87.4 sought direction as to how the decision should be applied to enable their applications to be processed. Mr. Justice Barnes decided that the relief in *Liang* did not apply and that the applications remained terminated under s 87.4: *Emam*, above.

[9] The Federal Court and the Federal Court of Appeal heard challenges to the validity of s 87.4, and confirmed that it did indeed terminate FSW applications, and did not violate the *Canadian Bill of Rights*, the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act*, 1982 (UK), 1982, c 11 [*Charter*], the rule of law, or judicial independence: *Tabingo v Canada (Citizenship and Immigration)*, 2013 FC 377 [*Tabingo*]; *Austria v Canada (Citizenship and Immigration)*, 2014 FCA 191 at paras 75-77 [*Austria*].

[10] In February 2014, the Court received correspondence in respect of the applications of the Pre-Bill C-50 Group that the Respondent now regarded as terminated, but that had been held in abeyance pending the result in *Austria*, above. The parties to this litigation decided that this group of applications should be divided into the two representative cases: *Back v Canada (Citizenship and Immigration)* [*Back*] and *Gong v Canada (Citizenship and Immigration)* [*Gong*].

C. *Back and Gong*

[11] The determination of whether an application appropriately comes under *Back* is based on whether the application was filed with the Federal Court before the decision in *Liang*, above. The determination of whether an application appropriately comes under *Gong* is based on whether the application was filed with the Federal Court after the decision in *Liang*.

[12] Ms. Young Mi Back is a Korean citizen and her application is the lead case for applications challenging s 87.4 and whose inclusion under the Protocol is *not* disputed. Ms. Back

filed her FSW application on January 15, 2008. Her case represents those applicants who applied prior to February 27, 2008.

[13] Ms. Haiyan Gong is the lead for all applications challenging s 87.4 and whose inclusion under the Protocol is disputed, as well as the effect of a selection decision after March 29, 2012. Ms. Gong filed her FSW application on September 1, 2006. Her case represents applicants who applied after February 27, 2008 but before June 25, 2010.

III. MATTERS UNDER REVIEW

[14] The two representative cases for these applications were decided similarly. As a result of both applications being made before February 27, 2008, and having not received selection decisions prior to March 29, 2012 neither was processed by CIC. The applications were terminated on June 29, 2012 by operation of s 87.4(1) of the Act.

IV. ISSUES

[15] As argued before me at the hearing of this application, the principal issues to be addressed by this Court are:

1. The enforceability of the Protocol signed by the parties;
2. The applicability and constitutionality of s 87.4 of the Act;
3. Whether the Applicants relied to their detriment on the legitimate expectation that their applications would be processed to completion;
4. Whether the Minister can be compelled by s 25.2 of the Act to process the Applicants' FSW applications;

5. Whether s 87.4 of the Act breaches judicial independence and the Applicants' access to justice rights; and,

6. Whether the application of s 87.4 of the Act is an abuse of process.

V. STANDARD OF REVIEW

[16] Essentially, this is an application for *mandamus*. The Applicants are asking the Court to order the processing of their FSW applications. Consequently, the Court will apply the well-established principles set out by Justice de Montigny in *Singh v Canada (Citizenship and Immigration)*, 2010 FC 757 at para 48:

> The necessary conditions to be met for the issuance of a writ of *mandamus* have been set out by the Federal Court of Appeal in *Apotex Inc. v. Canada (Attorney General)*, [1994] 1 F.C. 742, at para. 45; aff'd [1994] 3 S.C.R. 1100) and aptly summarized by my colleague Justice Danièle Tremblay-Lamer in the following terms:
>
> > (1) there is a public legal duty to the applicant to act;
> >
> > (2) the duty must be owed to the applicant;
> >
> > (3) there is a clear right to the performance of that duty, in particular:
> >
> > > (a) the applicant has satisfied all conditions precedent giving rise to the duty;
> > >
> > > (b) there was a prior demand for performance of the duty, a reasonable time to comply with the demand, and a subsequent refusal which can be either expressed or implied, e.g. unreasonable delay; and
> >
> > (4) there is no other adequate remedy.
> >
> > *Conille v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 F.C. 33, (T.D.) at para. 8

VI. STATUTORY PROVISIONS

[17] The following provisions of the Act are applicable in this proceeding:

Humanitarian and compassionate considerations – Minister's own initiative	**Séjour pour motif d'ordre humanitaire à l'initiative du ministre**
25.1 (1) The Minister may, on the Minister's own initiative, examine the circumstances concerning a foreign national who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.	25.1 (1) Le ministre peut, de sa propre initiative, étudier le cas de l'étranger qui est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 — ou qui ne se conforme pas à la présente loi; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.
Public policy considerations	**Séjour dans l'intérêt public**
25.2 (1) The Minister may, in examining the circumstances concerning a foreign national who is inadmissible or who does not meet the requirements of this Act, grant that person permanent resident status or an exemption from any applicable criteria or obligations of this Act if the foreign national complies with any conditions imposed by the Minister and	25.2 (1) Le ministre peut étudier le cas de l'étranger qui est interdit de territoire ou qui ne se conforme pas à la présente loi et lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, si l'étranger remplit toute condition fixée par le ministre et que celui-ci estime que l'intérêt public le justifie.

the Minister is of the opinion that it is justified by public policy considerations.

Instructions on Processing Applications and Requests

87.3 (1) This section applies to applications for visas or other documents made under subsections 11(1) and (1.01), other than those made by persons referred to in subsection 99(2), to sponsorship applications made under subsection 13(1), to applications for permanent resident status under subsection 21(1) or temporary resident status under subsection 22(1) made by foreign nationals in Canada, to applications for work or study permits and to requests under subsection 25(1) made by foreign nationals outside Canada.

(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.

(3) For the purposes of subsection (2), the Minister may give instructions with respect to the processing of applications and requests, including instructions:

(*a*) establishing categories of applications or requests to

Instructions sur le traitement des demandes

87.3 (1) Le présent article s'applique aux demandes de visa et autres documents visées aux paragraphes 11(1) et (1.01) — sauf à celle faite par la personne visée au paragraphe 99(2) —, aux demandes de parrainage faites au titre du paragraphe 13(1), aux demandes de statut de résident permanent visées au paragraphe 21(1) ou de résident temporaire visées au paragraphe 22(1) faites par un étranger se trouvant au Canada, aux demandes de permis de travail ou d'études ainsi qu'aux demandes prévues au paragraphe 25(1) faites par un étranger se trouvant hors du Canada.

(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) Pour l'application du paragraphe (2), le ministre peut donner des instructions sur le traitement des demandes, notamment des instructions:

(*a*) prévoyant les groupes de demandes à l'égard desquels

which the instructions apply;

(*a.1*) establishing conditions, by category or otherwise, that must be met before or during the processing of an application or request;

(*b*) establishing an order, by category or otherwise, for the processing of applications or requests;

(*c*) setting the number of applications or requests, by category or otherwise, to be processed in any year; and

(*d*) providing for the disposition of applications and requests, including those made subsequent to the first application or request.

(3.1) An instruction may, if it so provides, apply in respect of pending applications or requests that are made before the day on which the instruction takes effect.

