Federal Court  Cour fédérale

Date: 20170421

Docket: IMM-3709-16

Citation: 2017 FC 389

Ottawa, Ontario, April 21, 2017

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

NAVDEEP KAUR SRAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act] for judicial review of the decision of the Immigration Appeal Division of the Immigration and Refugee Board of Canada [IAD], dated August 5, 2016 [Decision], which denied the Applicant's appeal to sponsor her father and brother for permanent residence in Canada as members of the family class.

II. BACKGROUND

[2] The Applicant is a 33-year-old citizen of India and has been a permanent resident of Canada since 2004. She is married with three children, born in 2004, 2006, and 2013. Previously, she was a co-signer to her husband's sponsorship of his parents and brother from 2002 to 2012.

[3] On June 5, 2008, the Applicant applied to sponsor her father and her then 17-year-old brother. At the time of the application, the Applicant's family included herself, her husband, her two children, her parents-in-law, her brother-in-law, her father, and her brother.

[4] Prior to the assessment of the application, the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations] were amended and came into force on January 1, 2014. Section 133(1)(j)(i) of the Amended Regulations increased the minimum necessary income [MNI] required to sponsor a parent or grandparent from solely the low income cut-offs [LICO] to LICO plus 30 per cent and required the sponsor to meet the MNI requirement for each of the three consecutive taxation years preceding the date of the application. Notably, the Amended Regulations did not contain transition provisions.

[5] A visa officer refused the application on July 3, 2014 for the reason that the Applicant did not meet the MNI requirement for a family of nine, which included her parents-in-law and brother-in-law. The visa officer based the financial calculation on the combined income of the Applicant and her husband in 2007, the year preceding the application, which was $63,522.00. In other words, the Applicant was $3,800.00 less than the required MNI of $67,300.00.

[6] The Applicant appealed the refusal to the IAD and the matter was heard on June 21, 2016.

III. DECISION UNDER REVIEW

[7] A decision by a Member of the IAD on August 5, 2016 determined that the refusal was valid in law and that special relief was not merited in the circumstances of the case.

[8] In its assessment of whether the refusal was correct in law, the IAD applied *Gill v Canada (Citizenship and Immigration)*, 2012 FC 1522 [*Gill*]. In *Gill*, Chief Justice Crampton held that the sponsor did not have a right to have her spousal sponsorship application determined under the previous version of the Regulations because persons who make such applications have no accrued or accruing rights until all of the conditions precedent to the exercise of the right they hope to obtain have been fulfilled. In the context of IAD hearings, which are *de novo* in nature, the Regulations applicable in a determination of an appeal are the version in force at the time the parties make submissions to the IAD or, if they supplement their prior written submissions with oral submissions at the time of the hearing, the Regulations in force at that time.

[9] The IAD also considered *R v Dineley*, 2012 SCC 58 [*Dineley*]; *Patel v The Minister of Citizenship and Immigration*, [2014] IADD No 389 [*B. Patel*]; and the Operational Bulletin 561 [OB 561]. While the IAD chose not to apply the former because it referred to a criminal matter, *B. Patel* and OB 561 were also not applied to the Decision on the basis that neither was binding on the IAD. The IAD upheld the refusal.

[10] The IAD then considered whether special relief was merited in light of the circumstances of the case and set out the factors that would be considered, including the objectives of the Act.

[11] The IAD noted that, at the time of the assessment in July 2014, the Applicant was no longer responsible for the financial welfare of her parents-in-law and brother-in-law; accordingly, these three family members should have been removed from the financial calculation. However, the IAD concluded the Applicant still would not have met the required MNI for the three years prior to the calculation because the Applicant's household income was under the MNI for a family of nine by $30,000.00 in 2012 and under the MNI for a family of seven by $16,400.00 in 2013. Additionally, the IAD considered the test from *Jugpall v Canada (Minister of Citizenship and Immigration)*, [1999] IADD No 600 [*Jugpall*] but chose to apply the test from *Chirwa v Canada (Minister of Canada*, [1970] IABD No 1 [*Chirwa*]; in doing so, the IAD noted the Applicant's household income exceeded the MNI for a family of seven by $1,800 and $3,200 in 2014 and 2015, respectively.

[12] In consideration of the relationship between the Applicant and the individuals being sponsored, the IAD discussed the Applicant's intention to sponsor her father from when she first immigrated to Canada in 2004 and her testimony that she needed her father and brother in Canada to deal with problems that arose in the family. However, the IAD found that, despite her intentions, she immigrated to Canada knowing that her family's immigration was not guaranteed. Furthermore, given that the Applicant was in communication with her father and brother three or four times per week, the IAD could not see why their physical presence would be required to maintain their closeness.

[13] The best interests of the children were the next consideration. The IAD found no evidence to indicate that the emotional well-being of the Applicant's children relied on their maternal grandfather or maternal uncle, or that the children would gain greater cultural awareness from having them in Canada, especially since their paternal grandparents and paternal uncle were in Canada. The children also did not rely on their maternal grandfather and maternal uncle for financial support.

[14] The IAD then assessed the situation of the Applicant's father and brother in India. The IAD determined that the father would not suffer any hardship from the decision given that he was financially comfortable and lived in the same city as his other children and grandchildren. Similarly, the IAD found that the brother would not suffer any hardship in India, despite the likelihood that his sister could not sponsor him in the future since he was over the age of 18. The IAD also found no evidence that the Applicant's father and brother could not visit Canada in the future or apply for a supervisa.

[15] The IAD concluded that the Applicant had not met the onus to establish that humanitarian and compassionate [H&C] considerations warranted special relief.

IV. ISSUES

[1] The Applicant submits that the following are at issue in this application:

a) Did the IAD err in law by applying the Amended Regulations that came into effect on January 1, 2014 despite the application being received on June 5, 2008?

b) Did the IAD err in law by failing to consider all the documentation and by applying the higher income requirements as per the Amended Regulations in its assessment of the humanitarian and compassionate factors?

[2] The Respondent submits that the following are at issue in this application:

a) Did the IAD err in applying *Gill*, above, to find the current s 133(1)(j)(i)(B) of the Regulations applied in its assessment of the MNI? Did the IAD err in finding the application of the lower *Jugpall*, above, threshold should be guided by the Current Regulations?

b) Did the IAD otherwise err in assessing the sponsorship appeal?

V. STANDARD OF REVIEW

[3] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[4] As regards the choice of which version of s 133(1)(j)(i) applies to the IAD's determination of appeals of decisions that were made prior to January 1, 2014, this Court has held that the matter engages procedural fairness and attracts a correctness standard: *Patel v Canada (Minister of Citizenship and Canada)*, 2016 FC 1221 [*Patel*] at para 18.

[5] As to the IAD's assessment of the evidence and exercise of its H&C discretion, the standard is reasonableness: *Patel*, above, at para 19; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 [*Khosa*] at para 59.

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

VI. STATUTORY PROVISIONS

[7] The following provisions from the Act are relevant in this proceeding:

Right to appeal — visa refusal of family class	**Droit d'appel : visa**
63 (1) A person who has filed in the prescribed manner an application to sponsor a foreign national as a member	63 (1) Quiconque a déposé, conformément au règlement, une demande de parrainage au titre du regroupement familial

of the family class may appeal to the Immigration Appeal Division against a decision not to issue the foreign national a permanent resident visa.

peut interjeter appel du refus de délivrer le visa de résident permanent.

