Federal Court Cour fédérale

Date: 20220729

Docket: IMM-5594-20

Citation: 2022 FC 1147

Ottawa, Ontario, July 29, 2022

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

MAKKAR, SUNNY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Mr. Sunny Makkar, is seeking the judicial review of the Panel of the Immigration Appeal Division's (Panel or IAD) October 20, 2020 decision to dismiss his sponsorship appeal for lack of jurisdiction. The IAD dismissed the appeal because it did not find that the appellant (the Applicant before this Court) had shown that he had a right of appeal in the circumstances.

[2] The application for judicial review is brought pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act or IRPA].

I. Facts

[3] The Applicant landed as a permanent resident in Canada from India on July 29, 2011 (Applicant's Memorandum of Fact and Law (AM), para 4). On January 5, 2017, he married Ms. Maneet Kaur in India (AM, para 5).

[4] In February 2017, Ms. Kaur applied for a temporary resident visa (TRV) to visit with the Applicant in Canada. The Respondent subsequently interviewed her. The Respondent refused her application on January 7, 2018 because the Respondent concluded that she committed misrepresentations by providing contradictory information about her father-in-law's occupation, and whether a consultant had assisted with her application. She was also accused of misrepresenting information about whether this was her first marriage, but this accusation turned out to be false (AM, para 34).

[5] Ms. Kaur's inadmissibility stemmed from sections 40(1)(a), 40(2) and 40(3) of the IRPA. These provisions specify that a foreign national is inadmissible for misrepresentation, and cannot apply for permanent residency for five (5) years following such a determination. In this instance, Ms. Kaur cannot apply for permanent residency until her inadmissibility finding's expiration date of January 6, 2023.

[6] On January 24, 2018, Ms. Kaur applied for a second TRV. This application was refused on April 3, 2018. Her inadmissibility was maintained because a period of five years had not passed since the prior inadmissibility determination.

[7] In March 2018, the Applicant submitted an application to sponsor his wife for permanent residence. This sponsorship application was refused on the same grounds of inadmissibility.

[8] On July 5, 2019, the Applicant submitted a second, and different, sponsorship application, asking the officer to assess his application using humanitarian and compassionate (H&C) considerations pursuant to section 25(1) of the IRPA. Specifically, the Applicant included information on the struggles the relationship would face if they remained separated for the full duration of the inadmissibility period.

[9] On July 29, 2020, an immigration officer refused the second sponsorship application because the five-year inadmissibility period had not elapsed, and there were insufficient H&C considerations to justify granting the Applicant's wife a permanent residence visa. A letter was sent to the Applicant's wife denying the issuance of the permanent residence visa; a different letter was sent the same day to the Applicant in his quality as a sponsor. The letter advises him that "[s]ubsection 63(1) of the *Immigration and Refugee Protection Act* allows a person who has filed in the prescribed manner an application to sponsor a foreign national as a member of the family class to appeal to the Immigration Appeal Board against a decision not to issue the foreign national a permanent resident visa".

[10] Around August 12, 2020, the Applicant filed a Notice of Appeal of the refusal decision before the IAD. The IAD responded with a letter stating that the tribunal may not be able to hear the appeal because of lack of jurisdiction. The IAD decision on the sponsorship appeal came on October 17, 2020.

II. The decision under review

[11] The decision of July 29, 2020 appealed from before the IAD is itself very short. It refers to section 40(2) of the Act that extends the inadmissibility for five years. That prohibits an application for a permanent resident visa until the expiration of the inadmissibility period. The officer then announces that the application and "your circumstances" have been examined in accordance with section 25(1) of the Act. Without any analysis, it is declared that "I have determined it would not be justified by humanitarian or compassionate considerations to grant your permanent residence status or exempt you from any applicable criteria or obligation of the Act". No reason given.