(3.2) For greater certainty, an instruction given under paragraph (3)(*c*) may provide that the number of applications or requests, by category or otherwise, to be processed in any year be set at zero

(4) Officers and persons authorized to exercise the powers of the Minister under section 25 shall comply with any instructions before processing an application or request or when processing one. If an application or

s'appliquent les instructions;

(a.1) prévoyant des conditions, notamment par groupe, à remplir en vue du traitement des demandes ou lors de celui-ci;

(b) prévoyant l'ordre de traitement des demandes, notamment par groupe;

(c) précisant le nombre de demandes à traiter par an, notamment par groupe;

(d) régissant la disposition des demandes dont celles faites de nouveau.

(3.1) Les instructions peuvent, lorsqu'elles le prévoient, s'appliquer à l'égard des demandes pendantes faites avant la date où elles prennent effet.

(3.2) Il est entendu que les instructions données en vertu de l'alinéa (3)*c*) peuvent préciser que le nombre de demandes à traiter par an, notamment par groupe, est de zéro.

(4) L'agent — ou la personne habilitée à exercer les pouvoirs du ministre prévus à l'article 25 — est tenu de se conformer aux instructions avant et pendant le traitement de la demande; s'il ne procède pas au traitement de la demande, il

request is not processed, it may be retained, returned or otherwise disposed of in accordance with the instructions of the Minister.

peut, conformément aux instructions du ministre, la retenir, la retourner ou en disposer.

(5) The fact that an application or request is retained, returned or otherwise disposed of does not constitute a decision not to issue the visa or other document, or grant the status or exemption, in relation to which the application or request is made.

(5) Le fait de retenir ou de retourner une demande ou d'en disposer ne constitue pas un refus de délivrer les visa ou autres documents, d'octroyer le statut ou de lever tout ou partie des critères et obligations applicables.

(6) Instructions shall be published in the *Canada Gazette*.

(6) Les instructions sont publiées dans la *Gazette du Canada*.

(7) Nothing in this section in any way limits the power of the Minister to otherwise determine the most efficient manner in which to administer this Act.

(7) Le présent article n'a pas pour effet de porter atteinte au pouvoir du ministre de déterminer de toute autre façon la manière la plus efficace d'assurer l'application de la loi.

Federal Skilled Workers

Travailleurs qualifiés (fédéral)

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

87.4 (1) Il est mis fin à toute demande de visa de résident permanent faite avant le 27 février 2008 au titre de la catégorie réglementaire des travailleurs qualifiés (fédéral) si, au 29 mars 2012, un agent n'a pas statué, conformément aux règlements, quant à la conformité de la demande aux critères de sélection et autres exigences applicables à cette catégorie.

(2) Subsection (1) does not

(2) Le paragraphe (1) ne

apply to an application in respect of which a superior court has made a final determination unless the determination is made on or after March 29, 2012.	s'applique pas aux demandes à l'égard desquelles une cour supérieur a rendu une décision finale, sauf dans les cas où celle-ci a été rendue le 29 mars 2012 ou après cette date.
(3) The fact that an application is terminated under subsection (1) does not constitute a decision not to issue a permanent resident visa.	(3) Le fait qu'il a été mis fin à une demande de visa de résident permanent en application du paragraphe (1) ne constitue pas un refus de délivrer le visa.
(4) Any fees paid to the Minister in respect of the application referred to in subsection (1) — including for the acquisition of permanent resident status — must be returned, without interest, to the person who paid them. The amounts payable may be paid out of the Consolidated Revenue Fund.	(4) Les frais versés au ministre à l'égard de la demande visée au paragraphe (1), notamment pour l'acquisition du statut de résident permanent, sont remboursés, sans intérêts, à la personne qui les a acquittés; ils peuvent être payés sur le Trésor.
(5) No person has a right of recourse or indemnity against Her Majesty in connection with an application that is terminated under subsection (1).	(5) Nul n'a de recours contre sa Majesté ni droit à une indemnité de sa part relativement à une demande à laquelle il est mis fin en vertu du paragraphe (1).

VII. ARGUMENT

A. *Applicants*

(1) Subsection 87.4 of the Act

[18] The Applicants submit that, following the decision in *Liang*, the Respondent refused to apply the signed Protocol and asserted that s 87.4 of the Act barred it from doing so. The

Applicants say that where s 87.4 prevents the application of the Protocol, its constitutionality as well as its operability and applicability, is challenged.

[19] The Applicants also say that application of the Protocol would not violate s 87.4 and it would not violate the law to apply the Protocol by way of s 25 of the Act. The Applicants further submit that in the event that application of the Protocol is a violation of the law, ss 87.4(2) and (5) are unconstitutional and of no force and effect because these two subsections, effectively, tell the Court what and how to decide cases currently before it. This is something, the Applicants submit, that is wholly and flagrantly unconstitutional, upsetting the individual *Charter* right to due process (including access to judicial review as well as the right to sue in tort against individuals), and the judicial independence of the Court: *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 27-31 [*Dunsmuir*].

[20] The Applicants submit that the present applications (both pre- and post-*Liang*) were made prior to s 87.4's coming into force. The application of the subsection therefore represents an inappropriate and retroactive instruction by the legislature to a Superior Court.

[21] The Applicants further submit that should the Court find s 87.4(2) to be unconstitutional, s 87.4(1) cannot be interpreted to be applicable to the Applicants' cases, as they were filed prior to the coming into force of s 87.4(1) on June 29, 2012. To terminate applications, which are in the Court and filed prior to the coming into force of the very section that purports to terminate them, would breach the independence of the judiciary doctrine, as well as the constitutional right to judicial review.

[22] Noting the vast jurisprudence which has confirmed the maxim that there is no right without a remedy, the Applicants submit that to deny them the right to argue the appropriate remedy is to deny their constitutional right to judicial review, for which leave has been granted: *R v Mills*, [1986] 1 SCR 863; *Nelles v Ontario*, [1989] 2 SCR 170.

(2) Abuse of Process

[23] The Applicants further argue that the Respondent's position constitutes an abuse of process that ought to be remedied by the Court for a number of reasons. First, the Respondent's officials were aware, prior to signing the Protocol, that the decision to terminate the FSW decisions had already been made. Second, the relevant applications had been filed prior to s 87.4's enactment. Third, notwithstanding issues relating to s 87.4, s 25 of the Act remains available to apply the terms of the Protocol. Fourth, the Respondent improperly asserts that the Protocol issue is governed by *res judicata* as a result of the decision in *Tabingo*, above.

(3) Alternative Relief via s 25

[24] The Applicants further submit that, as a matter of the proper administration of justice, and curing an abuse of process, even if ss 87.4(2) and (5) are constitutional, the Protocol, in its substance, ought to be enforced by way of s 25 of the Act, on humanitarian and compassionate, and public policy grounds, in order to maintain the integrity of the administration of justice and underlying Rule of Law.

(4) Costs

[25] The Applicants submit that the circumstances of the case warrant the awarding of solicitor-client costs.

B. *Respondent*

(1) Subsection 87.4 of the Act

[26] The Respondent submits that many of the Applicants' arguments have already been thoroughly considered and dismissed by the Court and the Federal Court of Appeal, and s 87.4 has already been ruled as valid law.

