Federal Court  Cour fédérale

Date: 20200205

Docket: IMM-826-19

Citation: 2020 FC 199

Ottawa, Ontario, February 5, 2020

PRESENT: Mr. Justice Russell

BETWEEN:

TALIB SHEIKH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application brought by the Applicant under s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], for judicial review of the decision of an Immigration Officer [Officer], dated January 18, 2019 [Decision], refusing to process the Applicant's sponsorship application.

II. BACKGROUND

[2] The Applicant is a citizen of Pakistan, born February 17, 1991. He was granted Permanent Resident status in Canada on May 14, 2017.

[3] In January 2018, the Applicant submitted two Expression of Interest [EOI] forms indicating his interest in making an application to sponsor his parents. He submitted the first form himself, while the second was submitted by his counsel. On March 28, 2018, Immigration, Refugees and Citizenship Canada [IRCC] invited the Applicant to apply to sponsor his parents based on EOI #90BC106-19, which listed his date of birth as December 17, 1991 ("1991/12/17"). On May 22, 2018, the Applicant submitted an application to sponsor his parents listing his date of birth as February 17, 1991 ("1991/02/17"). The Applicant included a copy of his passport, his Permanent Resident card, and a copy of his Government of Pakistan Family Registration Certificate with his application. All three documents list his date of birth as February 17, 1991.

[4] On September 6, 2018, an officer refused the Applicant's sponsorship application for processing as it was discovered that the Applicant had submitted more than one EOI. The Applicant filed an application for leave and judicial review claiming that the duplicate EOIs were the result of an error. The Respondent consented at the leave stage to have this refusal set aside and to re-assess the application.

[5] On reassessment, the Applicant's application was once again refused for processing on January 18, 2019.

III. DECISION UNDER REVIEW

[6] On reassessment, the Officer refused to process the Applicant's sponsorship application on the basis that the date of birth listed in EOI #90BC106-19 differed from the one listed in his sponsorship application. The Officer noted that the EOI listed his date of birth as December 17, 1991 ("1991/12/17"), while the sponsorship application listed it as February 17, 1991 ("1991/02/17").

[7] Specifically, the Officer noted that the sponsorship application did not comply with the 21st set of instructions in the *Ministerial Instructions with respect to the processing of applications from a permanent residence visa made by parents or grandparents of a sponsor as members of the family class and the processing of sponsorship applications made in relation to those application*, (2017) C Gas Vol 151, No. 1 [MI-21] issued on January 1, 2017. The Officer stated that MI-21 requires that a sponsorship application be made by the same person invited to do so by IRCC and, in order to ensure this, the application must indicate the same information provided in the EOI, including an applicant's date of birth.

[8] Consequently, given the inconsistent dates of birth, the Officer refused to process the Applicant's sponsorship application and invited him to resubmit an EOI when the program reopened.

IV. ISSUES

[9] The issues raised in the present application are the following:

1. Does the Officer's refusal to process the Applicant's sponsorship application constitute a reviewable decision?

2. Did the Officer fetter their discretion?

V. STANDARD OF REVIEW

[10] This application was argued prior to the Supreme Court of Canada's recent decisions in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] and *Bell Canada v Canada (Attorney General)*, 2019 SCC 66. This Court's judgment was taken under reserve. The parties' submissions on the standard of review were therefore made under the *Dunsmuir v New Brunswick,* 2008 SCC 9 [*Dunsmuir*] framework. However, given the circumstances in this matter, and the Supreme Court of Canada's instructions in *Vavilov* at para 144, this Court found that it was necessary to ask the parties to make additional submissions on the standard of review. I have applied the *Vavilov* framework in my consideration of the application and it does not change the applicable standard of review in this case nor my conclusions.

[11] In *Vavilov*, at paras 23-32, the majority sought to simplify how a court selects the standard of review applicable to the issues before it. The majority did away with the contextual and categorical approach taken in *Dunsmuir* in favour of instating a presumption that the

reasonableness standard applies. However, the majority noted that this presumption can be set aside on the basis of: (1) clear legislative intent to prescribe a different standard of review (*Vavilov*, at paras 33-52); and (2) certain scenarios where the rule of law requires the application of the standard of correctness, such as constitutional questions, general questions of law of central importance to the legal system as a whole and questions regarding the jurisdictional boundaries between two or more administrative bodies (*Vavilov*, at paras 53-64).

[12] The parties originally submitted that the applicable standard of review in this case was reasonableness. However, they both submitted that regardless of the standard of review applied by this Court when reviewing whether a decision-maker fettered their discretion, a positive finding constitutes a reviewable error requiring the Decision to be set aside.

[13] On January 16, 2020, the parties were asked to make written submissions on the applicable standard of review in light of the *Vavilov* decision. Both parties continued to hold that the standard of reasonableness applies to the question as to whether the Officer fettered their discretion. The Applicant continues to hold that regardless of the standard of review applied, a positive finding with regard to this issue constitutes a reviewable error requiring the Decision to be set aside.

[14] I agree with both parties that the standard of reasonableness should be applied to this Court's review of whether the Officer fettered their discretion, as there is nothing to rebut the presumption that the standard of reasonableness applies.

[15] In *Vavilov*, the Supreme Court of Canada noted at para 108 that a governing statutory scheme "[…] informs the acceptable approaches to decision making: for example, where a decision maker is given wide discretion, it would be unreasonable for it to fetter that discretion […]." This is consistent with the jurisprudence prior to *Vavilov*, which established that fettering of discretion is a reviewable error that warrants setting aside the decision (*Maple Lodge Farms Ltd v Canada*, [1982] 2 SCR 2 at para 6).