[12] That takes us to the actual decision by the IAD and its justification. The decision is merely one-page long. It refused to hear the matter because of a lack of jurisdiction (Decision dated October 17, 2020). The IAD notes that this constitutes a second attempt at sponsoring Mr. Makkar's wife. Given that the inadmissibility finding has not been made the subject of any appeal, a foreigner cannot apply for permanent resident status by operation of paragraph 40(3) of the Act.

[13] The second sponsorship application was made on July 5, 2019, well before the expiry date of the prohibition from being able to apply. Here, that period expires on January 6, 2023. This, according to the IAD, means that it cannot consider the appeal. The decision of this Court in *Gill v Canada (Citizenship and Immigration)*, 2020 FC 33 [*Gill*] is the authority which is controlling according to the IAD.

[14] As for the application of section 25(1) of the Act, the IAD says this:

> Whereas under section 25(1) of the Act, the minister <u>can</u> determine whether humanitarian and compassionate grounds apply in the case of a foreign national <u>outside Canada</u> who is inadmissible for misrepresentation. In this case, Mr. Makkar's wife being outside Canada, the minister is not under any obligation to consider her request. Moreover, the IAD has no jurisdiction in this matter. This is a prerogative specific to the minister.
>
> Whereas the Federal Court has confirmed that the assessment of humanitarian and compassionate grounds referred to in subsection 25(1) of the Act is at the discretion of the minister and not of the IAD.

These paragraphs, which are rather elliptical, do not benefit from any explanation as to what is meant, especially in view of the fact that the immigration officer already had opined on the application of section 25 in the circumstances of the case. That constitutes the long and short of the reasons given. It continues to be very much unclear what is meant by these two paragraphs when considering section 65 of the Act.

III. Arguments and analysis

A. *The arguments*

[15] The Applicant puts the issue to be addressed squarely at paragraph 2 of his written case: "if a foreign national is inadmissible for misrepresentation and their spouse files an application to sponsor them for permanent residence before the 5-year period inadmissibility time period has elapsed, but asks for the application to be considered under humanitarian and compassionate (H&C) considerations, does the sponsor have a right to appeal the refusal decision to the IAD?" The Applicant adds that "[t]o date, it appears that the Federal Court has not yet addressed this specific scenario".

[16] As we shall see, this last affirmation may not be accurate anymore. Our Court has opined with respect to the IAD's jurisdiction in a case where H&C considerations were raised for the purpose of subtracting a person from the 5-year inadmissibility time period for humanitarian and compassionate considerations. Even if one assumes that the *Gill* decision invoked by the IAD to deny having jurisdiction is good law, that would not account for the scenario presented by this case under review. To put it bluntly, the two situations are different.

[17] The Applicant develops his own argument. He submits that there is an issue of procedural fairness, which calls for a standard of review of correctness. If there is such an issue, the case law supports that standard of review.

[18] However, for that to be true, there must first be an issue of procedural fairness. I am not satisfied that the issue identified by the Applicant is one of procedural fairness. It is claimed that the IAD denied a legal recourse afforded by law. According to the construction put on sections 63 and 64 of the Act, an appeal before the IAD exists, says the Applicant. However, what the Applicant truly does is to argue that the IAD is guilty of an error in law in the interpretation it gives to Division 7 of the IRPA. *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] confirms that a review court "should start with the presumption that the applicable standard of review for all aspects of that decision will be reasonableness" (at para 25). Some exceptions to that presumption are described in *Vavilov*, and confirmed in *Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association*, 2022 SCC 30 [*Society of Composers*] at para 26, but none applies to regular questions of law concerning a decision maker's home statute. In fact, it is well recognized that the reasonableness standard applies to the decision maker's interpretation of its home statute. This is not new (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654 at para 30; *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 SCR 293 at paras 22-23). The recent *Society of Composers* case adds a sixth category but does not disturb the state of the law as per *Vavilov*.

[19] The Applicant argued his case also on the basis of a decision that is unreasonable.