[27] The Respondent says that, under the Protocol, the results in the two representative cases were to guide the Respondent's approach to processing the other FSW applications. However, the Protocol does not establish any vested right to processing or the expectation of a global result. The result in *Liang* was not, as suggested by the Applicants, fully successful. Its applicability to the present applications should be scrutinized, particularly given that the decision is silent about FSW applications terminated by law.

[28] The Protocol indicated that the Respondent would be "guided" by the result in *Liang*, but did not go so far as to bind the Respondent to any particular relief. The Protocol did not provide a vested right to continued processing, nor a legitimate expectation that would preclude termination. It was expressly limited to the representative cases in the *Liang* litigation.

Furthermore, the Respondent cannot, by virtue of signing the Protocol, simply disregard duly enacted legislation or bind Parliament in some way. The Respondent says that the broad language of s 87.4(1) captures all described FSW applications including those subject to a case-management agreement – the clear and broad wording used by Parliament makes this determinative.

[29] The Respondent submits that it cannot be legally compelled to use s 25.2 of the Act, as it is predicated on public policy grounds – a form of relief not contemplated by the jurisprudence.

[30] The Applicants' argument that s 87.4 impairs judicial independence should not succeed as it has been rejected by the Federal Court and the Federal Court of Appeal (*Tabingo*, above, at paras 50-59). Furthermore, the argument fails on principle as the right to judicial review is not absolute and can be displaced by legislation, and "adjudicated rights" are not exempted from the effects of legislation: *Gustavson Drilling (1964) Ltd v Minister of National Revenue*, [1977] 1 SCR 271; *Federal Courts Act*, RSC 1985, c F-7, ss 18 and 18.1; Act, s 72(1); *Johnson & Johnson Inc v Boston Scientific Ltd*, 2006 FCA 195. In addition, the Respondent asserts that *mandamus* is available only for a breach of duty imposed by public law.

(2) Abuse of Process

[31] The Respondent says that relief cannot be obtained by the Applicants on grounds relating to an abuse of process, as neither the termination of the FSW applications nor the absence of humanitarian and compassionate relief is abusive.

[32] That one of the Respondent's officials may have been aware of a potential future policy plan to terminate FSW applications at the time of the Protocol's signing does not properly establish an abuse of process. The Applicants have made this assertion without demonstrating that the official authorizing the Protocol was the same individual that they reference, and without acknowledgment of the fact that no legislation relating to the termination of the applications had been introduced at the time the Protocol was signed.

[33] As regards the assertion that an abuse of process flows from the Respondent's *res judicata* argument, the Respondent submits that this has no validity. The Applicants' reliance on the decision in *United States v Cobb*, 2001 SCC 587 [*Cobb*] is misplaced, given its completely different factual nature and issues. The remedy sought in *Cobb* was not one precluded by statute.

[34] The Respondent submits that, even if abuse of process was properly established, the Applicants have failed to demonstrate that the public interest warrants a remedy in this case. In any event, the relief being sought is not within the boundaries of the law, as the Court should not ignore a relevant statutory provision, or order *mandamus* on terminated FSW applications: *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at para 120.

(3) Alternative Relief via s 25

[35] The Applicants' request for alternative relief should not succeed because it presumes that the Protocol provided for something that it did not. Any reliance on such an expectation by the Applicants was undone by s 87.4, as termination of the FSW applications removes any presumed entitlement to alternative relief.

[36] The Respondent further submits that the Applicants' request for $1,000,000.00 is a disguised petition for damages, which cannot be sought under judicial review: *Al-Mhamad v Canada (Radio-Television and Telecommunications Commission)*, 2003 FCA 45 at para 3. Furthermore, the award of damages flowing from termination is disallowed by s 87.4(5) of the Act.

(4) Costs

[37] Noting the high bar that must be met prior to the awarding of costs by the Federal Court, the Respondent references a series of "disparaging comments" made by the Applicants and submits that any petitioning on the part of the Applicants for costs against the Respondent would be inappropriate: *Ndungu v Canada (Citizenship and Immigration)*, 2011 FCA 208 at para 7; *Federal Court Immigration and Refugee Protection Rules*, SOR/93-22, Rule 22.

VIII. ANALYSIS

A. *The Protocol*

[38] The Applicants argue that the Court should enforce the Protocol in their favour and order the Minister to process their FSW applications in accordance with the Protocol. Alternatively, they say that if s 87.4 removed the "vested rights" given to them under the Protocol then that provision is unconstitutional for various reasons.

[39] The "vested rights" claimed by the Applicants appear at paragraph 14 of the Protocol which reads as follows:

> If the Respondent's arguments fail, the Respondent will be guided by the decisions in the representative cases, subject to appeal rights being exhausted, on the possible disposition of the remaining cases held in abeyance.

[40] It is immediately apparent from the clear wording of this paragraph that the Applicants have no "vested rights" to enforce. Not only does the paragraph say that "the Respondent will be guided by the decisions in the representative cases," it also says "on the *possible* disposition of the remaining cases held in abeyance" (emphasis added). It doesn't say "on the disposition of the remaining cases held in abeyance." The word "possible" has to have a meaning, otherwise it would not have been inserted. To refer to "possible disposition" means, inevitably, that disposition may not be possible; and it may not be possible for a variety of reasons.

[41] The Applicants' present position is that the Minister is now obliged to process their FSW applications irrespective of the impact of s 87.4. But the Protocol clearly contemplates, in my view, that disposition of their applications may not be possible. The Protocol says nothing specific about what is to happen if the law applicable to the Applicants' FSW applications changes before they can be dealt with, but it is obvious why the Protocol does not say that the applications *will* be dealt with irrespective of any changes to the law. The Minister could never enter into such an undertaking because it would involve a promise to ignore the will of Parliament as expressed in applicable legislation. There is no evidence before me to suggest that the Minister intended to provide such an undertaking and, even if he did, it could not trump the effect of any validly enacted Parliamentary legislation that impacted the applications at issue. An undertaking to be "guided by" decisions in representative cases does not include a promise to process applications even if they are validly terminated by Parliament. If counsel acting at the

time of the Protocol had intended such an undertaking, then he should have asked for it. Had he done so, the answer would be obvious: it is not possible.

[42] Justice Barnes has already referred to this situation in his December 14, 2012 order in *Emam*, above:

> [7] It is self-evident that Justice Rennie's decision in *Liang* and *Gurung*, above, offers no present guidance for the resolution of those matters affected by the *Jobs, Growth and Long-Term Prosperity Act*. As Justice Rennie noted "each case must be determined on a case-by-case basis" to establish whether a satisfactory explanation exists for any inordinate processing delay. If the Respondent is correct that this legislation is unambiguous and valid, there is nothing left to consider and Justice Rennie's decision offers no guidance to the disposition of those terminated applications. If that legislation is upheld, it cannot be bypassed or ignored by the Court on the basis of an unsubstantiated assertion of unfairness or, indeed, on any basis. It remains to be seen if the pending challenge will be successful, but until that matter is determined the Court is required to assume the validity of the legislation.

[43] In my view, then, there is no basis upon which the Court could order *mandamus* based upon the Protocol alone. The Applicants must convince the Court that either s 87.4 does not apply to their FSW applications or, if it does, that the provision is unconstitutional.