[16] As a result, no amount of deference will salvage a decision that results from the fettering of discretion. As stated by Justice Stratas in *Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 at para 24: "A decision that is the product of a fettered discretion must *per se* be unreasonable." It is sufficient to state that, regardless of the standard of review selected for this issue, a decision that is the product of fettered discretion will be set aside (*Barco v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 421 at para 20; *Gordon v Canada (Attorney General)*, 2016 FC 643 at para 28).

[17] For the sake of clarity, no standard of review is applicable to whether the Officer's refusal to process the Applicant's sponsorship application constitutes a reviewable decision.

VI. STATUTORY PROVISIONS

[18] The following provisions of the *IRPA* are relevant to this application for judicial review:

Selection of Permanent Residents

Sélection des résidents permanents

Family reunification

Regroupement familial

12(1) A foreign national may be selected as a member of the family class on the basis of their relationship as the spouse, common-law partner, child, parent or other prescribed family member of a Canadian citizen or permanent resident.

12 (1) La sélection des étrangers de la catégorie « regroupement familial » se fait en fonction de la relation qu'ils ont avec un citoyen canadien ou un résident permanent, à titre d'époux, de conjoint de fait, d'enfant ou de père ou mère ou à titre d'autre membre de la famille prévu par règlement.

Sponsorship of foreign nationals

Parrainage de l'étranger

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

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

Instructions of Minister

Instructions

13(4) An officer shall apply the regulations on sponsorship referred to in paragraph 14(2)(e) in accordance with any instructions that the Minister may make.

13(4) L'agent est tenu de se conformer aux instructions du ministre sur la mise en oeuvre des règlements visés à l'alinéa 14(2)e).

Instructions on Processing Applications and Requests

Application

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.

Attainment of immigration goals

87.3(2) The processing of applications and requests is to be conducted in a manner that, in the opinion of the Minister, will best support the attainment of the immigration goals established by the Government of Canada.

Instructions

87.3(3) For the purposes of subsection (2), the Minister may give instructions with respect to the processing of applications and requests,

Instructions sur le traitement des demandes

Application

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.

Atteinte des objectifs d’immigration

87.3(2) Le traitement des demandes se fait de la manière qui, selon le ministre, est la plus susceptible d’aider l’atteinte des objectifs fixés pour l’immigration par le gouvernement fédéral.

Instructions

87.3(3) Pour l’application du paragraphe (2), le ministre peut donner des instructions sur le traitement des demandes, notamment des instructions :

including instructions

(a) establishing categories of applications or requests to which the instructions apply;

a) prévoyant les groupes de demandes à l'égard desquels s'appliquent les instructions;

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

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

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

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

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

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

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

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

Application

87.3(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.

Application

87.3(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.

Clarification

87.3(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.

Précision

87.3(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.

Compliance with instructions

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

Respect des instructions

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

Clarification

87.3(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.

Précision

87.3(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.

Publication

87.3(6) Instructions shall be published in the *Canada Gazette*.

Publication

87.3(6) Les instructions sont publiées dans la *Gazette du Canada*.

Clarification

87.3(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.

Précision

87.3(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.

[19] The following provisions of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*Regulations*] are relevant to this application for judicial review:

Applications	**Demandes**
Form and content of application	**Forme et contenu de la demande**
10(1) Subject to paragraphs 28(b) to (d) and 139(1)(b), an application under these Regulations shall	10(1) Sous réserve des alinéas 28b) à d) et 139(1)b), toute demande au titre du présent règlement :
(a) be made in writing using the form, if any, provided by the Department or, in the case of an application for a declaration of relief under subsection 42.1(1) of the Act, by the Canada Border Services Agency;	a) est faite par écrit sur le formulaire fourni, le cas échéant, par le ministère ou, dans le cas d'une demande de déclaration de dispense visée au paragraphe 42.1(1) de la Loi, par l'Agence des services frontaliers du Canada;
(b) be signed by the applicant;	b) est signée par le demandeur;
(c) include all information and documents required by these Regulations, as well as any other evidence required by the Act;	c) comporte les renseignements et documents exigés par le présent règlement et est accompagnée des autres pièces justificatives exigées par la Loi;
(d) be accompanied by evidence of payment of the applicable fee, if any, set out in these Regulations; and	d) est accompagnée d'un récépissé de paiement des droits applicables prévus par le présent règlement;
(e) if there is an accompanying spouse or common-law partner, identify who is the principal applicant and who is the accompanying spouse or common-law partner.	e) dans le cas où le demandeur est accompagné d'un époux ou d'un conjoint de fait, indique celui d'entre eux qui agit à titre de demandeur principal et celui qui agit à titre d'époux ou de conjoint de fait accompagnant le demandeur principal.

Required information

10(2) The application shall, unless otherwise provided by these Regulations,

(a) contain the name, birth date, address, nationality and immigration status of the applicant and of all family members of the applicant, whether accompanying or not, and a statement whether the applicant or any of the family members is the spouse, common-law partner or conjugal partner of another person;

(d) include a declaration that the information provided is complete and accurate.

Application — sponsorship

10(4) An application made by a foreign national as a member of the family class must be accompanied by a sponsorship application referred to in paragraph 130(1)(c).