[20] In *Canada (Public Safety and Emergency Preparedness) v Gaytan*, 2021 FCA 163, the Federal Court of Appeal summarized what is entailed by the reasonableness standard of review once a reviewing court is seized of the interpretation given to a decision maker's home statute:

> [23] On reasonableness review, the focus of the inquiry "must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome" (*Vavilov* at para. 83). Ultimately, the reviewing court must be satisfied that the administrative decision is "based on an internally coherent and rational chain of analysis and … is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para. 85). When the matter at issue concerns more specifically the decision maker's interpretation of its home statute, reasonableness review means that although the decision maker's interpretation must be consistent with the text, context, and purpose of the provision, as required by the usual principles of statutory interpretation (*Vavilov* at para. 120), the reviewing court must refrain from undertaking a *de novo* analysis of the question or from asking itself "what the correct decision would have been". It must instead, "examine the administrative decision as a whole, including the reasons provided by the decision maker and the outcome that was reached" (*Vavilov* at para. 116).
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> [My emphasis.]

[21] The Applicant submits that the IAD's decision was unreasonable. First, the Applicant submits that the panel's decision is unreasonable because the Panel refused to consider one of the Applicant's central submissions. The Applicant further submits that the IAD's decision is faulty because the application for sponsorship was made in accordance with the Act, contrary to the finding of the IAD. Finally, the Applicant's decision is unreasonable because it refused to consider that the right to appeal to the IAD is a right held by a sponsor in Canada, and not the foreign national. In the final analysis, it all boils down to the argument that the legislation, once properly understood, allows an appeal where H&C considerations are raised.

[22] The right of appeal invoked in this case is found at section 63(1) of the IRPA:

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 of the family class may appeal to the Immigration Appeal Division against a decision not to issue the foreign national a permanent resident visa.	**63 (1)** Quiconque a déposé, conformément au règlement, une demande de parrainage au titre du regroupement familial peut interjeter appel du refus de délivrer le visa de résident permanent.

The Applicant argues that the essential elements of section 63(1) are present in his case. An application to sponsor was filed in the prescribed manner; the person sponsored is a foreign national qualifying in the family class; the decision subject to appeal was to refuse to issue a permanent visa.

[23] The Applicant asserts that the IAD's decision was unreasonable since it failed to consider one of the Applicant's central arguments, notably that the case is distinct from *Gill* since it concerns an application made under section 25(1) of the IRPA. The IAD determined that it could not hear the appeal during the five year inadmissibility period; the IAD made its decision based on *Gill*, which found that an application is not made in accordance with the Act where it is made in spite of the prohibition of section 40(3). The Applicant's attempt to distinguish their case from *Gill* because the case should be evaluated using H&C factors, which brings in a scenario not contemplated in *Gill*.

[24] *Gill* is not a bar to an appeal before the IAD, because the application for sponsorship was made in accordance with the Act, since section 25 of the Act could exempt from any applicable criteria or obligations of the Act. The distinguishing factor for the Applicant is that *Gill* did not

ask the IAD to consider humanitarian and compassionate grounds. The IRPA allows for those who do not meet the requirements of the Act to request that the permanent residency applications be evaluated pursuant to H&C considerations.

[25] The same officer who refused the sponsorship application also found there to be insufficient H&C considerations to justify making a positive decision under section 25(1) of the IRPA. This decision triggers the application of section 63(1) of the IRPA, namely that the application be filed in a prescribed manner, that the foreign national is a member of the family class, and there has been a decision to refuse a PR visa (AM, para 41).

[26] The Applicant argues that section 64(3) confirms his right of appeal in this case:

Misrepresentation	**Fausses déclarations**
64 (3) No appeal may be made under subsection 63(1) in respect of a decision that was based on a finding of inadmissibility on the ground of misrepresentation, unless the foreign national in question is the sponsor's spouse, common-law partner or child.	**64 (3)** N'est pas susceptible d'appel au titre du paragraphe 63(1) le refus fondé sur l'interdiction de territoire pour fausses déclarations, sauf si l'étranger en cause est l'époux ou le conjoint de fait du répondant ou son enfant.