…

…

Disposition

66 After considering the appeal of a decision, the Immigration Appeal Division shall

Décision

66 Il est statué sur l'appel comme il suit :

(a) allow the appeal in accordance with section 67;

a) il y fait droit conformément à l'article 67;

(b) stay the removal order in accordance with section 68; or

b) il est sursis à la mesure de renvoi conformément à l'article 68;

(c) dismiss the appeal in accordance with section 69.

c) il est rejeté conformément à l'article 69.

Appeal allowed

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

Fondement de l'appel

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

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

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

(b) a principle of natural justice has not been observed; or

b) il y a eu manquement à un principe de justice naturelle;

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

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

warrant special relief in light of all the circumstances of the case.	prise de mesures spéciales.

[8] The following provisions from the Regulations that were in effect as of January 1, 2014 [Amended Regulations] are relevant in this proceeding:

Interpretation	**Définitions**
2 The definitions in this section apply in these Regulations.	2 Les définitions qui suivent s'appliquent au présent règlement.
minimum necessary income means the amount identified, in the most recent edition of the publication concerning low income cut-offs that is published annually by Statistics Canada under the Statistics Act, for urban areas of residence of 500,000 persons or more as the minimum amount of before-tax annual income necessary to support a group of persons equal in number to the total number of the following persons:	***revenu vital minimum*** Le montant du revenu minimal nécessaire, dans les régions urbaines de 500 000 habitants et plus, selon la version la plus récente de la grille des seuils de faible revenu avant impôt, publiée annuellement par Statistique Canada au titre de la Loi sur la statistique, pour subvenir pendant un an aux besoins d'un groupe constitué dont le nombre correspond à celui de l'ensemble des personnes suivantes :
(a) a sponsor and their family members,	a) le répondant et les membres de sa famille;
(b) the sponsored foreign national, and their family members, whether they are accompanying the foreign national or not, and	b) l'étranger parrainé et, qu'ils l'accompagnent ou non, les membres de sa famille;
(c) every other person, and their family members,	c) toute autre personne — et les membres de sa famille — visée par :
(i) in respect of whom the	(i) un autre engagement en

sponsor has given or cosigned an undertaking that is still in effect, and	cours de validité que le répondant a pris ou cosigné,
(ii) in respect of whom the sponsor's spouse or common-law partner has given or co-signed an undertaking that is still in effect, if the sponsor's spouse or common-law partner has co-signed with the sponsor the undertaking in respect of the foreign national referred to in paragraph (b).	(ii) un autre engagement en cours de validité que l'époux ou le conjoint de fait du répondant a pris ou cosigné, si l'époux ou le conjoint de fait a cosigné l'engagement avec le répondant à l'égard de l'étranger visé à l'alinéa b).
…	…
Member	**Regroupement familial**
117 (1) A foreign national is a member of the family class if, with respect to a sponsor, the foreign national is	117 (1) Appartiennent à la catégorie du regroupement familial du fait de la relation qu'ils ont avec le répondant les étrangers suivants :
(a) the sponsor's spouse, common-law partner or conjugal partner;	a) son époux, conjoint de fait ou partenaire conjugal;
(b) a dependent child of the sponsor;	b) ses enfants à charge;
(c) the sponsor's mother or father;	c) ses parents;
…	…
Approved sponsorship application	**Parrainage**
120 For the purposes of Part 5,	120 Pour l'application de la partie 5, l'engagement de parrainage doit être valide à l'égard de l'étranger qui présente une demande au titre de la catégorie du regroupement familial et à l'égard des membres de sa

famille qui l'accompagnent, à la fois :

(a) a permanent resident visa shall not be issued to a foreign national who makes an application as a member of the family class or to their accompanying family members unless a sponsorship undertaking in respect of the foreign national and those family members is in effect; and

a) au moment où le visa est délivré;

(b) a foreign national who makes an application as a member of the family class and their accompanying family members shall not become permanent residents unless a sponsorship undertaking in respect of the foreign national and those family members is in effect and the sponsor who gave that undertaking still meets the requirements of section 133 and, if applicable, section 137.

b) au moment où l'étranger et les membres de sa famille qui l'accompagnent deviennent résidents permanents, à condition que le répondant qui s'est engagé satisfasse toujours aux exigences de l'article 133 et, le cas échéant, de l'article 137.

…

…

Undertaking — duration

132 (1) Subject to subsection (2), the sponsor's undertaking obliges the sponsor to reimburse Her Majesty in right of Canada or a province for every benefit provided as social assistance to or on behalf of the sponsored foreign national and their family members during the period

Engagement : durée

132 (1) Sous réserve du paragraphe (2), le répondant s'engage à rembourser à Sa Majesté du chef du Canada ou de la province en cause les prestations fournies à titre d'assistance sociale à l'étranger parrainé, ou pour son compte, ou aux membres de la famille de celui-ci, ou pour leur compte :

(a) beginning

a) à compter, selon le cas :

(i) if the foreign national enters Canada with a temporary resident permit, on the day of that entry,	(i) si l'étranger parrainé est entré au Canada muni d'un permis de séjour temporaire, du jour de son entrée,
(ii) if the foreign national is in Canada, on the day on which the foreign national obtains a temporary resident permit following an application to remain in Canada as a permanent resident, and	(ii) si l'étranger parrainé est déjà au Canada, du jour où il obtient un permis de séjour temporaire à la suite d'une demande de séjour au Canada à titre de résident permanent,
(iii) in any other case, on the day on which the foreign national becomes a permanent resident; and	(iii) dans tout autre cas, de la date à laquelle l'étranger devient résident permanent;
…	…
Requirements for sponsor	**Exigences : répondant**
133 (1) A sponsorship application shall only be approved by an officer if, on the day on which the application was filed and from that day until the day a decision is made with respect to the application, there is evidence that the sponsor	133 (1) L'agent n'accorde la demande de parrainage que sur preuve que, de la date du dépôt de la demande jusqu'à celle de la décision, le répondant, à la fois :
…	…
(j) if the sponsor resides	j) dans le cas où il réside :
(i) in a province other than a province referred to in paragraph 131(b),	(i) dans une province autre qu'une province visée à l'alinéa 131b) :
(A) has a total income that is at least equal to the minimum necessary income, if the sponsorship application was filed in respect of a foreign national other than a foreign national referred to in clause	(A) a un revenu total au moins égal à son revenu vital minimum, s'il a déposé une demande de parrainage à l'égard d'un étranger autre que l'un des étrangers visés à la division (B),

(B), or

(B) has a total income that is at least equal to the minimum necessary income, plus 30%, for each of the three consecutive taxation years immediately preceding the date of filing of the sponsorship application, if the sponsorship application was filed in respect of a foreign national who is

(B) a un revenu total au moins égal à son revenu vital minimum, majoré de 30 %, pour chacune des trois années d'imposition consécutives précédant la date de dépôt de la demande de parrainage, s'il a déposé une demande de parrainage à l'égard de l'un des étrangers suivants :