Multiple applications

10(5) No sponsorship application may be filed by a sponsor in respect of a person if the sponsor has filed another sponsorship application in respect of that same person and a final decision has not been made in respect of that other application.

Renseignements à fournir

10(2) La demande comporte, sauf disposition contraire du présent règlement, les éléments suivants :

a) les nom, date de naissance, adresse, nationalité et statut d'immigration du demandeur et de chacun des membres de sa famille, que ceux-ci l'accompagnent ou non, ainsi que la mention du fait que le demandeur ou l'un ou l'autre des membres de sa famille est l'époux, le conjoint de fait ou le partenaire conjugal d'une autre personne;

d) une déclaration attestant que les renseignements fournis sont exacts et complets.

Demande de parrainage

10(4) La demande faite par l'étranger au titre de la catégorie du regroupement familial doit être accompagnée de la demande de parrainage visée à l'alinéa 130(1)c).

Demandes multiples

10(5) Le répondant qui a déposé une demande de parrainage à l'égard d'une personne ne peut déposer de nouvelle demande concernant celle-ci tant qu'il n'a pas été statué en dernier ressort sur la demande initiale.

Invalid sponsorship application	**Demande de parrainage non valide**
10(6) A sponsorship application that is not made in accordance with subsection (1) is considered not to be an application filed in the prescribed manner for the purposes of subsection 63(1) of the Act.	10(6) Pour l'application du paragraphe 63(1) de la Loi, la demande de parrainage qui n'est pas faite en conformité avec le paragraphe (1) est réputée non déposée.
Return of application	**Renvoi de la demande**
12 Subject to section 140.4, if the requirements of sections 10 and 11 are not met, the application and all documents submitted in support of it, except the information referred to in subparagraphs 12.3(b)(i) and (ii), shall be returned to the applicant.	12 Sous réserve de l'article 140.4, si les exigences prévues aux articles 10 et 11 ne sont pas remplies, la demande et tous les documents fournis à l'appui de celle-ci, sauf les renseignements visés aux sous-alinéas 12.3b)(i) et (ii), sont retournés au demandeur.

[20] The following provisions of MI-21 are relevant to this application for judicial review:

Conditions — sponsorship applications	**Conditions — demandes de parrainage**
With respect to a year, in order to be processed, any sponsorship application referred to in these Instructions that has not been returned under section 12 of the Regulations for not meeting the requirements of sections 10 and 11 of the Regulations — for example by not using all the applicable forms provided by the Department in the application package published on the website of the Department or by not including all information, documents and	À l'égard d'une année, afin d'être traitée, toute demande de parrainage visée par les présentes instructions qui n'a pas été retournée en vertu de l'article 12 du Règlement parce qu'elle ne remplissait pas les exigences prévues aux articles 10 et 11 du Règlement — par exemple parce qu'elle n'avait pas été faite sur tous les formulaires applicables fournis par le Ministère dans la trousse de demande publiée sur le site Web du Ministère ou parce qu'elle ne comportait pas tous

evidence referred to in paragraph 10(1)(c) of the Regulations — must meet the following conditions:

les renseignements, documents et pièces justificatives visés à l'alinéa 10(1)c) du Règlement — doit remplir les conditions suivantes :

(a) the sponsorship application is made by a person who, having indicated — during the period during which they could do so — their interest in making a sponsorship application by means that have been made available by the Department for that purpose, has been invited to make the application after they were randomly selected by the Department among the other interested persons;

a) la demande de parrainage est faite par une personne qui, ayant indiqué — durant la période durant laquelle elle pouvait le faire — son intérêt à faire une demande de parrainage par les moyens mis à disposition par le Ministère à cette fin, a été invitée à faire sa demande après avoir été sélectionnée au hasard par le Ministère parmi les autres intéressés;

(b) the sponsorship application has been received by the Department within the period of 90 days after the day on which the Department sent the sponsor an invitation to make a sponsorship application;

b) la demande de parrainage a été reçue par le Ministère dans les 90 jours suivant le jour où le Ministère lui a envoyé une invitation à faire une demande de parrainage;

(c) the sponsorship application indicates the same information, such as name, date of birth, address, country of birth, as that of the person who has been invited to make such an application; and

c) la demande de parrainage indique les mêmes renseignements, tels que le nom, la date de naissance, l'adresse et le pays de naissance, que ceux relatifs à la personne qui a été invitée à faire une telle demande;

(d) the sponsorship application is accompanied by the documents required by the application package published on the website of the Department, as amended from time to time.

d) la demande de parrainage est accompagnée des documents exigés par la trousse de demande, avec ses modifications successives, publiée sur le site Web du Ministère.

[21] The following provision of the Operational Guideline and Instruction titled Instructions "Family Class: Parents and Grandparents" [*Guidelines*] is relevant to this application for judicial review:

Validating applications to sponsor	**Validation des demandes de parrainage**
IRCC officers in the CN validate the name, date of birth, address, country of birth, names of sponsored person or people, and status-in-Canada document number by comparing the information in the sponsorship application to the information in the working list. If the information in the sponsorship application does not match what is on the interest to sponsor form, the application may be rejected. If the IRCC officer is satisfied the information on the interest to sponsor form and the sponsorship application match, the officer records the decision.	L'agent d'IRCC du RC compare les renseignements contenus dans la demande de parrainage à ceux qui se trouvent dans la liste de travail pour valider le nom, la date de naissance, l'adresse, le pays de naissance, les noms de la ou des personnes parrainées, et le numéro du document attestant du statut au Canada. Si les renseignements contenus dans la demande de parrainage ne correspondent pas à ceux qui se trouvent dans le formulaire « Intérêt pour le parrainage », la demande peut être rejetée. Si l'agent d'IRCC est convaincu de la concordance des renseignements qui figurent dans le formulaire « Intérêt pour le parrainage » et dans la demande de parrainage, il consigne la décision.
If the officer is unable to validate the information in the sponsorship application, and no letter of explanation or supporting documentation is included to explain discrepancies between the information on the interest to sponsor form and the information in the application, the officer cannot accept the application for processing and	Si l'agent est incapable de valider les renseignements contenus dans la demande de parrainage et qu'aucune lettre d'explication ni aucun document justificatif n'ont été transmis pour expliquer les divergences entre les renseignements figurant dans le formulaire « Intérêt pour le parrainage » et dans la demande, il ne peut pas

returns it to the sponsor. Officers should record the reason for the decision.	accepter la demande aux fins de traitement et la retourne au répondant. L'agent doit consigner les motifs de la décision.

[22] The following provisions of the *Federal Courts Act*, RSC 1985, c F-7 are relevant to this application for judicial review:

Application for judicial review	**Demande de contrôle judiciaire**
18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.	18.1 (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.
Time limitation	**Délai de présentation**
(2) An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.	(2) Les demandes de contrôle judiciaire sont à présenter dans les trente jours qui suivent la première communication, par l'office fédéral, de sa décision ou de son ordonnance au bureau du sous-procureur général du Canada ou à la partie concernée, ou dans le délai supplémentaire qu'un juge de la Cour fédérale peut, avant ou après l'expiration de ces trente jours, fixer ou accorder.
Powers of Federal Court	**Pouvoirs de la Cour fédérale**
(3) On an application for judicial review, the Federal	(3) Sur présentation d'une demande de contrôle judiciaire,

Court may	la Cour fédérale peut :
(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or	a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;
(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.	b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

VII. ARGUMENTS

A. *Applicant*

[23] The Applicant argues that the Officer fettered their discretion by elevating MI-21 and the *Guidelines* to a mandatory rule, thus allowing no discretion to the Officer to consider whether the Applicant's sponsorship application, as a whole, sufficiently confirmed his date of birth and that he was the same person who submitted the EOI. The Applicant also says that the Officer's refusal to process his application constitutes a reviewable decision and the judicial review in question pertains to the Officer's erroneous finding of non-compliance. As such, the Applicant argues that this application for judicial review should be allowed, that the Decision be set aside, and that his application be sent back for redetermination by a different officer.

(1) Reviewability of the Refusal to Process the Sponsorship Application

[24] The Applicant argues that the Decision to refuse his sponsorship application is judicially reviewable as he met all of the requirements set forth in the *IRPA*, the *Regulations*, MI-21, and the *Guidelines* for the processing of a sponsorship application, but for a single digit typographical error. The Applicant states that the judicial review in question pertains to the Officer's erroneous determination of non-compliance itself and is therefore judicially reviewable. The Applicant notes that to hold such a decision to be non-reviewable would permit decision-makers to refuse to process applications for specious reasons without being accountable.

[25] The Applicant further submits that the jurisprudence cited by the Respondent does not apply in this case. In fact, the Applicant notes that *Dhillon v Canada (Citizenship and Immigration)*, 2019 FC 391 [*Dhillon*] and *Liang v Canada (Citizenship and Immigration)*, 2012 FC 758 [*Liang*] are not relevant in this case as he is challenging the very fact that he was deemed ineligible for processing. In *Dhillon*, the applicants had not been invited to apply for a sponsorship application, while in *Liang*, the Court noted that a duty to process only exists towards those who are determined eligible for processing.

[26] Furthermore, the Applicant states that *Filippiadis v Canada (Citizenship and Immigration)*, 2014 FC 685 [*Filippiadis*] is also distinguishable as the Court in that case found that the refusal to process an "incomplete" application did not constitute a reviewable decision as the applicant had failed to include the correct identity document. The Applicant submits that this

is not comparable to the case at bar as he submitted all the necessary documents and provided the Officer with all the necessary information required to process his application.

(2) Fettering of Discretion

[27] The Applicant argues that the Officer fettered their discretion by applying MI-21 and the *Guidelines* as legally binding authorities instead of assessing the single and obvious typographical error with regard to the plain and clear evidence before them.

[28] The Applicant first notes that it appears the Officer based their Decision on the *Guidelines* and not MI-21, as the terms of the former are included despite the latter being cited. Regardless, the Applicant submits that neither the *Guidelines* nor MI-21 provide the legal authority upon which to base a decision. The Applicant states that it is well established that Ministerial Instructions and guidelines are helpful tools in assisting a decision-maker in processing applications rather than binding legal authorities that must be applied strictly in every case without regard to the circumstances.

[29] Concerning the legal authority of guidelines, the Applicant cites the Federal Court of Appeal's decision in *Kanthasamy v Canada (Citizenship and Immigration)*, 2014 FCA 113 at paras 51-54, where it is specifically noted at para 52 that:

> The processing manual is an administrative guideline, nothing more. Administrative guidelines are desirable when dealing with a provision such as this, as they promote consistency in decision-making: *Hawthorne*, *supra*; *Eng v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 596. This manual goes some way toward shedding light on the meaning of "unusual and undeserved, or disproportionate hardship." Indeed, the Federal

> Court regularly upholds Officers' determinations that are based on a sensitive consideration of these factors that are live on the facts before them.