Being a sponsor's spouse found inadmissible on the ground of misrepresentation is not a bar to an appeal before the IAD as section 64(3) attests.

[27] The right to appeal in the narrow circumstances of section 64(3) is for the purpose of softening the severe consequences flowing from the Act where it has been found that there has

been misrepresentation. There is no justification for denying the appeal, certainly not on the basis of a lack of jurisdiction in the IAD.

[28] The Respondent took the position that section 40(3) of the IRPA was dispositive of the jurisdictional issue, together with this Court's decision in *Gill*. The sponsorship application was null and void *ab initio*. The Minister further submitted that a "humanitarian and compassionate application is foreclosed by the very terms of subsection 40(3) of the IRPA" (written case, para 50). The Minister also posits that section 64(3) of the IRPA is limited to cases where the misrepresentation by the spouse occurs during the sponsorship application process. I have not found in the text of section 64(3) how its scope can be limited as suggested by the Minister. Similarly, it is argued that *stare decisis* requires that *Gill* be followed.

B. *Post-hearing developments*

[29] At the time the parties produced their memorandum of fact and law, the Federal Court had not yet considered whether an appeal lies with the IAD where an applicant submits a sponsorship application for his or her inadmissible spouse and asked for the application to be considered in light of H&C considerations. In fact, the IAD seems to have found in *Gill* an authority to support its decision, but in a scenario that was significantly different from that presented in this case.

[30] At the hearing of this case, the Court sought submissions on a case which was at the time taken under advisement by our Court. As noted by the parties, there was no case law out of this Court other than *Gill*. Some comments and observations were supplied. A decision on whether or

not the IAD has jurisdiction on a case like the one before this Court has come down since those early comments.

[31] Thus, the Court sought further comments and observations on that case that was not available at the time this case was originally heard. In *Sedki v Canada (Citizenship and Immigration)*, 2021 FC 1071 [*Sedki*], our Court did not find that *Gill* was dispositive of what is a different issue, i.e. how to resolve the tension between section 40(3) and section 25(1).

[32] In the latest supplementary arguments, counsel for the Applicant argued that *Sedki* is perfectly in line with her submissions: she contends that the relevant facts in the two cases are identical and they both deal with the same central issues. The Court in *Sedki* considered both the decision of the immigration officer and the jurisdiction of the IAD to hear an appeal from the officer's decision. Her arguments in her original written case are fully supported in *Sedki*. Following *R. v Sullivan*, 2022 SCC 19 [*Sullivan*], on the principle of judicial comity, or horizontal *stare decisis*, *Sedki* should be followed by this Court in this case.

[33] Counsel for the Minister notes for her part that the Minister is appealing *Sedki* (a question was certified). Counsel reasserts that section 40(3) of the IRPA is dispositive of the matter. Counsel comments on the application of the recent Supreme Court of Canada decision in *Sullivan* seeking to draw some distinctions on the fact between *Gill* and *Sedki*. Nevertheless, counsel proposed questions for certification. We will get back to the issue of what constitutes appropriate questions in this case.

C. *The Sedki decision*

[34] Our Court has, in my view, dealt with the issue of the relationship between sections 40 and 25, together with Division 7 of the IRPA, in a fulsome and persuasive fashion in *Sedki*. It follows that this Court should follow *Sedki* unless there are reasons to depart from it (*Sullivan*). I cannot find any.

[35] In *Sedki*, Justice McHaffie addressed squarely the tension that exists between section 25(1) and section 40(3) of the Act. Paragraph 1 of the decision is unequivocal:

> [1] A foreign national who is inadmissible to Canada for misrepresentation may not apply for permanent resident status during the inadmissibility period. Does this prohibition preclude a foreign national from applying for a permanent resident visa on humanitarian and compassionate grounds [H&C application] under section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]? This question is at the heart of this application for judicial review.