(I) the sponsor's mother or father,

(I) l'un de ses parents,

(II) the mother or father of the sponsor's mother or father, or

(II) le parent de l'un ou l'autre de ses parents,

(III) an accompanying family member of the foreign national described in subclause (I) or (II), and

(III) un membre de la famille qui accompagne l'étranger visé aux subdivisions (I) ou (II),

…

…

Income calculation rules

Règles de calcul du revenu

134 (1) Subject to subsection (3), for the purpose of clause 133(1)(j)(i)(A), the sponsor's total income shall be calculated in accordance with the following rules:

134 (1) Sous réserve du paragraphe (3) et pour l'application de la division 133(1)j)(i)(A), le revenu total du répondant est calculé selon les règles suivantes :

(a) the sponsor's income shall be calculated on the basis of the last notice of assessment, or an equivalent document, issued by the Minister of National Revenue in respect of the most recent taxation year preceding the date of filing of the sponsorship application;

a) le calcul du revenu se fait sur la base du dernier avis de cotisation qui lui a été délivré par le ministre du Revenu national avant la date de dépôt de la demande de parrainage, à l'égard de l'année d'imposition la plus récente, ou tout document équivalent délivré par celui-ci;

(b) if the sponsor produces a document referred to in

b) si le répondant produit un document visé à l'alinéa a),

paragraph (a), the sponsor's income is the income earned as reported in that document less the amounts referred to in subparagraphs (c)(i) to (v);

son revenu équivaut à la différence entre la somme indiquée sur ce document et les sommes visées aux sous-alinéas c)(i) à (v);

(c) if the sponsor does not produce a document referred to in paragraph (a), or if the sponsor's income as calculated under paragraph (b) is less than their minimum necessary income, the sponsor's Canadian income for the 12-month period preceding the date of filing of the sponsorship application is the income earned by the sponsor not including

c) si le répondant ne produit pas de document visé à l'alinéa a) ou si son revenu calculé conformément à l'alinéa b) est inférieur à son revenu vital minimum, son revenu correspond à l'ensemble de ses revenus canadiens gagnés au cours des douze mois précédant la date du dépôt de la demande de parrainage, exclusion faite de ce qui suit :

(i) any provincial allowance received by the sponsor for a program of instruction or training,

(i) les allocations provinciales reçues au titre de tout programme d'éducation ou de formation,

(ii) any social assistance received by the sponsor from a province,

(ii) toute somme reçue d'une province au titre de l'assistance sociale,

(iii) any financial assistance received by the sponsor from the Government of Canada under a resettlement assistance program,

(iii) toute somme reçue du gouvernement du Canada dans le cadre d'un programme d'aide pour la réinstallation,

(iv) any amounts paid to the sponsor under the Employment Insurance Act, other than special benefits,

(iv) les sommes, autres que les prestations spéciales, reçues au titre de la Loi sur l'assurance-emploi,

(v) any monthly guaranteed income supplement paid to the sponsor under the Old Age Security Act, and

(v) tout supplément de revenu mensuel garanti reçu au titre de la Loi sur la sécurité de la vieillesse,

(vi) any Canada child benefit paid to the sponsor under the

(vi) les allocations canadiennes pour enfants reçues au titre de

Income Tax Act; and	la Loi de l'impôt sur le revenu;
(d) if there is a co-signer, the income of the co-signer, as calculated in accordance with paragraphs (a) to (c), with any modifications that the circumstances require, shall be included in the calculation of the sponsor's income.	d) le revenu du cosignataire, calculé conformément aux alinéas a) à c), avec les adaptations nécessaires, est, le cas échéant, inclus dans le calcul du revenu du répondant.

[9] The following provisions from the Regulations that were in effect on December 31, 2013 [2013 Regulations] are relevant in this proceeding:

Requirements for sponsor	**Exigences : répondant**
133 (1) A sponsorship application shall only be approved by an officer if, on the day on which the application was filed and from that day until the day a decision is made with respect to the application, there is evidence that the sponsor	133 (1) L'agent n'accorde la demande de parrainage que sur preuve que, de la date du dépôt de la demande jusqu'à celle de la décision, le répondant, à la fois :
…	…
(j) if the sponsor resides	j) dans le cas où il réside :
(i) in a province other than a province referred to in paragraph 131(b), has a total income that is at least equal to the minimum necessary income, and	(i) dans une province autre qu'une province visée à l'alinéa 131b), a eu un revenu total au moins égal à son revenu vital minimum,
(ii) in a province referred to in paragraph 131(b), is able, within the meaning of the laws of that province and as determined by the competent authority of that province, to fulfil the undertaking referred	(ii) dans une province visée à l'alinéa 131b), a été en mesure, aux termes du droit provincial et de l'avis des autorités provinciales compétentes, de respecter l'engagement visé à cet alinéa;

to in that paragraph; and

VII. ARGUMENTS

A. *Applicant*

(1) Application of Regulations

[10] The Applicant submits that the IAD erred in law by failing to perform an analysis of the validity of the visa officer's refusal.

[11] The visa officer refused the Applicant's sponsorship application on the basis that the Applicant did not meet the MNI for a family of nine. However, at the time of the assessment in 2014, the Applicant was no longer responsible for the financial welfare of her parents-in-law and brother-in-law and should have been assessed for the MNI for a family of seven. In 2014, the MNI for a family of seven was $57,974.00 and the Applicant's household income was $66,530 in 2013; $83,200 in 2014; and $85,325.00. Moreover, the IAD noted in the Decision that the visa officer should have removed the parents-in-law and brother-in-law from the calculation after 2012.

[12] The Applicant also submits that it was unfair of the visa officer to assess her 2007 income. The application had been in process for five years and should have been assessed according to recent income.

(2) H&C Assessment

[13] The Applicant submits that the IAD breached procedural fairness in its consideration of the H&C reasons for granting special relief by failing to consider all the documentation and applying the higher MNI as required by the Amended Regulations that came into effect on January 1, 2014.

[14] In support of her argument, the Applicant cites two Supreme Court of Canada cases. In *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49 at paragraph 71, it was stated that "the absence of a general requirement of legislative prospectivity exists despite the fact that retrospective and retroactive legislation can overturn settled expectations and is sometimes perceived as unjust". In *Dineley*, above, at paragraph 10, Justice Deschamps stated, "New legislation that affects substantive rights will be presumed to have only prospective effect unless it is possible to discern a clear legislative intent that it is to apply retrospectively".

[15] The Applicant also relies on s 43 of the *Interpretation Act*, RSC 1985, c I-21 [*Interpretation Act*] to reinforce the presumption against retroactive and retrospective effects of legislation where it affects rights, privileges, obligations, or liabilities that were accrued, accruing, or were incurred under the repealed enactment. Furthermore, there is no language in the Regulations or Regulatory Impact Analysis Statement [RIAS] that indicates Parliament intended to apply s 133(1)(j) of the Amended Regulations retrospectively to the sponsorships filed prior to January 1, 2014.

[16] On December 31, 2013, OB 561 instructed visa officers to process applications received before November 2011 against the regulatory requirements that were in force prior to January 1, 2014. The Applicant's sponsorship application was received on June 5, 2008. Accordingly, the visa officer was obligated to apply only the LICO figures rather than LICO plus 30 per cent. Immigration manuals contain guidelines that constitute instructions that may be relied upon by the Court in determining the reasonableness of an exercise of discretion under the Act: *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 16. It was unfair for the Applicant to have to deal with two different sets of requirements at two different levels.