[30] The Applicant also states that this equally applies to Ministerial Instructions and relies on this Court's decision in *Lorenzo v Canada (Citizenship and Immigration)*, 2016 FC 37 at para 25, where it is noted that:

> To read the Ministerial Instructions as being legally binding and giving powers to the Officer that the IRPA did not intend, as suggested by the Applicant, would be in patent contradiction with the well-established principle that the Ministerial Instructions are not law (*Agraira v Canada (Public Safety and Emergency Preparedness)*, [2013] 2 SCR 559, 2013 SCC 36 at para 85; *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 32 [*Kanthasamy*]). Ministerial Instructions are "useful in indicating what constitutes a reasonable interpretation of a given provision of the *Immigration and Refugee Protection Act*: *Agraira*, at para 85" (*Kanthasamy*, above at para 32).

[31] Consequently, the Applicant states that the Officer erred by basing their refusal on an improper legal authority and, in consequence, fettered their discretion by refusing his application for what was clearly a typographical error. The Applicant argues that, had the Officer exercised their discretion and reviewed the totality of the evidence submitted, they would have clearly been able to determine that the person who submitted the EOI and the sponsorship application were one and the same and that the discrepancy resulted from a single typographical error.

[32] The Applicant notes that the overall purpose of MI-21 is to ensure consistent personal information in order to validate that the person who submitted the EOI is the same person making the sponsorship application. Although the Applicant states that he was unaware of the

error until he was alerted to it by the Officer, and was thus unable to provide a letter of explanation for the discrepancies, the Officer would have had no trouble validating the information in the sponsorship application upon reviewing all the evidence at hand.

[33] The Applicant also submits that the *Guidelines*, upon which the Officer appears to have grounded their Decision, were permissive as they note that if "the information in the sponsorship application does not match what is on the interest to sponsor form, the application may be rejected." The Officer is therefore not automatically required to reject an application for processing simply due to a typographical error since the *Guidelines* authorize the Officer's discretion.

[34] The Applicant concludes that the Officer fettered their discretion by elevating the Ministerial Instructions and the *Guidelines* to a mandatory rule, which allowed no discretion. The Applicant notes that this, in effect, overrides the proper legal authority given to officers by the *IRPA* and its regulations as the Applicant met all the requirements for processing outlined in s 10 of the *Regulations*.

[35] Finally, the Applicant states that the Decision does not respect the principle of *de minimus non curate lex* as set out by the Supreme Court of Canada in *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4 at para 202:

> The common law concept of *de minimis non curat lex* was expressed in the English decision of *The "Reward"* (1818), 2 Dods. 265, 165 E.R. 1482, at p. 1484, in the following manner:
>
> > The Court is not bound to a strictness at once harsh and pedantic in the application of statutes. The law permits the qualification implied in the ancient

> maxim *De minimis non curat lex*. — Where there are irregularities of very slight consequence, it does not intend that the infliction of penalties should be inflexibly severe. If the deviation were a mere trifle, which, if continued in practice, would weigh little or nothing on the public interest, it might properly be overlooked.

[36] Given the fact that the typographical error in this case was minimal and trivial in nature, while the interests at hand are significant, the Applicant submits that the Officer interpreted the *Guidelines* in a "harsh" and "pedantic" fashion giving rise to an "outrageously punitive" outcome breaching the principle of *de minimus non curate lex*.

B. *Respondent*

[37] The Respondent submits that the Decision to return the Applicant's sponsorship application for non-compliance is not a judicially reviewable decision that is reviewable by this Court. However, the Respondent notes that, in any case, the Officer did not fetter their discretion since the Applicant failed to submit complete and accurate information to demonstrate that he met the requirements set out in MI-21. As such, the Respondent argues that this application for judicial review should be dismissed.

(1) Reviewability of the Refusal to Process the Sponsorship Application

[38] The Respondent argues that the return of the Applicant's sponsorship application for non-compliance is not a decision that is reviewable by this Court, as it does not constitute a decision to refuse that application. The Respondent points to s 87.3(5) of the *IRPA*, which states that the

refusal to process an application does not constitute a decision not to issue a visa. The Respondent cites *Dhillon*, at paras 24-34 and *Liang*, at para 43 in support.

[39] The Respondent notes that, just as in *Filippiadis*, superficial non-compliance with Ministerial Instructions can result in a finding of non-acceptance, even if the relevant information could have been deduced from other elements of an applicant's materials.

(2) Fettering of Discretion

[40] The Respondent submits that an officer is required to ensure that a sponsorship application complies with MI-21. An officer's discretion to accept a sponsorship application is limited by s 13(4) of the *IRPA*, which requires that an application be considered, "in accordance with any instructions that the Minister may make."

[41] The Respondent notes that MI-21 requires an applicant to provide the same personal information in their sponsorship application that was provided in their EOI. The Respondent further states that the *Guidelines* support this and, even if they are not legally binding, they serve as valuable tools in assessing an officer's duties. The Respondent explains that this strict requirement is in place because an invitation to submit a sponsorship application is non-transferable.

[42] In this case, the Respondent submits that the onus is always on an applicant to provide complete and accurate information. Though the Respondent admits that the Applicant's date of birth is listed on some of his supporting documentation, these documents do not explain,

pursuant to the *Guidelines*, the discrepancy nor confirm that the Applicant was the same person who submitted the EOI. As the sponsorship application did not meet the requirements set out in MI-21, the Officer had no choice but to refuse it for processing. The Respondent states that there was no duty on the Officer to assume that there was a typographical error in this case. As such, there was no fettering of discretion.