As a matter of fact, the Minister made in *Sedki* the same argument offered in the case under review: “The Minister asserts that the Court should uphold the officer’s decision on the ground that subsection 40(3) of the IRPA precludes an H&C application under subsection 25(1).” (*Sedki*, at para 4). The Court addresses the issue at paragraph 5:

> [5] I do not agree. On the contrary, having heard the arguments of the Minister and the applicants, I find that the only reasonable interpretation of the relevant provisions is that a foreign national who is inadmissible for misrepresentation can still file an H&C application under subsection 25(1). According to the language of section 25, Parliament has expressly precluded certain inadmissible foreign nationals from filing an H&C application. Foreign nationals who are inadmissible under section 40 for misrepresentation are not among those listed in section 25. This strong legislative indication is confirmed by other indications in

> the IRPA, in certain manuals published by Immigration, Refugees and Citizenship Canada (IRCC), and in this Court's jurisprudence. These indications show, without allowing another reasonable interpretation, that the officer had discretion to process the H&C application, which he did not do.

[36] The judgment goes on to explain over 145 paragraphs how to reconcile sections 25 and 40 of the Act. The *Sedki* Court provides its understanding of the articulation of the sections:

> [58] Thus, reading their texts independently, one sees that subsection 40(3) prevents a foreign national who is inadmissible for misrepresentation from applying for permanent resident status while subsection 25(1) allows a foreign national outside Canada to file an H&C application to obtain permanent resident status, with some exceptions. The question is therefore effectively whether, when read together, subsection 40(3) is an exception to subsection 25(1) or whether subsection 25(1) is an exception to subsection 40(3).
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> [59] Neither the text of subsection 40(3) nor that of subsection 25(1) refers to the other. Nevertheless, as the applicants point out, subsection 25(1) explicitly sets out several circumstances in which the Minister may not consider an H&C application. These include inadmissibility under section 34, 35 or 37. The subsection does not mention inadmissibility for misrepresentation under section 40.
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> [60] I agree with the applicants that the absence of section 40 from the text of subsection 25(1), when several other inadmissibilities are listed, strongly and clearly suggests that Parliament's intention was not to prevent a foreign national who is inadmissible for misrepresentation from making an H&C application.
>
> [61] If Parliament wanted to prevent a foreign national who is inadmissible under section 40 from making an H&C application, it would be sufficient to add section 40 to sections 34, 35 and 37 in the text of subsection 25(1). The fact that Parliament did not include section 40 in this list is a clear textual indication. This is especially the case since subsection 40(3) was added to IRPA as part of the same legislation that amended subsection 25(1) to exclude from its application a foreign national who is inadmissible by reason of a case described in section 34, 35 or 37: *Faster Removal of Foreign Criminals Act*, SC 2013, c 16, ss 9, 16.

[37] The analysis did not stop with the examination of the two sections. The Court goes on to consider other provisions. It is found that sections 63 to 65 in Division 7 of the IRPA, which provide for the right of appeal before the IAD, support access to an appeal in circumstances like those in this case. For ease of reference, I reproduce together sections 63(1), 64(3) and 65:

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 of the family class may appeal to the Immigration Appeal Division against a decision not to issue the foreign national a permanent resident visa.	**63 (1)** Quiconque a déposé, conformément au règlement, une demande de parrainage au titre du regroupement familial peut interjeter appel du refus de délivrer le visa de résident permanent.
[…]	…
Misrepresentation	**Fausses déclarations**
64 (3) No appeal may be made under subsection 63(1) in respect of a decision that was based on a finding of inadmissibility on the ground of misrepresentation, unless the foreign national in question is the sponsor's spouse, common-law partner or child.	**64 (3)** N'est pas susceptible d'appel au titre du paragraphe 63(1) le refus fondé sur l'interdiction de territoire pour fausses déclarations, sauf si l'étranger en cause est l'époux ou le conjoint de fait du répondant ou son enfant.
[…]	…
Humanitarian and compassionate considerations	**Motifs d'ordre humanitaires**
65 In an appeal under subsection 63(1) or (2) respecting an application based on membership in the family class, the Immigration Appeal Division may not consider humanitarian and	**65** Dans le cas de l'appel visé aux paragraphes 63(1) ou (2) d'une décision portant sur une demande au titre du regroupement familial, les motifs d'ordre humanitaire ne peuvent être pris en