[17] The Applicant also takes issue with the IAD's choice of jurisprudence to support the Decision. In dismissing the appeal of the visa officer's decision, the IAD relied on *Gill*, above, which should not apply because it was decided before OB 561 was issued and deals with regulations regarding marriage rather than income. The IAD also concluded that OB 561was not binding on the IAD, thereby failing to accept *Baker*'s instructions on the relevance of guidelines. The Applicant also submits that the IAD should have followed *Jugpall*, above, rather than *Chirwa*, above, in its assessment of H&C factors.

[18] In the Decision, the IAD found that the Applicant did not present evidence as to why her father and brother could not visit Canada on a visa or supervisa. However, the Applicant submits that such temporary visas are not an alternative to immigration to Canada, as they fail to achieve the objective of permanently reuniting families. Moreover, the refusal of a permanent residence application decreases the chances that a temporary visitor's visa will be granted.

[19] The Applicant submits that the IAD failed to consider pertinent documentation, such as the Notice of Assessments of the Applicant's parents-in-law and brother-in-law that demonstrate they are self-dependents. The IAD also failed to consider the proof that the Applicant's family have been continuously employed, have savings of $37,000, and own property.

[20] The Applicant also disagrees with the IAD's conclusion that the Applicant's father and brother are not needed in Canada because the children already have their paternal grandparents in Canada.

[21] Finally, the Applicant submits that it was unreasonable for the IAD to apply the higher test set out in *Chirwa*, above, because the Amended Regulations that required LICO plus 30 per cent were not in existence in 2013, the only year in which the Applicant did not meet the new MNI requirement.

[22] Furthermore, the Applicant requests the Court to provide clear guidelines as to which version of the Regulations should apply to applications filed prior to January 1, 2014 since the IAD has not been consistent in their decisions.

B. *Respondent*

(1) Application of Regulations

[23] The Respondent submits that there is no error in the Decision. Hearings of the IAD are *de novo* in nature and appeals of sponsorship applications should be based on the laws in force at

the time of the IAD decision. The IAD correctly applied *Gill*, above, in finding that there was no accruing or vested right at the time the sponsorship application was made. Consequently, both the visa officer and IAD were consistent in applying the appropriate version of the Regulations to their assessments.

[24] Contrary to the Applicant's submission, the IAD conducted its own assessment of the evidence on MNI in the Decision. The IAD noted the Applicant's household income did not meet the MNI for a family of nine in 2007, which was correct since the Applicant's parents-in-law and brother-in-law were still under sponsorship in 2007. The visa officer's inclusion of the three in-laws in the post-2007 calculations is irrelevant because the basis for the refusal was the 2007 income. The Respondent also notes that the Applicant herself failed to correctly record the number of her dependents in her Financial Evaluation Document, which was noted in the Global Case Management System entries.

[25] In its assessment, the IAD noted the correct family size for the 2013 to 2015 calculations but found the Applicant still did not meet the requirements of s 133(1)(j)(i)(B). The Applicant's household income failed to meet the MNI for a family of nine in 2012 by a shortfall of $30,000.00 and the MNI for a family of seven in 2013 by a shortfall of $16,400.00. Accordingly, the IAD was correct in its application of the law to the facts.

[26] In regards to the matter of fairness, the Respondent submits that it was not unfair of the visa officer to consider the 2007 income in his assessment. Section 133(1)(j)(i) of the Regulations required the Applicant to have an income equal to the MNI for the year preceding

the date of the sponsorship application; thus, the visa officer was correct in assessing the 2007 income for an application filed in 2008.

[27] As to the application of OB 561, the Respondent contends that such documents do not bind this Court or the IAD: *Kinsel v Canada (Citizenship and Immigration)*, 2014 FCA 126 at para 80.

[28] The Respondent also argues that s 43 of the *Interpretation Act* is not applicable to the present case since *Gill*, above, held that there cannot be accrued or vested rights with respect to sponsorship applications, including regulatory changes.

[29] The lack of retrospective language in the Amended Regulations or RIAS also does not support the Applicant's arguments. On the contrary, it confirms the Respondent's position that, absent any legislation providing otherwise, the Amended Regulations were properly applied by the IAD. As a side note, the RIAS is also not binding on the Court or the IAD.

(2) H&C Assessment

[30] The Respondent submits that the IAD did not err in its decision to withhold H&C relief. The IAD set out the factors that would be considered, with specific reference to s 67(1)(c) of the Act.

[31] In the Decision, the IAD considered all the evidence, including evidence that had not been before the visa officer. However, the IAD determined that the Applicant did not discharge

her onus of establishing that special relief was warranted in accordance with s 67(1)(c) of the Act.

[32] The Respondent disagrees with the Applicant's argument that the IAD applied the wrong test in its H&C assessment. The correct standards, as determined in *Gill*, above, and *Chirwa*, above, were identified and applied. The Applicant did not meet the standard.

[33] Furthermore, the Respondent submits that the IAD did not overlook or misconstrue evidence in finding that the evidence failed to establish a grant of H&C relief was warranted.

[34] Finally, the Respondent takes issue with the Applicant's argument that clear guidelines are required from the Court on this issue as such guidance has already been provided by Chief Justice Crampton in *Gill*, above.

C. *Applicant's Reply*

[35] The Applicant submits that it is a clear breach of fairness for the application to be refused after seven years based on the 2007 income. If the application had been refused in 2008, then the appeal would have been heard prior to the Amended Regulations coming into force. Accordingly, there would be no issue about whether the Amended Regulations are applicable. In short, the Applicant is suffering for the Respondent's delay in making the Decision.

[36] Additionally, it is unfair for the Applicant to be expected to meet the new requirement of the Amended Regulations in 2013, considering the requirement did not exist in 2013.

[37] The Applicant also argues that, pursuant to s 67(1) of the Act, the appeal should have been allowed because the visa officer had made a decision based on a calculation that included the incorrect number of family members.

[38] Moreover, the IAD failed to consider the guidelines in OB 561 and the RIAS. Under these guidelines, the visa officer had an obligation to apply the 2013 Regulations to applications made prior to November 2011. Also, the visa officer had no requirement to consider the Amended Regulations at the time of his assessment in 2014.

[39] In light of the IAD's acceptance of the fact that the Applicant exceeded the MNI for a family of seven in 2014, the time of the assessment, the appeal should have been allowed.

[40] In regards to the H&C assessment, the Applicant argues that the IAD did not consider the fact that the Applicant's income was only short of $3,832.00 based on the 2007 income and that the co-signer's gross income was $152,159.00 and net income was $31,814.00 in that same period.

[41] Finally, the Applicant contends that she accrued the right to sponsor her brother as he was under the age of 22 at the time the application was filed, as dependent children are age-locked according to the Immigration Manual guidelines and *McDoom v Canada (Minister of Manpower and Immigration)*, [1977] FCJ No 148.