VIII. ANALYSIS

A. *Decision*

[43] Notwithstanding the Applicant's written submissions (see para 39 of Applicant's Memorandum and paras 2 and 6 of his Reply Memorandum) where the Applicant asks the Court to "set aside the decision of the officer refusing the applicant's sponsorship application, and order the redetermination of the decision by a different officer," the Applicant clarified at the oral hearing that he is seeking judicial review of the refusal to process his sponsorship application that is found in the Officer's letter to the Applicant dated January 18, 2019.

B. *Issues for Review*

[44] This application raises two principal issues for review:

(a) Is the Officer's Decision to refuse the Applicant's sponsorship application for processing a reviewable matter in this Court?

(b) In refusing the sponsorship application for processing, did the Officer fail to exercise a discretionary power under the governing law, regulations, and Ministerial Instructions?

[45] In addition to the review issues, the Applicant is also seeking costs and has raised a question for certification.

C. *Reviewability*

(1) Nature of the Decision

[46] The Respondent says that the refusal to process is not reviewable by virtue of s 87.3(5) of the *IRPA* and the jurisprudence of this Court. The Respondent relies principally upon this Court's decision in *Filippiadis*.

[47] The refusal in this case reads as follows:

> Consequently, **your sponsorship application, or any related permanent residence application, will not be processed or be put in queue for processing under the PGP cap for 2018**. You will not be issued another invitation to apply and you will have to resubmit an *Interest to Sponsor* when the PGP program re-opens in 2019.
>
> [Emphasis in original.]

[48] As the refusal letter makes clear, the sponsorship application itself was not refused; the letter simply noted that it would not be processed under the Parents and Grandparents Program [PGP] cap for 2018, and the Applicant would consequently have to re-submit an EOI form at a later date.

[49] The implications of this refusal for the Applicant could be serious. He was lucky enough to have been selected by lottery under the 2018 program to submit a sponsorship application for

his parents. He lost the chance to do so for 2018 as a result of this refusal and may not be so lucky in whatever form the intake process takes in the future.

[50] However, that does not mean that his sponsorship application has been rejected. Section 87.3(5) of the *IRPA* makes this clear.

[51] The reality is that the Applicant was participating in the 2018 administrative scheme (a lottery) for dealing with the vast number of applications for sponsorship. He will now have to comply with whatever new selection scheme is in place when he re-submits his sponsorship application.

[52] There is no dispute here, or in the jurisprudence, that the Minister can set instructions that permit the Minister to return some applications without processing them at all. See, for example, *Liang*, at para 43. In the present case, the dispute is whether the Officer's refusal to allow processing to occur at a particular time and under the scheme in place in 2018 should be subject to review in this Court.

[53] I see nothing in s 87.3 of the *IRPA* that answers this question. Section 87.3(5) merely tells us that retaining, returning or otherwise disposing of a sponsorship application "does not constitute a decision not to issue the visa or other documents, or grant the status or exemption, in relation to whether the application was made."

[54] In other words, s 87.3 holds that the refusal to process the sponsorship application in this case was not a refusal of the Applicant's application to sponsor his parents.

[55] However, in my view, it was a decision not to allow the sponsorship application to be processed under the administrative scheme in place in 2018, so that the Applicant would have to re-submit in accordance with whatever scheme is in place thereafter.

[56] In the present case, the refusal to process did not occur because the sponsorship application was non-compliant. Instead, it occurred because, under the 2018 scheme in place for sorting and assessing applications for processing, there was a discrepancy between the Applicant's date of birth in the EOI selected by IRCC via lottery and in his sponsorship application. Had the dates of birth matched (the discrepancy was one digit) the sponsorship application would, in all likelihood, have been processed. However, we do not know whether it would have been approved or rejected.

(2) Federal Court's Jurisdiction over Judicial Review

[57] This Court's jurisdiction over judicial reviews is established in s 18.1 of the *Federal Courts Act*, RSC 1985, c F-7. Notably, ss 18.1(1) and 18.1(2) state:

18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.	18.1 (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.
(2) An application for judicial	(2) Les demandes de contrôle

review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.	judiciaire sont à présenter dans les trente jours qui suivent la première communication, par l'office fédéral, de sa décision ou de son ordonnance au bureau du sous-procureur général du Canada ou à la partie concernée, ou dans le délai supplémentaire qu'un juge de la Cour fédérale peut, avant ou après l'expiration de ces trente jours, fixer ou accorder.

[58] In the context of judicial reviews under the *IRPA*, the Federal Court of Appeal has recently stated that s 72 of the *IRPA* does not in itself "create a right to have a matter arising under the [*IRPA*] judicially reviewed" but rather, this right rises from ss 18 and 18.1 of the *Federal Courts Act*. Instead, s 72 of the *IRPA* "simply imposes additional procedural requirements, in the immigration context, on the exercise of the right to seek judicial review" and "does not define when judicial review is available" (*Zaghbib v Canada (Minister of Public Safety and Emergency Preparedness)*, 2016 FCA 182 at paras 29-31 [*Zaghbib*]).