compassionate considerations unless it has decided that the foreign national is a member of the family class and that their sponsor is a sponsor within the meaning of the regulations.	considération que s'il a été statué que l'étranger fait bien partie de cette catégorie et que le répondant a bien la qualité réglementaire.

[38] One should read paragraphs 72 to 75 of the decision where the *Sedki* Court makes a convincing demonstration that an appeal lies before the IAD. Section 63(1) appears to be rather plain and simple. It gives jurisdiction to the IAD to hear an appeal concerning an application to sponsor a foreign national as a member of the family class. Section 64(3) further assures that an appeal of a decision based on a finding of inadmissibility for misrepresentation is available as long as the foreign national is (among others) the sponsor's spouse. Justice McHaffie found that signal to be powerful. So do I. Finally, I am hard-pressed to understand how it is asserted that the IAD is not concerned with H&C considerations. Section 65 does not accord with such a broad proposition. It bears repeating that in the case at hand the immigration officer found that the H&C grounds were not sufficient. Although there is no explanation for that decision, it remains that it is the decision appealed from before the IAD and refusing to take jurisdiction to hear the appeal in the face of section 65 requires an explanation. The *Sedki* Court examines very carefully, and rigorously, sections 40, 63 and 64 of the Act in answering the question of "whether the IAD had jurisdiction to hear an appeal of the officer's decision and to consider humanitarian and compassionate grounds" (at para 118).

[39] As pointed out earlier, the IAD concluded summarily that it did not have jurisdiction to hear the appeal from an immigration officer's decision who, having examined the application in accordance with section 25(1) of the IRPA, concluded that granting the remedy was not justified.

Our Court in *Sedki* concluded that an "application under section 25 is not prohibited by subsection 40(3). Such an application is therefore not void and Gill does not apply." (at para 126). If there are other reasons than those spelled out by the IAD, they have not been submitted on this record. Indeed, if there were other reasons, I would have asked for further submissions on the adequacy of reasons in order to satisfy the requirements of *Vavilov* (particularly, paras 82 to 87).

D. *Horizontal stare decisis*

[40] In my estimation, the analysis conducted in paragraphs 123 to 130 of *Sedki* requires that it be followed as a matter of horizontal *stare decisis* or judicial comity (*Sullivan*, at para 65). It is on point, it is persuasive and the parties in this case have not offered any reason why it should not be followed. I have not found any reasons to depart from *Sedki* (*Sullivan*, at paras 73 et al). I reproduce in its entirety paragraph 75 of *Sullivan*.

> [75] The principle of judicial comity — that judges treat fellow judges' decisions with courtesy and consideration — as well as the rule of law principles supporting stare decisis mean that prior decisions should be followed unless the *Spruce Mills* criteria are met. Correctly stated and applied, the *Spruce Mills* criteria strike the appropriate balance between the competing demands of certainty, correctness and the even-handed development of the law. Trial courts should only depart from binding decisions issued by a court of coordinate jurisdiction in three narrow circumstances:
>
> > 1. The rationale of an earlier decision has been undermined by subsequent appellate decisions;
> >
> > 2. The earlier decision was reached per incuriam ("through carelessness" or "by inadvertence"); or
> >
> > 3. The earlier decision was not fully considered, e.g. taken in exigent circumstances.