D. *Respondent's Further Argument*

[42] In *Gill*, above, Chief Justice Crampton specifically recognized that people who make applications to sponsor have no substantive accrued or accruing rights until a final decision has been made on their application. Accordingly, s 43 of the *Interpretation Act* does not apply. Furthermore, based on the reasoning in *Gill*, above, the IAD correctly applied the Amended Regulations in its assessment. The Applicant's submissions to the IAD were made on March 17, 2015 and the Decision is dated August 5, 2016; consequently, there is no error.

[43] The Applicant's arguments do not raise an error or issue with the Chief Justice's reasoning on accrued rights in the context of a sponsorship application; instead, they rely on documents that are non-binding on this Court or the IAD. The fact that *Gill*, above, was decided prior to the issuance of OB 561 or the RIAS does not mean the jurisprudence was wrongly applied.

[44] In the event that the Court determines it must examine legislative intent with regards to the present case, the Respondent notes that the Applicant only provided a selected excerpt of the RIAS. The full scope of the legislative objectives respecting the regulatory changes reflect Parliament's concern with the sustainability of the PGP Sponsorship Program over the long-term, and reflect the attempt to address concerns about sponsors' ongoing ability to adequately support their sponsored family members' basic needs on a forward-looking basis.

VIII. ANALYSIS

[45] This application raises two important and related issues:

a) Did the IAD err in law when it applied the Amended Regulations that came into effect on January1, 2014, given that the Applicant's sponsorship application for permanent residence on behalf of her father and her brother was received on June 5, 2008; and

b) Did the IAD err in law by failing to consider all of the evidence and documents, and by applying the higher requirements under the Amended Regulations when it considered the humanitarian and compassionate aspects of the Applicant's application?

A. *Which Regulations Should Apply?*

[46] In her written Reply Submissions, the Applicant provides a very succinct summary of what is at issue here. Put simply, the Applicant argues that the IAD did not apply the correct law, but she also provides a summary of the dispute between the parties on this issue:

> 10. Pursuant to R. 132 (1) of the *Immigration and Refugee Protection Regulations*, the sponsor's obligation to reimburse Her Majesty in right of Canada or a province for every benefit provided as social assistance to or on behalf of the sponsored foreign national and their family members stars [*sic*] on the day the foreign national becomes a permanent resident of Canada.
>
> 11. The liability to support sponsored family members is a forward looking once the sponsored relatives arrives [sic] in Canada. It is a breach of fairness that in 2014 the visa officer refused the application based on the 2007 income. Moreover in assessing the human and compassionate factors the IAD member should have considered the fact that the family income was only short of $3832 based on 2007 but the co-signer's gross income for 2007 was $152,159 and reported net income was $31,814.00.

12. At paragraph 16 the IAD member wrote that:

> "Nevertheless, in 2014 when the assessment was calculated, the appellant did not meet the required MNI for three years prior to the calculation."

13. When [the] visa officer made decision in 2014 there was no requirement for visa officer to look at new regulations. The guidelines provided in Immigration Operational Bulletin 561 and Regulatory Impact Analysis Statement are clear that the visa officer has an obligation to apply old regulations when applications are in process.

14. The hearings before the IAD are *de novo* in nature, the IAD member made an error in law by applying the new income requirements three years prior to the visa officer's decision. (Page 10 of CTR)

15. The IAD member accepted that the applicant has exceeded the required income for seven persons which was $62,581.00, therefore the appeal should have been allowed as the visa officer's decision was not valid in law (page 457 of CTR)

Lock in age of principal applicants or accompanying family members:

16. In case of dependent children the age is locked as per Immigration Manual guidelines Inland Processing Manual IP 2 paragraph 5.17. The applicant sponsored her father and brother therefore the applicant accrued right to sponsor her brother as he was under 22 years of age at the time of filing of the sponsorship.

17. In *McDoom v Minister of Manpower and Immigration*, [1978] 1 FC 323 Mr. Justice Walsh found that the applicant had accrued right to have her son nominated under the regulations as they were at the time of filing of the application.

18. The same way in this application the applicant has accrued her right to sponsor her brother as a dependent on her father the day she filed the sponsorship.

19. In light of the above, I would submit that this application should be allowed as the IAD member erred in law concluding that the visa officer's decision was valid in law because the officer did not remove three persons previously sponsored. Secondly, the IAD member agreed that at the time of visa officer's decision in 2014 the applicant had the required income. Thirdly, the hearings before the IAD are de novo the IAD member looked at the three years

> income prior to visa officer's decision i.e. for 2012, 2013 and 2014.

[47] The essence of the dispute is whether *Gill*, above, was improperly applied in this case. Given the RIAS statement and OB 561, should the IAD have applied the regulations that were in force prior to January 1, 2014. Given that, in *Gill*, there were no guidelines in place to direct which regulations should apply, should the existence of the RIAS and OB 561 directions make a difference to the result reached in *Gill*?

[48] In its Decision, the IAD was fully alive to the issues at play in this dispute and gave a complete answer to the basic question of which regulations should apply and why the decision in *Gill* should be determinative of this issue:

> [6] Section 133(1)(j) of the Regulations was amended and came into force on January 1, 2014. The minimum necessary income required to sponsor a parent or grandparent was increased from the low income cut-offs (LICO) to LICO plus 30 per cent. The sponsor is required to meet that threshold for each of the three consecutive taxation years preceding the date of the application. Parliament did not establish transition provisions with respect to the amendments in section 133(1)(j) of the Regulations and there has not been a definitive decision from the Federal Court with respect to whether the old regulations or the new regulations should apply to those applications that were submitted prior to the change in the legislation on January 1, 2014.
>
> [7] I have considered the case law presented by both parties, which has been somewhat informative. I find that the decision is *Gill* is more instructive because it is current and deals directly with the change of laws in sponsorship applications. Although I agree with the appellant's Counsel that *Gill* specifically addresses the change in law with respect to Regulation 4(1), Chief Justice Crampton speaks more generally about the proposition of accruing rights in sponsorship applications.
>
> [8] The following is from *Gill*:

[39] Contrary to Ms. Kaur Gill's submissions, a right to have her spousal sponsorship application determined under the version of the Regulations that was in force prior to September 30, 2010 did not become accrued and did not begin to accrue as of the moment she filed her Notice of Appeal with the IAD.

[40] This is because persons who make such applications have no accrued or accruing rights until all of the conditions precedent to the exercise of the right they hope to obtain under the application have been fulfilled (*R. v Puskas*, 1998 CanLII 784 (SCC), [1998] 1 SCR 1207, at para 14;*Apotex Inc v Canada (Attorney General)*, 1993 CanLII 3004 (FCA), [1994] 1 FC 742, at paras 56-63 (CA); *Scott v College of Physicians & Surgeons of Saskatchewan* [1992] SJ No 432, at 718 (CA); *Kazi v Canada (Minister of Citizenship and Immigration)*, 2003 FC 948 (CanLII), at para 19; *Gustavson Drilling*, above). Until a final decision has been made on the application, the applicant simply has potential future rights that remain to be determined (*Bell Canada v Palmer* [1974] 1FC 186, at paras 12-15 (CA) [*Palmer*]; *McAllister v Canada (Minister of Citizenship and Immigration)*, 1996 CanLII 4030 (FC), [1996] 2 FC 190, at paras 53-54); *Chu v Canada (Minister of Citizenship and Immigration)*, 2006 FC 893 (CanLII), at paras 67-68). Stated alternatively, the applicant has no more than a hope that the application will be successful. There are no rights that may be retroactively or retrospectively affected by a change in the test applicable to spousal sponsorship applications. To the extent that this Court's decision in *McDoom v. Canada (Minister of Manpower and Immigration)* [1978] 1 FC 323, which dealt with a significantly different legislative regime, stands for the contrary position, I respectfully decline to follow that decision.