B. *Applicability of s 87.4*

[44] Subsection 87.4 of the Act reads as follows:

Federal Skilled Workers	**Travailleurs qualifiés (fédéral)**
87.4 (1) An application by a foreign national for a	87.4 (1) Il est mis fin à toute demande de visa de résident

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

permanent faite avant le 27 février 2008 au titre de la catégorie réglementaire des travailleurs qualifiés (fédéral) si, au 29 mars 2012, un agent n'a pas statué, conformément aux règlements, quant à la conformité de la demande aux critères de sélection et autres exigences applicables à cette catégorie.

(2) Subsection (1) does not apply to an application in respect of which a superior court has made a final determination unless the determination is made on or after March 29, 2012.

(2) Le paragraphe (1) ne s'applique pas aux demandes à l'égard desquelles une cour supérieur a rendu une décision finale, sauf dans les cas où celle-ci a été rendue le 29 mars 2012 ou après cette date.

(3) The fact that an application is terminated under subsection (1) does not constitute a decision not to issue a permanent resident visa.

(3) Le fait qu'il a été mis fin à une demande de visa de résident permanent en application du paragraphe (1) ne constitue pas un refus de délivrer le visa.

(4) Any fees paid to the Minister in respect of the application referred to in subsection (1) — including for the acquisition of permanent resident status — must be returned, without interest, to the person who paid them. The amounts payable may be paid out of the Consolidated Revenue Fund.

(4) Les frais versés au ministre à l'égard de la demande visée au paragraphe (1), notamment pour l'acquisition du statut de résident permanent, sont remboursés, sans intérêts, à la personne qui les a acquittés; ils peuvent être payés sur le Trésor.

(5) No person has a right of recourse or indemnity against Her Majesty in connection with an application that is terminated under subsection (1).

(5) Nul n'a de recours contre sa Majesté ni droit à une indemnité de sa part relativement à une demande à laquelle il est mis fin en vertu du paragraphe (1).

[45] In *Tabingo*, above, Justice Rennie found that s 87.4 was valid legislation:

> [139] *Mandamus* is available to compel a public authority to perform a duty that it is obligated to do under its enabling statute. As I have found that section 87.4 of the *IRPA* unambiguous and constitutionally valid legislation, the applications are terminated and the respondent has no legal duty to continue to process them. There can be no order for *mandamus*.
>
> …
>
> [147] As noted earlier, the applicants have waited in the queue for many years only to find the entrance door closed. They see the termination of their hope for a new life in Canada to be an unfair, arbitrary and unnecessary measure. However, section 87.4 is valid legislation, compliant with the rule of law, the *Bill of Rights* and the *Charter*. The applications have been terminated by operation of law and this Court cannot order *mandamus*.

[46] All appeals from Justice Rennie's decision in *Tabingo* were dismissed by the Federal Court of Appeal. See *Austria*, above.

[47] The Applicants argue that Justice Rennie did not, in *Tabingo*, deal with the scope and constitutionality of s 87.4(2). They claim that this subsection saves their applications from termination because, even though their applications fall within s 87.4(1), s 87.4(2) exempts from termination any applications that were already before the Court, including their own.

[48] It is clear from the record that neither application at issue in this case had received a selection decision prior to March 29, 2012. Hence, the Applicants argue that they fall within the exemption of s 87.4(2).

[49] As I understand the Applicants' argument, it is to the effect that the Protocol is a final determination of the Court, so that all cases subject to the Protocol are exempted from s 87.4(1) by virtue of s 87.4(2). The Applicants point to paragraph 17 of the Protocol as effecting this result. That paragraph reads as follows:

> Pending the outcome of the representative cases, all other related cases shall be held in abeyance, along with any new applications for leave and judicial review subsequently filed and brought to the attention of the Case Management Judge. The Respondent shall continue to be relieved of the requirement to file a Notice of Appearance in any new leave application filed.

[50] It is difficult to see how the Protocol could qualify as a "final determination" of an "application" that was made "on or after March 29, 2012." The Protocol is nothing more than a case management device, created to deal with a large number of cases that have similar legal issues. If it finally determines anything, it determines the process that will be followed to lead to a final determination. It is not a final determination of the "application" and, as I have already discussed, the Protocol contemplates in paragraph 14, the "possible disposition" of remaining cases. In short, I cannot find that s 87.4(2) exempts the Applicants from s 87.4(1).

C. *Constitutionality of s 87.4*

[51] As previously discussed, Justice Rennie in *Tabingo*, above, has already found s 87.4 to be valid legislation, compliant with the Rule of Law, the *Bill of Rights* and the *Charter*. This finding has been endorsed by the Federal Court of Appeal.

[52] The Applicants now wish to raise a number of constitutional arguments which they allege were not before Justice Rennie in *Tabingo*. In particular, they say that if s 87.4(2) terminates

FSW applications that were before the Court on judicial review applications, then it is of no force and effect because it violates judicial independence and a fair and impartial judiciary.

[53] Because s 87.4(2) provides for an exception to s 87.4(1), which I have found is not applicable to the Applicants, then it seems to me that the Applicants' constitutional arguments are really directed at s 87.4(1), because their FSW applications are terminated pursuant to that subsection.

[54] In order to avoid the impact of *Tabingo*, the Applicants assert that they are bringing new constitutional and *Charter* arguments to bear upon s 87.4, relying on the Supreme Court of Canada's decisions in *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 42 [*Bedford*] and *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 44 [*Carter*].

[55] Paragraph 42 of *Bedford* reads as follows:

> In my view, a trial judge can consider and decide arguments based on *Charter* provisions that were not raised in the earlier case; this constitutes a new legal issue. Similarly, the matter may be revisited if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate.

[56] Paragraph 44 of *Carter* reads as follows:

> The doctrine that lower courts must follow the decisions of higher courts is fundamental to our legal system. It provides certainty while permitting the orderly development of the law in incremental steps. However, *stare decisis* is not a straitjacket that condemns the law to stasis. Trial courts may reconsider settled rulings of higher courts in two situations: (1) where a new legal issue is raised; and (2) where there is a change in the circumstances or evidence that

> "fundamentally shifts the parameters of the debate" (*Bedford v. Canada (Attorney General)*, 2013 SCC 72, [2013] 3 S.C.R. 1101 (S.C.C.), at para. 42).

[57] Despite the Applicants' insistence that they are raising new constitutional issues to challenge the validity of s 87.4, it seems to me that many of their arguments have already been addressed by this Court and the Federal Court of Appeal so that I am bound to follow and apply those precedents.