I believe it is plain to see that none of the three "narrow circumstances" is found in the case at hand. There is no subsequent appellate decision to undermine *Sedki*. It was not reached *per incuriam*. It was fully considered.

[41] Paragraph 130 of *Sedki* summarizes usefully the decision reached by the Court. It reads:

> [130] On the basis of these provisions of the IRPA and the judgments in *Gill* and *Habtenkiel*, I conclude that the right of appeal to the IAD when a foreign national files a sponsored application for permanent residence while inadmissible under section 40 applies as follows:
>
> > (1) If the application is not accompanied by an H&C application under section 25, it is void and there is no right of appeal to the IAD even if the officer has processed the application. The IAD has no jurisdiction and an application for leave and judicial review may be filed: *Gill* at para 16.
> >
> > (2) <u>If the application is accompanied by an H&C application, the officer must process the H&C application under section 25.</u> If the application is refused, meaning that the officer has concluded expressly or implicitly that H&C grounds do not justify an exemption from the inadmissibility:
> >
> > > (a) if the applicant is not a member of the family class, the IAD has no jurisdiction to determine humanitarian and compassionate grounds and an application for leave and judicial review may be filed: *Habtenkiel* at para 38; IRPA, s 65; IRPR, s 117;
> > >
> > > (b) if the applicant is a member of the family class, but is not the spouse, common-law partner or child of the sponsor, there is no appeal to the IAD and an application for leave and judicial review may be filed: IRPA, s 64(3); and
> > >
> > > (c) <u>if the applicant is a member of the family class and is the spouse, common-law partner or child of the sponsor, the sponsor may appeal to</u>

> the IAD, which has jurisdiction to determine humanitarian and compassionate grounds, and an application for leave and judicial review may only be made after the sponsor's appeal process has been exhausted: IRPA, s 72(2)(a).

[My emphasis.]

[42] In effect, *Sedki* disposes of the argument that section 40(3) of the Act prevents an officer from processing H&C considerations and it concludes that an appeal lies to the IAD. These are findings that apply to this case on this record.

[43] The *Sedki* decision considers fully the issue. Not only does it examine carefully the provisions in play, but it examines the manuals published by the Department of Citizenship and Immigration (at paras 77 to 82) relevant to the issue, the administrative context (at paras 83 to 85), the jurisprudential context (at paras 86 to 95) as well as the amendments to the Act and the parliamentary debates (at paras 96 to 107). Accordingly, *Sedki* is to be followed as a matter of horizontal *stare decisis*.

IV. Conclusion

[44] The combination of sections 25 and 40 of the IRPA does not prevent the processing by an officer of the humanitarian and compassionate considerations. The officer simply concluded in this case that "it would not be justified by humanitarian or compassionate considerations to grant you permanent resident status or exempt you from any applicable criteria or obligation of the Act". In the case at bar, the IAD concluded that it did not have jurisdiction to entertain an appeal from the decision of the visa officer to conclude that there were insufficient H&C considerations

to justify the granting of a permanent residence visa or to exempt from any applicable criteria or obligation under the Act. Contrary to the argument presented by the Respondent, the decision in *Gill* does not control in the circumstances of this case. It is rather the decision in *Sedki* which applies.

[45] The issue before this Court is whether or not the IAD has jurisdiction to hear the appeal from the decision of an officer to deny the remedy sought because it lacks jurisdiction. It follows that the judicial review application must be granted, and the matter must be returned to the IAD for it to exercise its jurisdiction and consider the appeal on its merits.

[46] The Minister suggested in his supplementary submissions three questions for certification pursuant to section 74 of the Act. They are:

> Is an application for permanent resident visa by a person inadmissible under subsection 40(1) of the *Immigration and Refugee Protection Act* (IRPA) filed during the inadmissibility period set out in paragraph 40(2)(a) of the IRPA null and void *ab initio*?
>
> If a visa officer nonetheless renders a decision on an application for permanent resident visa by a person inadmissible under subsection 40(1) of the IRPA filed during the inadmissibility period set out in paragraph 40(2)(a) of the IRPA, is his decision null and void *ab initio*?
>
> Is the decision of the visa officer on an application for permanent resident visa presented by a person inadmissible under subsection 40(1) of the IRPA during the inadmissibility period set out in paragraph 40(2)(a) of the IRPA subject to a right of appeal before the Immigration Appeal Division under subsection 63(1) of the IRPA?