[41] The situation faced by such applicants contrasts with situations in which a party to legal proceedings has an accrued substantive right (for example, to equal pay) at the time that party initiates legal proceedings. Pursuant to paragraph 43(c) of the *Interpretation Act*, above, such accrued

rights-cannot be adversely affected as a result of the partial or complete repeal of the enactment which confers those rights (*Palmer*, above, at paras 8-15).

[42] At first blush, the Respondent's position that the IAD must apply the law as it stands at the time of its decision would appear to be correct. That position was endorsed by this Court in *Macdonald v Canada (Minister of Citizenship and Immigration*), 2012 FC 978 (CanLII, at paras 22-25 and *Wiesehahan v Canada (Minister of Citizenship and Immigration)*, 2011 FC 858 (CanLII), at para 54). However, in those cases, the visa officer and the IAD each determined that the applicant had failed to establish both of the tests in section 4. As a result, the fact that section 4 was changed from a conjunctive test to a disjunctive test between the time of the visa officer's decision and the time of the IAD's decision had no particular significance.

[43] This case calls for a closer examination of the issue. In conducting this examination, it must be kept in mind that the IAD's hearings are *de novo* in nature, and that persons who make applications to sponsor a spouse under the family class have no accrued or accruing rights until a final decision has been made on their application.

[44] In this context, the version of the Regulations that is applicable to a determination of an appeal by the IAD is the version that was in force at the time the parties made their submissions to the IAD. However, if the parties have a full opportunity to supplement their prior written submissions with oral submissions at the time of the IAD's hearing, then the version of the Regulations which ought to be applied by the IAD is the version that was in force at that time. I acknowledge that there may be situations in which a subsequent amendment to the Regulations has no bearing on any of the submissions that were made by the parties, and that in such situations, it may be appropriate for the IAD to apply that amended version of the Regulations, i.e., the version that was in force at the time of its decision.

> [45] Ms. Kaur Gill submitted her evidence to the IAD beginning in early 2011, well after the existing version of section 4 came into force. It does not appear that she made any written submissions to the IAD. However, she had an opportunity to make oral submissions during the IAD's hearings on March 18, 2011, at which the Respondent raised the change in the wording of section 4 as a potential issue, and on October 25, 2011.
>
> [46] Accordingly, the IAD correctly determined that the version of the Regulations that had to be applied in assessing Ms. Kaur Gill's application was the current version of those Regulations.
>
> [47] I am not aware of any principle of procedural fairness, due process or natural justice in this country that required the IAD to apply the version of those Regulations that existed at the time the visa officer's decision was made.

[9] The *Gill* decision clearly stands for the proposition that people do not have accrued rights at the time they make an application for permanent residence. Given that applicants who apply for immigration to Canada have no vested rights until a final decision has been made on their application, the principles regarding substantive changes in the law as addressed in *R. v Dineley* have no application to this case. Furthermore, *Dineley* referred to a criminal matter and I see no reason why it should apply to immigration law. Counsel also provided the guidelines in the Operational Bulletin 561 and the IAD decision in *Buhpendrabhai Patel*. The Operational Bulletin 561 stated, "All family class applications for parents and grandparents in the Department's existing inventory, which were received before the pause on the acceptance of new applications was put in place in November 2011, will be processed against the regulatory requirements in force prior to January 1, 2014. They include applications which currently reside at the CPC-M as well as those currently held at visa offices, including the Case Processing Centre office in Ottawa (CPC-0)." However, neither the Operational Bulletin nor the *Buhpendrabhai Patel* decision is binding on the IAD. Based on *Gill*, I find that the amended section 133(1)j) of the Regulations that were in force at the time of the appeal (and the final decision) is the standard by which the appellant must meet in order that the *Jugpall* test be applied, that is, the low income cut-off plus 30% for three years prior to the time the final decision is rendered.

[footnotes omitted]

[49] In the recent decision of *Patel*, above, Justice Mosley has given full consideration to the central issues before me in the present application:

> [22] The applicant's position that the former version of the paragraph should apply is primarily based on temporal factors. The old paragraph was operative at the time that the applicant filed her sponsorship application in 2008, when it was refused in October 2013, and when the appeal to the IAD was filed in December 2013. Had the appeal been decided at that time, the old regulation would have applied to her application. The decision to apply the new regulation constituted an error of law, she argues.
>
> [23] The applicant contends that the IAD's application of the new regulation on appeal amounts to retrospective application of the law. Her substantive, not procedural rights, were affected, she argues, as the application concerned family reunification and engaged significant human interests: *R v Dineley*, 2012 SCC 58, [2012] SCJ No 58 at para 10; see also *R v Howard Smith Paper Mills*, [1957] SCR 403. Those substantive rights were acquired, accrued or accruing when the paragraph was amended. This negatively affected the IAD's exercise of equitable discretion because it wrongly applied the higher threshold for exercising its discretion under *Chirwa*, above, rather than the lower threshold found in *Jugpall v Canada (Minister of Employment and Immigration)*, [1999] LADD No 600.
>
> [24] In support of her position, the applicant relies on a number of older decisions from this Court. Only two dealt with an IAD appeal: *Canada (Minister of Employment and Immigration) v Lidder*, [1992] 2 FC 621, [1992] FCJ No 212 (CA); *Canada (Minister of Citizenship and Immigration) v Nikolova*, [1995] FCJ No 1337. Both of these decisions are, in my view, distinguishable on their facts.
>
> …
>
> [30] The underlying question in this matter is whether by the act of filing an application to sponsor her father, the applicant acquired rights which attract the presumption in *Gustavson Drilling, (1964) Ltd v Canada (MNR)*, [1977] 1 SCR 271 at p 282, and were operative at the time her appeal was considered by the IAD.

[31] A similar question was dealt with in the spousal sponsorship context by Chief Justice Crampton in *Gill*, above, and by Justice MacDonald in Burton, above. In *Gill*, Chief Justice Crampton found, at paragraphs 39 and 40, that the sponsor did not have an accruing or accrued right to have her sponsorship application determined according to the law that was in place when she filed her notice of appeal. This was because persons who make such applications have no accrued or accruing rights until all of the conditions precedent to the exercise of the right they hope to obtain under the application have been fulfilled.