[59] Likewise, in my opinion, it cannot be said that s 87.3 of the *IRPA* defines when judicial review is available to an applicant in the immigration context. Rather, it simply informs the Court of the legal nature and consequences of a decision not to allow a sponsorship application to be processed under the administrative scheme in place at the time.

[60] Courts have repeatedly held that judicial review under s 18.1 of the *Federal Courts Act* must be given a "broad and liberal interpretation, as a result of which a wide range of administrative decisions will fall within the Court's judicial review mandate" (*Larny Holdings Ltd v Canada (Minister of Health)*, [2003] 1 FC 541 at 543 [*Larny Holdings Ltd*]). This has been endorsed in numerous decisions since. See, for example, *Prudential Steel Ltd v Bell Supply Company*, 2015 FC 1243 at para 32 [*Prudential Steel Ltd*] and *Mikail v Canada (Attorney General)*, 2011 FC 674 at para 52, the latter noting:

> […] As highlighted by counsel for SIRC, the case of Gestion Complexe Cousineau (1989) Inc. v Canada (Minister of Public Works and Government Services), [1995] 2 FC 694, cited in Larny Holdings Ltd. v Canada (Minister of Health), 2002 FCT 750 stood for the following proposition:
>
> > As between an interpretation tending to make judicial review more readily available and providing a firm and uniform basis for the Court's jurisdiction and an interpretation which limits access to judicial review, carves up the Court's jurisdiction by uncertain and unworkable criteria and inevitably would lead to an avalanche of preliminary litigation, the choice is clear.

[61] As such, the jurisprudence has taken a broad approach in defining what a "matter" capable of judicial review consists of under s 18.1 of the *Federal Courts Act*. Indeed, this is clearly articulated by the Federal Court of Appeal in *Air Canada v Toronto Port Authority et al*, 2011 FCA 347 at paras 24-25 [*Air Canada*] (later endorsed by this same Court in *Zaghbib*, at para 30) where Justice Stratas notes that "[a] 'matter' that can be subject of judicial review includes not only a 'decision or order', but any matter in respect of which a remedy may be available under section 18 of the *Federal Courts Act*." This is the case even if the decision is not the ultimate decision, so long as a remedy might be available under s 18 or 18.1(3) of the *Federal Courts Act*.

[62] However, courts have nonetheless restricted this liberal interpretation of "matter" under s 18.1 of the *Federal Courts Act* to matters that affect a party's rights, impose legal obligations on a party, or prejudicially affect a party directly. See *Mfudi v Canada (Citizenship and Immigration)*, 2019 FC 1319 at para 7 [*Mfudi*]; *Air Canada*, at para 29.

[63] In the past, courts have found that pure clerical or administrative acts do not affect a party's rights, impose legal obligations on a party, or prejudicially affect a party directly. For instance, in *1099065 Ontario Inc v Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FCA 47, the Federal Court of Appeal found at para 9 that a "simple letter proposing dates for a meeting is not a 'decision', 'order' or 'matter' amenable to judicial review." Similarly, this Court found in *Alla v Canada (Public Safety and Emergency Preparedness)*, 2006 FC 14 that a letter setting the date for the applicant's removal was not subject to judicial review itself as the applicant did not attack the underlying removal order nor request to defer the removal. In that context, this Court noted at paras 14-15:

> [14] Although the Federal Court has broad sweeping powers in matters of judicial review, it must also be realized that decisions must be rendered in a practical context.
>
> [15] If every purely administrative order issued by an officer of a department, whether it be Citizenship and Immigration or any other government agency, were subject to an application for judicial review, the complete administration of federal entities could be compromised, thereby rendering them totally ineffective.

(3) Reviewability of the Decision

[64] Put simply, this Court must decide whether the Decision to not allow the sponsorship application to be processed under the administrative scheme in place in 2018 affects the

Applicant's rights, imposes legal obligations on him, or prejudicially affects him directly (*Mfudi*, at para 7; *Air Canada*, at para 29).

[65] In *Filippiadis*, a decision in a similar case which the Respondent principally relies on, Justice Gagné (as she then was) decided at paras 2-3 that:

> [2] Therefore, the issue is whether the return of the applicant's claim before it was processed may properly be considered to be a decision subject to the power of judicial review of the Court provided by subsection 18.1(1) of the *Federal Courts Act*, RSC 1985, c F-7.
>
> [3] For the reasons stated below, I am of the view that the application should be dismissed since the letter of July 3, 2013, received by the applicant does not contain a decision likely to be reviewed by this Court.

[66] In that case, Justice Gagné (as she then was) appears to have found that the application itself was non-compliant. No such finding exists in the present case. On the other hand, Justice Gagné tells us that "the letter of July 3, 2013, received by the applicant does not contain a decision likely to be reviewed by this Court." Justice Gagné does not say what the criteria are for deciding whether a decision is "likely to be reviewed by this Court."

[67] In my view, the Applicant has not been deprived of any rights in this matter. His right to submit a sponsorship application in accordance with whatever scheme is in place remains intact. The Applicant has simply lost the opportunity to have his sponsorship application processed under the 2018 scheme. This may or may not be a serious inconvenience, depending upon what happens when the Applicant re-submits. Also, no legal obligations have been imposed upon the Applicant and he has not established that he is directly prejudicially affected.

[68] The Minister has the right and the obligation to deal with the vast number of sponsorship applications submitted in Canada as the Minister thinks fit. The Minister is not responsible for that vast number and requires the discretionary flexibility to devise ways of dealing with it. The 2018 scheme was one attempt to address this problem, but there will no doubt be others. A scheme that may cause someone like the Applicant inconvenience and frustration, but does not deprive him of the right to sponsor his parents in accordance with whatever scheme happens to be in place at a particular time, is not, in my view, subject to review by this Court.