[58] First of all, *Tabingo*, *Austria* and *Shukla v Canada (Citizenship and Immigration)*, 2012 FC 1461 [*Shukla*], all make it clear that s 87.4, upon coming in force, immediately terminated all FSW applications that are described in s 87.4(1). That description includes the Applicants' FSW applications. The Federal Court of Appeal provided the following guidance in *Austria*:

> [76] The appellants had the right to apply for permanent resident visas and, when they submitted their applications, they had the right to have their applications considered in accordance with the IRPA. However, they did not have the right to the continuance of any provisions of the IRPA that affected their applications. Nor did they have the right to have their applications considered under the provisions of the IRPA as in effect when they submitted their applications. I reach that conclusion for the following reasons.
>
> [77] Parliament has the authority to enact laws governing immigration and to amend those laws from time to time. Parliament also has the authority to enact laws that have retrospective effect, although it is presumed that retrospective effect is not intended unless the law is so clear that it cannot reasonably be interpreted otherwise*: Gustavson Drilling (1964) Ltd. v. Minister of National Revenue* (1975), [1977] 1 S.C.R. 271 (S.C.C.) at pages 279 to 283, *Imperial Tobacco Canada Ltd.*, cited above, at paragraphs 69 to 72.
>
> [78] I have already concluded, for reasons stated earlier in these reasons, that subsection 87.4(1) of the IRPA is sufficiently clear to terminate the appellants' applications retrospectively. That distinguishes this case from *Dikranian*, in which the Supreme

> Court of Canada held that certain amendments to provincial legislation were not clear enough to abrogate contractual rights of students who borrowed money from financial institutions prior to the amendments.

[59] Notwithstanding this clear guidance from the Federal Court of Appeal, the Applicants are now asking the Court to declare s 87.4 unconstitutional. They raise a range of arguments, some of which have already been dealt with in previous jurisprudence.

D. *Omnibus Legislation*

[60] The Applicants argue that omnibus legislation of the kind that brought s 87.4 into being cannot divest persons of vested rights. They also assert that the legislative process by which s 87.4 was created was legally flawed.

[61] As the Respondent points out, the Applicants submit no evidence or authority, and specify no legislative protocol that was not followed when Parliament enacted s 87.4 into law. In any event, Parliament is the sole judge of its own proceedings. See *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319 at 385.

[62] There is nothing before me to suggest that Bill C-38 or the *Jobs, Growth and Long-Term Prosperity Act*, SC 2012, c 19 were not enacted in accordance with normal legislative procedures and safeguards.

E. *Legitimate Expectations*

[63] The Applicants assert that they had a legitimate expectation that their applications would be processed to completion. It is difficult to see how any such expectation could even arise in this case and, even if it did, the express language of s 87.4 clearly displaces it.

[64] As the Federal Court of Appeal made clear in *Austria*, above, FSW applicants had the right to have their applications considered in accordance with the Act, but, as stated at paragraph 76 of the decision:

> [T]hey did not have the right to the continuance of any provisions of IRPA that affected their applications. Nor did they have the right to have their applications considered under the provisions of the IRPA as in effect when they submitted their applications.

[65] As Justice Rennie made clear in *Liang*, above, each application had to be considered on its own merits. Therefore, the decision in *Liang* could not have given rise to any expectations in the Applicants.

[66] In addition, as I have already discussed, the terms of the Protocol itself refer to "possible disposition" and, in my view, contemplate that, for whatever reasons, it may not be possible to process applications to completion even if these cases provide guidance.

[67] In my view then, the doctrine of legitimate expectations does not arise in this case. As has been pointed out on many occasions, it is, in any event, a procedural doctrine and does not give

rise to substantive rights. See, for example, *Mount Sinai Hospital Centre v Quebec (Minister of Health and Social Services)*, [2001] 2 SCR 281 at paras 35-39.

F. *Subsection 25.2 of the Act*

[68] The Applicants ask the Court to compel the Minister to use s 25.2 of the Act to process their FSW applications.

[69] Justice Rennie dealt with s 25.2 to some extent in *Tabingo*:

> [141] The applicants advance an alternative argument. They say that even if their files were terminated, they are entitled, under section 25 of the *IRPA*, to apply for humanitarian and compassionate (H&C) relief from the application of section 87.4. The applicants note that the Minister used a similar section to assist applicants who were issued visas in error even though their applications were captured by section 87.4. On the basis of the Minister's own conduct, it is said that the applicants are entitled to H&C consideration
>
> [142] Section 25.2 allows the Minister to grant permanent resident status to a foreign national who is otherwise inadmissible or who does not meet the requirements of the IRPA if the Minister is satisfied that the decision is justified on public policy considerations. It is axiomatic that, save for the public policy exception, an H&C application is not a free-standing, independent vehicle for entry, rather it is an authority in the Minister to grant relief from requirements or provisions of the IRPA in an otherwise deficient application or claim. Here, there is no application, nor any requirements which could be waived on H&C grounds.
>
> [143] Applicants who were issued a visa in error were sent a letter informing them that their visa was invalid. They were then sent a subsequent letter explaining that the Minister considered there to be public policy considerations which warranted granting the visa and necessary exemptions. The letter asked the applicants to sign and date the letter to indicate that they wished to take advantage of the provision and to return it along with certain documents.

> [144] The applicants submit that if the underlying application had been terminated, then the Minister could not invoke section 25.2. Those individuals had already been issued permanent resident visas; some may have already landed in Canada. I see no conflict between the Minister's decision under section 25.2 and his position in the present applications. The nature of the discretion conferred under section 25.2 is very broad, and, in any event, no request has been made to the Minister nor is there a refusal. The argument is thus premature.

[70] It is important to note that the Applicants brought a motion on this issue before Justice Barnes in *Emam*, above, and Justice Barnes had the following to say:

> [8] It follows from this that Mr. Leahy's argument is without any legal merit. The Court has no power to ignore the will of Parliament. The further suggestion that the Court can order the Minister to grant humanitarian and compassionate relief to Mr. Leahy's clients would amount to unlawful usurpation of Ministerial authority. If Mr. Leahy's clients think they are entitled to this form of relief, they are legally obliged to request it from the Minister and not from the Court.

[71] It seems obvious why the Minister would not, and could not, exercise a public policy exemption under s 25.2 in favour of the Applicants. To do so would directly contradict the will of Parliament as embodied in s 87.4(1) which expresses a clear intent to terminate all FSW applications, including the Applicants', that fall within its ambit. The Court cannot now order the Minister to do something that would, in effect, be counter to Parliament's clearly expressed will.

[72] The Applicants' observation that the Minister has already used s 25.2 in some instances is addressed by Justice Rennie in *Tabingo*, above, (at para 144) who saw "no conflict between the Minister's decision under s 25.2 and his position in the present applications." As the Respondent points out, the limited use of s 25.2 under Operational Bulletin 479-13 applied only to a small

number of individuals whose terminated FSW applications had been finalized and permanent residence visas issued in error. That is not the situation of the Applicants.

[73] The Applicants are asking the Court to order or direct the Minister to use s 25.2 because, as the section says, to do so would be "justified by public policy considerations." Public policy considerations are not humanitarian and compassionate considerations and the Court is in no position to second guess or order the Minister to do anything on the basis of public policy. See *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 34.

G. *Access to Justice and Judicial Independence*

[74] The Applicants lay particular emphasis on the breach of constitutional rights and interference with an independent judiciary, which they say ss 87.4(2) or (5) of the Act bring about. Essentially, their argument is that if it would violate s 87.4 to apply the Protocol *per se*, and if s 25.2 cannot be used to remove the unfairness caused by s 87.4, then ss 87.4(2) or (5) of the Act are unconstitutional and of no force and effect.