[32] Chief Justice Crampton was guided by the Supreme Court's definition of what it means for a right to be "acquired", "accrued" or "accruing" in *R v Puskas*; *R v Chatwell*, [1998] 1 SCR 1207, [1998] SCJ No 51, at para 14:

> In our view, there are numerous reasons for deciding that the ability to appeal as of right to this Court is only "acquired," "accrued" or "accruing" when the court of appeal renders its judgment. The first is a common-sense understanding of what it means to "acquire" a right or have it "accrue" to you. A right can only be said to have been "acquired" when the right-holder can actually exercise it. The term "accrue" is simply a passive way of stating the same concept (a person "acquires" a right; a right "accrues" to a person). Similarly, something can only be said to be "accruing" if its eventual accrual is certain, and not conditional on future events (*Scott v. College of Physicians and Surgeons of Saskatchewan (1992)*, 95 D.L.R. (4th) 706 (Sask. C.A.), at p. 719). In other words, a right cannot accrue, be acquired, or be accruing until all conditions precedent to the exercise of the right have been fulfilled.

[33] Chief Justice Crampton found that no substantive rights accrued until all the conditions precedent to the exercise of the right had been fulfilled: *Gill*, at para 40. Until a final decision has been made on the application, the applicant simply has potential future rights that remain to be determined. There are no rights that may be retroactively or retrospectively affected by a change in the test applicable to sponsorship applications. To the extent that *McDoom* stood for the contrary position, Chief Justice Crampton respectfully declined to follow it referring to the significantly different legislative regime under which it was decided. Another

> factor that contributed to the outcome was that the IAD's hearings are *de novo* in nature: *Gill*, at para 43.
>
> [34] Counsel for the applicant invites me to find that the Chief Justice, and Justice MacDonald in *Burton*, erred in their analyses and decline to follow their judgments. While I am not bound by their decisions, in the interests of judicial comity I should not differ from their conclusions unless (a) subsequent decisions have affected the validity of the impugned judgment; (b) it has been demonstrated that some biding authority in case law and relevant statute was not considered; or (c) the judgment itself was unconsidered i.e., given where exigencies required an immediate decision: *Alfred v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1134, [2005] FCJ No 1391 at para 15. None of those considerations apply in this instance.
>
> [35] The applicant has not established that she had an accrued right to have her application determined on the basis of the regulation as it read at the time she submitted it or when it was considered by the visa officer. There had been no final decision granting her rights on the basis of the law as it previously read. At best, she had a right of appeal which was to be determined on the basis of the law as it was when it was heard and her application was considered *de novo*.

[50] Like Justice Mosley, I should not differ from these conclusions unless the Applicant has established that one of the three grounds for variance is applicable. None of them is applicable on the facts before me.

[51] All that the Applicant can point to are the RIAS and OB 561 directions, but these directions are not legally binding on the IAD, while *Gill* is. *Gill* is clear that "until a final decision has been made on the application, the applicant simply has potential future rights that remain to be determined" and

> Stated alternatively, the applicant has no more than a hope that the application will be successful. There are no rights that may be retroactively or retrospectively affected by a change in the test to spousal sponsorship applications.

[52] An IAD application is made *de novo*, so there is no final decision on an application until the IAD decision is made.

[53] Since *Gill*, the Court has consistently found that the right to sponsor a family member does not vest, accrue, or even begin to accrue until an affirmative decision is made on the application. See *MacDonald*, above; *Dalumay v Canada (Citizenship and Immigration)*, 2012 FC 1179; *Lukaj v Canada (Minister of Citizenship and Immigration)*, 2013 FC 8; and *Patel*, above.

[54] I can find nothing in the present application that could remove it or distinguish it from the basic ratio of *Gill*. The RIAS and OB 561 say otherwise, but the Applicant has not demonstrated that, in the absence of transitional provisions, the RIAS and OB 561 must govern the situation.

[55] On this issue, then, judicial comity means that, I am obliged to follow *Gill* and Justice Mosley's decision in *Patel*, above, which means that, in my view, the IAD was reasonable and correct in respect of the law applicable to the application before it.

[56] The Applicant attempts to take this aspect of the Decision a little further and argues that the IAD merely followed the visa officer's decision and did not make its own assessment and did not note the correct number of sponsors' dependants for the material times. She also says that it was totally unfair that the visa officer considered 2007 income in his assessment, that CIC Operational Bulletins are binding in the IAD and this Court, and that s 43 of the *Interpretation Act* prevents the retrospective effects of legislation where it affects rights. These arguments are simply not supported by a reading of the Decision or can be answered by the fact that the visa

officer and the IAD were simply applying the law. From the Applicant's perspective, this may seem grossly unfair, but the Applicant has no rights under Canadian law that the applicable regulations can impact. In a general sense, this may seem unfair to the Applicant, but the visa officer, the IAD and this Court have to apply the applicable law and that law, in any event, has fairly flexible H&C provisions that are intended to mitigate a strict application of the governing qualification regulations.

B. *H&C Considerations – Special Relief*

[57] In accordance with s 61(1)(c) of the Act, the IAD was obliged to consider "taking into account the best interests of a child directly affected by the decision, sufficient humanitarian compassionate considerations warrant special relief in light of all the circumstances of the case".

[58] As the Decision shows, the IAD considered a wide range of factors on this issue but ultimately concluded that special relief was not warranted. The Applicant has put forward a significant number of reasons as to why this conclusion is unreasonable.

C. *Wrong Test*

[59] The Applicant says that the IAD should have applied the *Jugpall*, above, threshold rather than the test stated in *Chirwa*.

[60] The IAD's approach to this issue is as follows:

> [17] Counsel for the respondent argues that the appellant did not meet the required income for three years prior to the hearing and

> therefore, the test extrapolated from *Jugpall* should not be applied, but rather it is the standard from *Chirwa*. From the documentary evidence before me, and in particular, the Canada Revenue Agency Notices of Assessment, the appellant's available income in 2014 and 2015 appears to have exceeded the required MNI for seven people by approximately $1,800.00 and $3,200.00 respectively. Indeed, this is only two years, rather than three years, as required by the Regulations. Nevertheless, I have taken this into consideration.

[61] So, in correctly applying *Gill*, the IAD properly found that the current regulation is the standard the Applicant had to meet in order for *Jugpall* to apply. That standard is LICO plus 30 per cent for all of the three years prior to the time the final decision is rendered. The IAD found that the Applicant did not meet this threshold.

D. *Visits to Canada by Father and Brother*

[62] The Applicant also disagrees with the IAD's relying upon visits by the Applicant's father and brother:

> 22. The IAD concluded that at paragraph 21 of her reasons for the decision that that the applicant did not present any evidence that why her brother and father can not come on visit visa or super visa. First of all it is not an alternative to the permanent residence to Canada, the Immigration and Refugee Protection Act specifically provides that one of the objective is to see families together. Visitor visa or super visa are temporary period of visits rather permanently re-uniting the families. Secondly, when permanent residence application is refused then chances are very little that- visa officer will allow them to come to Canada temporarily. (Page 14 of the Applicant's Record)

[63] The IAD never suggests that visits are an alternative to permanent residence. The Applicant is simply highlighting a particular point, among many others, that the IAD considers. I

think it can be safely assumed that the IAD would be fully aware that visits cannot be equated with permanent residence, but the availability of visits back and forth had to be taken into account as being one of the circumstances of the case that had to be considered.