[69] I say this because the Applicant had no right to have his sponsorship application dealt with under the 2018 scheme. He is attempting to establish a right to have his application dealt with at a particular time and in a particular way. In my view, there can be no such right and the Minister must be free to deal with applications in a manner that is dictated, by and large, by the vast number it receives. It would be different if the Applicant had, as a consequence of the Officer's Decision, lost the right to sponsor his parents. However, that has not occurred in this case. If the Applicant believes that the Minister is not dealing with his sponsorship application in a reasonably expeditious manner, and in accordance with his rights, then the remedy of *mandamus* is available to him. See, for example, *Liang*, at paras 40-43.

[70] In written argument, the Applicant says at para 15 of his Reply that "the decision to refuse the applicant's sponsorship application is justiciable." However, the sponsorship application has not been refused. Section 87.3(5) of the *IRPA* clarifies the legal consequences of the Decision at hand and accordingly states that a returned application does not constitute a

decision to refuse the application. The Applicant is attempting to conflate the refusal to process an application at a particular time with a refusal of that application. The law is clear that it is not.

[71] Consequently, I think that the Officer's decision not to allow the Applicant's sponsorship application to be processed in accordance with the 2018 scheme is not a matter that is judicially reviewable under s 18.1 of the *Federal Courts Act*.

[72] The Applicant obviously feels aggrieved and disappointed by the consequence of his mistake, that he characterized as a minor typographical issue. He appears to hold the Minister entirely responsible for what has happened and says that he had no opportunity to correct his error. This is not the case.

[73] The instructions to applicants on the Interest to Sponsor Web Form are crystal clear. All applicants are emphatically told to:

> Make sure this information is correct. It must be the same as what you'll put on your application, if you're invited to apply. Double-check all fields before submitting.
>
> Enter the name and date of birth as it is on your passport, travel or identity document.
>
> [Emphasis added.]

[74] There is no explanation why the Applicant did not follow these clear instructions. He clearly initiated the problem by not checking the date of birth he entered. Had he observed these simple instructions there would have been no need for this application for judicial review. The Applicant's position appears to be that if he does not follow the clear instructions to double

check the information he is submitting, then the Minister is required to examine the reason for any discrepancy and assist him in order to move his sponsorship application forward. Given the volume of applicants, this may not be possible. Moreover, this is the second time the Applicant has failed to follow instructions. The instructions made it clear that he is the person responsible for the accuracy of any information he submits and that discrepancies may have adverse consequences. The Applicant is attempting to avoid that responsibility in this application.

[75] Having decided that this matter is not judicially reviewable, there is no point in addressing the other issues raised.

D. *Costs*

[76] The Applicant has asked for costs in this case on the grounds that the Respondent has resisted processing his application for no justifiable reason. Even if I had decided that this matter was judicially reviewable and had gone on to deal with the fettering issue raised, no special reasons for costs have been raised that accord with Rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 or the jurisprudence. See *Balepo v Canada (Citizenship and Immigration)*, 2017 FC 1104 at para 40. The matter of fettering is complex in this context and there is no clear answer. The Minister was reasonably justified in resisting the application for judicial review.

E. *Certification*

[77] The Applicant has raised the following question for certification:

> Is a decision not to process an application pursuant to administrative instructions justiciable in this Court?

[78] The Federal Court of Appeal stated in *Canada (Minister of Citizenship and Immigration) v Liyanagamage*, [1994] FCJ No 1637, 176 NR 4 (CA), and has reaffirmed on numerous occasions that a judge must certify questions that are serious questions of general importance. In other words, the question must be one that is dispositive of the appeal and transcends the interests of the immediate parties to the litigation due to its broad significance. It must lend itself to a generic approach leading to an answer of general application. See *Canada (Citizenship and Immigration) v Nilam*, 2017 FCA 44 at para 2.

[79] In my view, a generic approach to this issue is not possible.

[80] To begin with, a refusal or failure to process any application can be dealt with by way of *mandamus*, which the Applicant did not seek in the present application.

[81] As regards the kind of judicial review application mounted in this case, the question does not lend itself to a generic approach because, in each instance, the answer will depend upon the particular context, including the nature and impact of the Ministerial Instructions, the governing regulations and statutory provisions, and the consequences of any such refusal. In the present case, the refusal does not exclude the Applicant from continuing with his sponsorship plans. I can see that, in some situations, a refusal to process could, *de facto*, lead to a loss of a recognized right or place an applicant in a position where continuing an application would not be possible. Practical matters might also come into play. In the present case, the sheer volume of sponsorship

applications that the Minister has to deal with has resulted in different administrative approaches over the years and is likely to result in further adjustments and changes in the future.

[82] The consequences of allowing judicial reviewability for what was a purely administrative act where no rights were compromised could result in extremely difficult consequences for the Respondent. This might not be so in other contexts.

[83] I do not think it would be possible to adjust the question to apply to the instructions in the present case, as the Applicant originally suggested. These particular instructions may well not apply in the future so that an answer would not lend itself to a general application.

[84] For these reasons, there is no question for certification.

JUDGMENT IN IMM-826-19

THIS COURT'S JUDGMENT is that

1. The application is dismissed.

2. There is no order as to costs.

3. There is no question for certification.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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