[75] They say this because their applications for judicial review were brought to the Court prior to the coming into force of s 87.4 and Parliament has no constitutional authority to tell a Superior Court what to do with cases that are properly before the Court, particularly on a blanket and arbitrary basis. They claim that both the pre-*Liang*, as well as the post-*Liang*, applications currently before the Court were properly brought by judicial process before the enactment of s 87.4 so that, in effect, Parliament is interfering retroactively with the independence of the

judiciary to deal with these cases on the basis of the law as it existed when they were filed with the Court.

[76] The Applicants' complaint with s 87.4(5) is that it is a further attempt to bar individuals from their right to judicial review, which is a breach of a constitutional right. See *Dunsmuir*, above, at para 31.

[77] The Applicants go further and say that, even if s 87.4(2) is unconstitutional then s 87.4(1) cannot apply to cases that were before the Court prior to its coming into force; if s 87.4(1) is constitutionally valid, it cannot be applied to cases like the Applicants' that were before the Court before that section came into force in June 29, 2012.

[78] In summary, then, the Applicants say that it would breach the independence of the judiciary, as well as their constitutional right to judicial review, to interpret s 87.4(1) to terminate judicial review applications that were filed with the Court prior to its coming into force because this would be inconsistent with applicable constitutional norms and the right to an independent judicial review under s 7 of the *Charter*.

[79] The first problem for me in addressing these arguments is that they have already been dealt with in *Tabingo*, and Justice Rennie's conclusions there have been confirmed by the Federal Court of Appeal in *Austria*, above.

[80] In *Tabingo*, Justice Rennie had the following to say on this point:

[50] With the exception of criminal offences and sanctions there is no requirement that legislation be prospective, even though retrospective and retroactive legislation can overturn settled expectations and be perceived as unjust: *Imperial Tobacco Canada Ltd.*, paras 69-72. Whatever personal and economic opportunities a pending FSW application may represent to an applicant, it does not equate with, or possess the characteristics of an interest that would preclude its termination on the basis of the rule of law. Here, Parliament has expressed a clear intention that section 87.4 apply retrospectively. Though this may be perceived as unjust, it does not violate the rule of law.

[51] Section 87.4 is also not contrary to the rule of law due to vagueness. I have found that its meaning is readily apparent on a plain and obvious reading. Second, vagueness has only been used to invalidate legislation in exceedingly rare circumstances and then only in a criminal law context: *R. v. Spindloe*, 2001 SKCA 58 (Sask. C.A.), para 78.

[52] As was the case in *Imperial Tobacco Canada Ltd.*, the applicants have argued for an understanding of unwritten constitutional principles that would expand on the rights specifically provided for in the written Constitution In particular, the applicants have argued that, embedded in the rule of law, there is a broader equality right than that provided for in section 15 of the *Charter*. Acceptance of this argument would render the written constitutional rights redundant. The recognition of unwritten constitutional principles is not an invitation to dispense with the written text of the Constitution: Reference re Secession of Quebec, [1998] 2 S.C.R. 217 (S.C.C.), para 53, and, while the parameters of the unwritten principles of the Constitution remain undefined, they must be balanced against the concept of Parliamentary sovereignty which is also a component of the rule of law: Warren J Newman, *The Principles of the Rule of Law and Parliamentary Sovereignty in Constitutional Theory and Litigation* (2005) 16 NJCL 175.

[53] The argument predicated on the rule of law and unwritten principles of the Constitution is therefore dismissed.

Judicial Independence

[54] Although unwritten, judicial independence is a foundational principle of the Constitution. Judicial independence safeguards the judiciary's freedom to render decisions based solely on the requirements of the law, without interference from the executive branches of government. There are three essential conditions of judicial independence: security of tenure, financial

security and administrative independence. The applicants have not identified a basis on which section 87.4 interferes with any of the essential conditions of judicial independence.

[55] In *Imperial Tobacco Canada Ltd.*, the Supreme Court of Canada emphasized that judicial independence does not include the freedom to apply only laws of which the judiciary approves. This would require "a constitutional guarantee not of judicial independence, but of judicial governance."

[56] The rule of law mandates that the government is not beyond the law. However, the government is only bound by the law as it exists from time to time. Subject always to the Constitution, both written and unwritten, Parliament may change the law and this includes barring certain claims through limitation and Crown immunity statutes: Bacon v. Saskatchewan Crop Insurance Corp. (1999), 11 W.W.R. 51 (Sask. C.A.), leave denied (2000), [1999] S.C.C.A. No. 437 (S.C.C.).

[57] The applicants argue that section 87.4 unduly interferes with the courts by prescribing certain outcomes. They draw support for this from subsection 87.4(3) which they argue excludes any form of judicial supervision, and subsection 87.4(5) which bars any right of recourse against the Crown for damages.

[58] This argument misunderstands the origins and purpose of judicial independence. Parliament is free to craft legislation and the courts must, assuming it is constitutional, interpret and apply that legislation as written. It is not interference with judicial independence for Parliament to write legislation which leads to a certain outcome when property applied. This is the proper function of lawmaking, of which there are many examples. *Authorson (Litigation Guardian of)*, *Imperial Tobacco Canada Ltd.*, and *Babcock* involved legislative change or adaptation to what would otherwise be decided through judicial process. In *Authorson (Litigation Guardian of)*, causes of action to recover interest were barred; in *Imperial Tobacco Canada Ltd.*, a duty of care and causation were decreed by legislation and in *Babcock*, relevant evidence could be rendered inadmissible by a certificate of the Clerk of the Privy Council.

[59] As I have previously explained, if any applicants believe their applications were improperly identified as terminated and can point to a positive selection decision before March 29, 2012, they may apply to the Court for an order of *mandamus*. The rule of law mandates that all administrative action must have its source in law. If CIC improperly identifies an application as terminated and

> refuses to process it, that action would be without a source in law and therefore amenable to the Court's jurisdiction. Additionally, this Court is not prevented from scrutinizing the legislation to ensure it is compliant with the Constitution and the *Bill of Rights*. Section 87.4 does not bar access to the courts.

[81] Justice Rennie also dealt with s 7 of the *Charter* and concluded at paragraph 102 as follows:

> The loss of the expectation or hope is understandably distressing. I also accept that, given the passage of time, the effect on the points awarded on the basis of age and the shift in occupational priorities reflected in successive Ministerial Instructions, the opportunity of re-applying has evaporated. Nevertheless, I find that the interests protected by section 7 are not engaged in these circumstances. In my view, the applicants have experienced the ordinary stresses and anxieties that accompany an application to immigrate. All section 87.4 did was terminate the opportunity. Therefore, the section 7 argument fails at the threshold question.

[82] When the Federal Court of Appeal addressed these matters in *Austria*, above, its conclusions were as follows:

> [100] I would answer the certified questions as follows:
>
> (a) Does subsection 87.4(1) of the IRPA terminate by operation of law the applications described in that subsection upon its coming into force, and if not, are the applicants entitled to mandamus?
>
> Answer: Subsection 87.4(1) terminated the applications automatically on June 29, 2012. After that date, the Minister had no legal obligation to continue to process the applications. The appellants are not entitled to mandamus.
>
> (b) Does the *Canadian Bill of Rights* mandate notice and an opportunity to make submissions prior to termination of an application under subsection 87.4(1) of the IRPA?
>
> Answer: No.