E. *Previously Sponsored Relatives*

[64] The Applicant points to the following:

> 23. In assessing the compassionate factors the IAD member failed to consider the fact that the previously sponsored relatives are self-dependents. The IAD member had Notices of Assessments of the previously sponsored relatives but did not consider, which is as relevant to consider under human and compassionate reasons. (Pages 106-122 of the Applicant's Record)
>
> 24. The applicant also provided proof that the applicant, co-signer and previously relatives are continuously employed, the family had a savings of $37,000 and also are owner of a property. The previously sponsored relatives are also successfully established in Canada. (Pages 102,103 and 106-122 of the Applicant's Record)

[65] The Applicant argues that:

> The hearings before the IAD are *de novo* in nature, the IAD member should have done his own analysis on the fact that when the application was refused the applicant and co-signer were not responsible for the previously sponsored relatives.

[66] As paragraph 16 of the Decision makes clear, this is exactly what the IAD did. The Applicant's assertions to the contrary are incomprehensible.

[67] The Applicant also says that the IAD failed to take into account the income of her father-in-law, which was $32,677 in 2014 and $37,869 in 2015, as well as the income of her brother-in-law, which was in excess of $28,000 in 2012.

[68] As the Decision makes clear, the IAD considered the record, additional materials tendered by the Appellant, oral testimony of the Appellant and her husband, as well as the oral submissions of counsel for the Appellant and Respondent. Given the wide range of factors that are set out in the Decision, the Court cannot say that a failure to mention two specific points in the record means that they were overlooked. In fact, the IAD, in paragraph 16 of its Decision specifically notes that "at the time of the assessment in 2014, the undertaking to support the appellant's husband's parents and brother was no longer in effect" and in paragraph 23, the IAD acknowledges that there is no "evidence that the appellant, her husband, or the family members who they sponsored in the past have ever relied on social services in Canada". The present position of previously sponsored relatives is not a fact that goes to the Applicant's present situation or required any more attention than it received in the Decision.

[69] The Applicant argues that the IAD failed to take into account that the family lives together in a joint family according to their culture and that they share expenses. The Applicant relies upon *Canada (Minister of Citizenship and Immigration) v Seepall*, [1995] F.C.J. No. 1580 for the proposition that a sponsor's income is only one factor and that, when considering H&C grounds, the IAD has a wide power to consider other factors including any support from relatives and the likelihood of future employment for the persons being sponsored.

[70] The IAD makes it clear in paragraph 19 of the Decision that it is fully aware of, and has taken into account, that the Applicant and her husband "live with their children and the appellant's mother-in-law and father-in-law" and that "they combine their incomes and the appellant has her own savings account". Also, the IAD acknowledged that the "home where they reside in in the name of the appellant's father-in-law".

[71] Given the extent of the Applicant's submissions to the IAD on this issue, I don't think the Applicant can now argue that the IAD was not fully aware of the significance of the family living arrangements and the income sharing to deal with expenses and that this factor was not taken into account or given sufficient weight.

F. *Children's Need for Applicant's Father and Brother*

[72] The Applicant says that the following consideration was also overlooked by the IAD:

> 25. The applicant has no one from her parents side here in Canada, her mother passed away and her children are quite close to the applicant' s father and brother. The IAD member concluded that because co-signer's parents are here in Canada so there is no need for children to have grandparents from applicant's side.

[73] This is simply an inaccurate characterization of the IAD's much fuller discussion of this issue:

> [22] The appellant's children do not rely on the applicants for financial support. They live with their parents and their paternal grandparents. Although it might be in their best interest to have the applicants live close by, I have not given this much weight because the children already live with grandparents in Canada and have a paternal uncle in Canada. There was no evidence presented that the children would gain any greater cultural awareness from having the applicants reside in Canada. I also note that the appellant had a

> married sister and nephews in India, who are also emotionally close to their maternal grandfather.

G. *Conclusions*

[74] In reaching its conclusions, the IAD identified the salient points put forward by the Applicant. Although I have every sympathy for the Applicant and her family, I cannot say that the decision not to grant special relief was not within the range of possible, acceptable outcomes that was defensible on the facts and the law. For this reason, I cannot interfere with the Decision.

IX. CERTIFICATION

[75] The Applicant had submitted the following question for certification:

> When there is a change in regulations to meet significantly higher requirements of minimum necessary income and the sponsorship was filed prior to the new regulations and there are specific instructions to the visa officers as per Operation Bulletin and *Regulatory Impact Analysis Statement* to assess applications as per old regulations then at IAD level do the revised regulations apply or the old one [?]

[76] I think this question would be better stated as follows:

> Given that s 133(1)(j) and s 34 of the *Immigration and Refugee Protection Regulations* were amended and came into force on January 2, 2014, should the IAD have retroactively applied the amended version of these regulations given that the Applicant's sponsorship application for permanent residence on behalf of her father and her brother was received on June 5, 2008?

[77] In *Mudrak v Canada (Citizenship and Immigration)*, 2016 FCA 178, the Federal Court of Appeal recently confirmed the principles to be applied when certifying questions:

> [15] This Court in *Canada (Minister of Citizenship and Immigration) v. Liyanagamage*, [1994] F.C.J. No. 1637 (QL), 176 N.R. 4 [*Liyanagamage*]) set the principles that should be considered when determining whether a question should be certified:
>
> > [4] In order to be certified pursuant to subsection 83(1), a question must be one which, in the opinion of the motions judge, transcends the interests of the immediate parties to the litigation and contemplates issues of broad significance or general application (see the useful analysis of the concept of "importance" by Catzman J. in *Rankin v. McLeod, Young, Weir Ltd. et al.* (1986), 57 O.R. (2d) 569 (Ont. H.C.)) but it must also be one that is determinative of the appeal. The certification process contemplated by section 83 of the *Immigration Act* is neither to be equated with the reference process established by section 18.3 of the *Federal Courts Act*, nor is it to be used as a tool to obtain from the Court of Appeal declaratory judgments on fine questions which need not be decided in order to dispose of a particular case.
>
> [16] In *Zhang v. Canada (Citizenship and Immigration)*, 2013 FCA 168, [2014] 4 F.C.R. 290 [*Zhang*], at paragraph 9, this Court reaffirmed these principles. It is trite law that to be certified, a question must (i) be dispositive of the appeal and (ii) transcend the interests of the immediate parties to the litigation, as well as contemplate issues of broad significance or general importance. As a corollary, the question must also have been raised and dealt with by the court below and it must arise from the case, not from the Judge's reasons (*Liyanagamage*, at paragraph 4; *Canada (Minister of Citizenship and Immigration) v. Zazai*, 2004 FCA 89, [2004] F.C.J. No. 368 (QL) at paragraphs 11 and 12 [*Zazai*]; *Varela* at paragraphs 28, 29, and 32).

[78] In my view, the question set out above satisfies these principles and criteria and should be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed.

2. The following question is certified for appeal:

> Given that s 133(1)(j) and s 34 of the *Immigration and Refugee Protection Regulations* were amended and came into force on January 2, 2014, should the IAD have retroactively applied the amended version of these regulations given that the Applicant's sponsorship application for permanent residence on behalf of her father and her brother was received on June 5, 2008?

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3709-16
STYLE OF CAUSE:	NAVDEEP KAUR SRAN v MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	CALGARY, ALBERTA
DATE OF HEARING:	JANUARY 26, 2017
JUDGMENT AND REASONS:	RUSSELL J.
DATED:	APRIL 21, 2017

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