I certainly agree with my colleague Justice McHaffie that the conditions for certifying questions are met (*Sedki*, at paras 141 to 143).

[47] As I read the three questions, it appears to me that the first two are covered in the certified question in *Sedki*. As for the third question, in view of the finding in *Sedki*, which is summarized at paragraph 130(c) of the decision, it might be suggested that the jurisdictional issue is subsumed within the *Sedki* question. I parenthetically add that not only does the Court follow the analysis on the jurisdiction of the IAD in *Sedki* as a matter of judicial comity, but I entirely agree with the *Sedki* rationale and analysis. It in my view disposes, for the reasons given in *Sedki*, of this particular issue in this case. Be that as it may, given that the importance of the jurisdictional issue in this case is such that some clarity may possibly be of assistance if a second question were certified, the Court would craft a question based in part on the Respondent's third proposed question. I would however amend the suggested third question to reflect fully that the issue is not only whether the IAD has jurisdiction, but rather that the jurisdiction on appeal is a function of a request made on the basis of humanitarian and compassionate considerations. The second certified question would therefore read:

> Is the decision about an application sponsoring for permanent residence presented by a person inadmissible under subsection 40(1) of the Act, during the inadmissibility period set out in paragraph 40(2)(a), where there is a request to seek a remedy concerning the effect of subsection 40(3) in accordance with section 25 of the Act (in view of humanitarian and compassionate considerations), subject to a right of appeal before the Immigration Appeal Division given subsections 63(1) and 64(3), and section 65 of the Act?

[48] The Court in *Sedki* certified a question. I would certify the same question pursuant to section 74 of the IRPA:

> Can a foreign national inadmissible for misrepresentation pursuant to subsection 40(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA) apply, during the period set out in paragraph 40(2)(a) of the IRPA, for permanent resident status on humanitarian and compassionate grounds under subsection 25(1) of the IRPA, despite the prohibition on applying for permanent resident status set out in subsection 40(3) of the IRPA?

For greater clarity, the Court would certify a second question.

<u>JUDGMENT in IMM-5594-20</u>

THIS COURT'S JUDGMENT is:

1. The application for judicial review is allowed. The Immigration Appeal Division has jurisdiction to hear the appeal. The matter is referred to the IAD for a different panel to exercise jurisdiction to consider the matter on its merits.

2. The following questions are certified for an appeal:

   (i) Can a foreign national inadmissible for misrepresentation pursuant to subsection 40(1) of the Immigration and Refugee Protection Act, SC 2001, c 27 (IRPA) apply, during the period set out in paragraph 40(2)(a) of the IRPA, for permanent resident status on humanitarian and compassionate grounds under subsection 25(1) of the IRPA, despite the prohibition on applying for permanent resident status set out in subsection 40(3) of the IRPA?

   (ii) Is the decision about an application sponsoring for permanent residence presented by a person inadmissible under subsection 40(1) of the Act, during the inadmissibility period set out in paragraph 40(2)(a), where there is a request to seek a remedy concerning the effect of subsection 40(3) in accordance with section 25 of the Act (in view of humanitarian and compassionate considerations), subject to a right of appeal before the Immigration Appeal Division given subsections 63(1) and 64(3), and section 65 of the Act?

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5594-20
STYLE OF CAUSE:	MAKKAR, SUNNY v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	OCTOBER 4, 2021
JUDGMENT AND REASONS:	ROY J.
DATED:	JULY 29, 2022

APPEARANCES:

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