> (c) Is section 87.4 of the IRPA unconstitutional, being contrary to the rule of law or sections 7 and 15 the Charter?
>
> Answer: No.

[83] The Applicants say that *Austria* only dealt with s 87.4(1) and not s 87.4(2), but paragraph 100(c) clearly refers to s 87.4 in its entirety.

[84] In any event, I find that the Applicants' focus on s 87.4(2) in these applications to be misleading. In my view, as already dismissed, the Applicants do not fall within the exception contained in s 87.4(2) so that, as *Austria* makes clear, their applications are terminated under s 87.4(1).

[85] However it is dressed up, it seems to me that the Applicants' argument is to the effect that once an application is before the Court, Parliament cannot change the law in a way that renders the basis of the application moot. Put another way, the Applicants are saying that their *mandamus* applications must be considered on the basis of the law as it existed prior to the coming into force of s 87.4. The Applicants inform the Court that they cannot find similar cases that support this position and they argue their case from principle.

[86] I think the starting point for answering this question is the guidance provided by the Federal Court of Appeal in *Austria*, above, at paragraphs 75-78 which I will reproduce here for convenience:

> [75] The appellants argue, based primarily on *Dikranian c. Québec (Procureur général)*, 2005 SCC 73, [2005] 3 S.C.R. 530 (S.C.C.), that when they submitted their permanent resident visa applications, they had a vested right to have their applications

> processed to completion and to have them considered under the statutory provisions and regulations in effect when the applications were submitted. There is no merit to this argument.
>
> [76] The appellants had the right to apply for permanent resident visas and, when they submitted their applications, they had the right to have their applications considered in accordance with the IRPA. However, they did not have the right to the continuance of any provisions of the IRPA that affected their applications. Nor did they have the right to have their applications considered under the provisions of the IRPA as in effect when they submitted their applications. I reach that conclusion for the following reasons.
>
> [77] Parliament has the authority to enact laws governing immigration and to amend those laws from time to time. Parliament also has the authority to enact laws that have retrospective effect, although it is presumed that retrospective effect is not intended unless the law is so clear that it cannot reasonably be interpreted otherwise: *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue* (1975), [1977] 1 S.C.R. 271 (S.C.C.) at pages 279 to 283, *Imperial Tobacco Canada Ltd.*, cited above, at paragraphs 69 to 72.
>
> [78] I have already concluded, for reasons stated earlier in these reasons, that subsection 87.4(1) of the IRPA is sufficiently clear to terminate the appellants' applications retrospectively. That distinguishes this case from *Dikranian*, in which the Supreme Court of Canada held that certain amendments to provincial legislation were not clear enough to abrogate contractual rights of students who borrowed money from financial institutions prior to the amendments.

[87] So we know that retrospective impact on the applications was intended and that s 87.4 terminated those applications when it came into force. As regards Parliamentary intent to terminate all applications before March 29, 2012, I can see no distinction between applications seeking *mandamus* that were before the Court and those not before the Court. In either case, it had not been established that they met the selection criteria and other requirements.

[88] I think it also has to be borne in mind that one of the principal findings of the Federal Court of Appeal in *Austria* (at para 3(b)) was that "After June 29, 2012, the Minister had no legal obligation to consider an application described in subsection 87.4(1)." This did not terminate applications before the Federal Court seeking *mandamus*. It simply means that they are moot because, as the Federal Court of Appeal found in *Austria*, the Minister no longer had a legal obligation to consider applications, such as the present, described in s 87.4(1).

[89] The Federal Court of Appeal in *Austria* states that s 87.4(1) was enacted in accordance with valid considerations pursuant to s 3 of the Act:

> [66] As mentioned above, the enactment of subsection 87.4(1) was intended to eliminate a backlog of federal skilled worker applications that the Minister considered so large as to be unmanageable within a reasonable time, and that was impeding the government's ability to respond to changing labour market conditions as they affected the prospects of new immigrants. Those were valid considerations pursuant to section 3 of the IRPA, in particular paragraphs 3(1)(a), (c), and (e), which are quoted above and repeated here for ease of reference:
>
> > 3. (1) The objectives of this Act with respect to immigration are
> >
> > (a) to permit Canada to pursue the maximum social, cultural and economic benefits of immigration;
> >
> > …
> >
> > (c) to support the development of a strong and prosperous Canadian economy, in which the benefits of immigration are shared across all regions of Canada;
> >
> > …
> >
> > (e) to promote the successful integration of permanent residents into Canada, while recognizing that integration involves mutual obligations for new immigrants and Canadian society

…

[90] In making these findings and observations, the Federal Court of Appeal makes no distinction between applications that were before the Court seeking *mandamus* and those that were not. They were all part of the same backlog that s 87.4 was intended to eliminate. There is no evidence before me that, in enacting s 87.4, Parliament had any intention of interfering with the judicial discretion to consider the *mandamus* cases before it and, as is obvious from the present applications, they are now before the Court for final consideration. The Court cannot grant them, because, as the Federal Court of Appeal has determined in *Austria*, the Minister no longer has an obligation to consider them under s 87.4(1).

[91] I have already concluded that the Applicants' applications do not engage s 87.4(2) because they do not involve a final determination of a Superior Court made on or after March 29, 2012. In refusing the requests for *mandamus*, I am simply following the findings and rulings of Justice Rennie in *Tabingo*, and the Federal Court of Appeal in *Austria*. I must abide by principles of judicial comity and *stare decisis*.

[92] The Applicants' argument is that, in enacting s 87.4, Parliament was telling the Federal Court what it must do in applications that were already in the Court but not yet decided. As the Federal Court of Appeal concluded in *Austria*, s 87.4 was legitimately enacted to deal with an enormous backlog of FSW applications. In my view, s 87.4 has in no way interfered with my discretion to decide these *mandamus* applications. Nonetheless, in deciding, I have to refuse the requests because Justice Rennie and the Federal Court of Appeal have decided that s 87.4 legitimately terminated all undecided FSW applications made before March 29, 2012. Hence, as

the matter stands before me, the Applicants no longer have FSW applications that the Court can order processed.

[93] It seems to me that the Applicants' constitutional and judicial independence arguments are masking their real arguments which are that, in deciding these *mandamus* applications, the Court must ignore the impact of s 87.4, as confirmed by Justice Rennie and the Federal Court of Appeal, and assess the availability of *mandamus* on the basis of the law as it existed prior to s 87.4 coming into force. In other words, they are asking the Court to disregard the clear will and intent of Parliament. In doing so, they have provided me with no supporting jurisprudence which says I must apply prior law irrespective of Parliament's clear will and intent. The Applicants have simply not established that the Court can, as a matter of law, do what they ask. While the result may appear unfair to some, it is the one that Parliament specifically provided for in plain and ordinary language; it is not the role of the Court to override such an intention: *Tabingo*, above, at para 23; *Kun v Canada (Citizenship and Immigration)*, 2014 FC 90; *Liu v Canada (Citizenship and Immigration)*, 2014 FC 42.

H. *Abuse of Process*

[94] Much of what the Applicants allege as an abuse of process is no more than an assertion that the Protocol should prevail over s 87.4, humanitarian and compassionate factors should have been applied to avoid the impact of s 87.4 in their FSW applications, and that the overall result is simply unfair to them.

[95] An argument for unfairness could be made from the perspective of the Applicants, but unfairness of this nature is not abuse of process. It cannot be an abuse of process that FSW applications have been terminated as a result of statutory provisions that have been legitimately enacted by Parliament for, as found by the Federal Court of Appeal, "valid considerations pursuant to section 3 of IRPA…." See, *Austria*, above, at para 66. Also see *Blencoe*, above, at para 120.

[96] The Applicants allege abuse of process because they say Mr. James McNamee knew that there was a plan to terminate FSW applications at some time in the future. The Protocol was signed on May 3, 2012 at a time when Bill C-38 remained speculative. As Justice Barnes found in his May 23, 2012 decision in *Datta v Canada (Citizenship and Immigration)*, 2012 FC 626:

> [7] I agree with counsel for the Respondent that this motion is devoid of merit because it is premature and speculative. Bill C-38 is currently before Parliament and has yet to receive second reading. There is no certainty that Parliament will enact Bill C-38 in its present form or in some other form that might be legally objectionable: see *Federation of Saskatchewan Indian Nations v Canada*, 2003 FCT 306 at para 22; [2003] 2 CNLR 131. . Accordingly, nothing has yet occurred that is prejudicial to Mr. Datta's visa application moving forward to a conclusion and there is nothing to enjoin. As the Supreme Court of Canada observed in *Re: Resolution to amend the Constitution*, [1981] 1 SCR 753 at p 785, [1981] SCJ no 58 (QL), "[c]ourts come into the picture when legislation is enacted and not before". To the same effect is the decision of Justice Andrew Mackay in *Federation of Saskatchewan Indian Nations*, above, at para 22.

[97] At the time of the signing of the Protocol, Bill C-38 had not even been introduced in Parliament and the executive can only act in accordance with existing law. It also seems to me, as already discussed, that the Protocol itself, in paragraph 14, raises future contingencies when it refers to the "possible" disposition of the remaining cases held in abeyance. The Protocol was a

case management tool put together to manage the situation in accordance with the law as it existed at that time. There is nothing in it that says it will prevail if the law changes. If that was a concern to the Applicants, they could have addressed it.

[98] Given the vociferous accusations of misconduct on the parts of the Minister and the Court by Applicants' former counsel that appear throughout the file, it has to be borne in mind that it was he who worked out the Protocol and agreed to the wording, which includes "guided by" and "possible disposition." This is terminology that is not precise and that obviously leaves the door open for future contingencies. I do not say this to criticize former counsel, but merely to point out that both sides were obviously aware that the Protocol could only deal with the law as it stood at the time it was entered into and that the future might change the situation.

[99] I see no connection between the situation in the present case and the facts in *Cobb*, above which the Applicants seek to rely upon.

[100] Even if the Applicants could establish some form of abuse, the Court could not, as a matter of public interest, grant the relief requested and simply ignore a statutory provision that the Federal Court of Appeal has said terminates "the applications on June 29, 2012" and, after that date, "the Minister had no legal obligation to continue to process the applications." See *Austria*, above, at para 100. The Court cannot simply ignore a statutory provision that is directly applicable.

[101] The Applicants' arguments based upon promissory estoppel must fail for similar reasons. See *Immeubles Jacques Robitaille Inc v Québec (City)*, 2014 SCC 34 at para 20; *Centre hospitalier Mont-Sinaï c Québec (Ministre de la Santé & des Services sociaux)*, 2001 SCC 41 at para 47.

IX. Certification

[102] The Applicants have submitted the following questions for certification:

> 1. Does s. 87.4(2) of the *IRPA* apply so as to "terminate" permanent residence applications that are the subject of judicial review, before the Federal Court, where the Federal Court application was filed:
>
>   (a) prior to March 29th, 2012; and/or
>
>   (b) prior to June 29th, 2012?
>
> 2. If the answer to question 1(a) and/or (b) is "yes", is s. 87.4(2) unconstitutional, and of no force and effect, for violating the (Applicants') right to judicial independence and a fair and impartial judiciary?
>
> 3. Is section 87.4 subject to the general provisions of ss. 25 and 25.2 of the *IRPA*?
>
> 4. Are cases, filed in Federal Court, prior to the enactment and/or coming into force of s 87.4, subject to *nunc pro tunc* orders as was the case in such cases as *Yadvinder Singh v. MCI* 2010 FC 757, pleaded and argued before the Court on the within applications?

[103] I see no dispute between the parties regarding the test for certification. The question posed must be a serious question of general importance that will be dispositive of the appeal, which means that the question at issue must lend itself to a generic approach as well as arising on the facts of the case. See *Canada (Minister of Citizenship and Immigration) v Zazai*, 2004 FCA

89 at paras 11 and 12 [*Zazai*] and *Kunkel v Canada (Citizenship and Immigration),* 2009 FCA 347 at para 9.

[104] It seems to me that questions 1 and 2 do not arise on the facts of this case because I have made specific findings that s 87.4(2) of the Act does not come into play in this case. See paras 84 and 91 of my reasons.

[105] The Applicants argue that with respect to question 3:

> With respect to question #3, it is submitted that the Court's analysis, at paragraphs 68-73, figure- skates around the issue with a "***de minimus***", quantitative conclusion that the Minister invoked s. 25.2 in a small group of cases. With respect, the legal avenue is, or is not available. The numbers, ***without any evidence being before the Court***, as to those numbers, are irrelevant.
>
> [emphasis in original]

[106] Subsection 25(1) does not arise on the facts of this case. The "small number of individuals" referred to in paragraph 71 of the reasons points to an observation of the Respondent, but the Court's reasons for rejecting the Applicants' position on s 25(2) are found in paragraphs 70, 71 and 73. There is no argument that s 25(2) was not available to the Applicants. As the evidence shows, the Department of Justice responded to Mr. Leahy's request for s 25(2) relief and, in my view, made it clear that such relief was not warranted. In these applications, the Court is simply saying that it will not compel the Minister to exercise public policy in favour of the Applicants in this case. No question for certification arises on this issue.

[107] Question 4 raises the scope of the Court's *nunc pro tunc* jurisdictions. It isn't clear to me that the Applicants raised this issue in their judicial review applications. As *Zazai*, above, makes clear, a certified question has to arise from matters dealt with on judicial review. In any event, however, the jurisprudence is clear that a *nunc pro tunc* order is not available where there has been no delay on the part of the Court and/or where the grant of *mandamus* on the basis of *nunc pro tunc* would defeat the will of Parliament. See *Shukla*, above, at paras 37, 41-43. Also, as the Respondent points out, the Court appears to have already rejected this question for certification in both *Shukla*, above, and *Liang*, above, at paras 59 and 62 for the reasons given in those cases The same reasons apply to the present applications.

[108] In conclusion, I don't think I can certify any of the questions put forward by the Applicants.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. Both applications are dismissed.

2. There are no questions for certification.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6828-12
STYLE OF CAUSE:	HAIYAN GONG v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
AND DOCKET:	IMM-1-13
STYLE OF CAUSE:	YOUNG MI BACK v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
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