Federal Court Cour fédérale

Date: 20221107

Docket: IMM-319-21

Citation: 2022 FC 1515

Ottawa, Ontario, November 7, 2022

PRESENT: Madam Justice Sadrehashemi

BETWEEN:

WING YU WONG

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

I. Overview

[1] These motions arose during an immigration-related judicial review proceeding that an Associate Judge of the Court is currently case managing. This decision does not deal with the merits of the application for judicial review. Rather, it deals with two preliminary matters: i) an appeal of the Associate Judge's Order relating to the documents the Minister is required to produce in the Certified Tribunal Record ("CTR"); and ii) whether this Court should convert the

application for judicial review to an action, which would provide the parties an opportunity to conduct document discovery and examinations for discovery.

[2] The Applicant, Wing Yu Wong ("Ms. Wong"), is seeking judicial review of the decision of the Minister of Citizenship and Immigration to not select her application to sponsor her parents to Canada for processing. At the time that Ms. Wong indicated interest to sponsor her parents, in January 2021, Immigration, Refugees and Citizenship Canada [IRCC] would only process those parental sponsorship applications that it had selected through a lottery system. The lottery was capped at 10,000 applications. Ms. Wong is challenging the determination to not select her application. She is also challenging the underlying lottery scheme established through ministerial instructions made under section 87.3 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[3] This Court granted leave. Associate Judge Ring ("Case Management Judge") is case managing the judicial review.

[4] Ms. Wong had argued that the Minister did not produce all the documents relevant to the judicial review. She specifically identified seven categories of documents that she claims the Minister should provide. Ms. Wong brought a motion before the Case Management Judge, asking the Court to require the Minister to produce these documents. The Case Management Judge partially granted her request. Before me, Ms. Wong brought a motion under Rule 51 of the Federal Courts Rules, SOR 98-106 [the *FC Rules*] appealing parts of the Case Management Judge's decision [Appeal Motion].

[5] After she filed her Appeal Motion and the Court scheduled a date to hear this motion, Ms. Wong brought another motion [the Conversion Motion] asking that the Court convert the application into an action under subsection 18.4 (2) of the *Federal Courts Act*, RSC 1985, c F-7 [*Federal Courts Act*]. Ms. Wong included the Conversion Motion with the written representations she filed in support of her Appeal Motion. Ms. Wong combined both issues, arguing that she is now, first, seeking that the Court convert the application to an action and, as an alternative, that the Court overturn the Case Management Judge's determination on the documents relevant to the judicial review.

[6] The Minister argues that there is no legal basis for me to consider Ms. Wong's Appeal Motion because she is barred by paragraph 72(2)(e) of *IRPA* from appealing an interlocutory order. The Minister argued that in essence Ms. Wong is trying to do an "end-run" around the Case Management Judge's relevance determination by seeking to convert the application to an action while also attempting to file a statement of claim that expands the scope of what she is challenging in the application for judicial review. The Minister seeks special costs because of this allegedly improper conduct.

[7] As I will explain more fully below, I do not find Ms. Wong's approach is an attempt to end-run the procedures. She has been forthright in her written and oral submissions before the Court. Ms. Wong's position is that if the Conversion Motion is granted, the Appeal Motion may become "academic" and that this was the basis for bringing both motions before me. I do not find a basis to order special costs in these circumstances.

[8] I do, however, find that this approach, and specifically Ms. Wong's request for me to first deal with the Conversion Motion, has resulted in some confusion. In my view, the appropriate way to deal with these issues is to start with whether I have jurisdiction to hear the appeal of the Case Management Judge's Order. This appeal is the only reason any of these issues are before me. Beginning with the Appeal Motion also allows me to consider the Minister's argument that the Conversion Motion is essentially an end-run around a determination on relevance that is barred from appeal.

[9] As I explain below, I find that I have jurisdiction to decide the appeal, despite it being an interlocutory order. I make this finding because paragraph 72(2)(e) of *IRPA*, relied upon by the Minister, does not apply where leave has already been granted. However, Ms. Wong has not convinced me that there is a basis to disturb the Case Management Judge's Order. I find no palpable and overriding error in the areas of the Order Ms. Wong challenges.

[10] On the Conversion Motion, after careful consideration, I have decided that it is inappropriate for me to decide this motion. The matter was before me and not the Case Management Judge because Ms. Wong framed it as related to the appeal of the Order. I have found no palpable and overriding error in this decision; nor do I find that the issues raised in the Conversion Motion are tied to my decision of the Appeal Motion. Deciding the Conversion Motion in these circumstances would circumvent the usual process for a case-managed matter.

[11] Moreover, Ms. Wong's argument about the need to convert the application to an action rests on a draft statement of claim, which arguably may expand the scope of what she challenges

in her Notice of Application. Ms. Wong has not sought leave to amend the originating Notice of Application; nor has the Minister consented to the amendments set out in the draft statement of claim.

[12] In these circumstances, as I set out below, the proper recourse is to direct any further requests to the Case Management Judge. Ms. Wong may seek to amend her application and seek further documents based on the amendments. Given that I have not decided that matter, there is no prejudice to Ms. Wong should she decide to file another motion to convert the application to an action before the Case Management Judge.

II. Background

[13] Ms. Wong is a permanent resident of Canada. On or about October 13, 2020, she submitted an interest form to IRCC to sponsor her parents who live in Hong Kong. On January 11, 2021, Ms. Wong learned that IRCC did not select her through the lottery process which was capped at 10,000 applications. Ms. Wong therefore could not proceed with her application to sponsor her parents.

[14] On January 19, 2021, Ms. Wong filed the underlying application for leave and judicial review. She challenged the decision to not select her to apply to sponsor her parents. She also challenged the underlying scheme for selecting and inviting sponsors to apply that is set out in

ministerial instructions (provided for by section 87.3 of *IRPA*) for the 2020 Parents and Grandparents Program. She argued that the process is:

i. Contrary to her legal right to make an application to sponsor a family member as established under subsection 13(1) of *IRPA*;

ii. Contrary to section 15 of the *Canadian Charter of Rights and Freedoms* [the *Charter*], in that it discriminates on the basis of family status and age; and

iii. Contrary to her right to a fair determination under subsection 2(e) of *Canadian Bill of Rights*, SC 1960, c 44 making the scheme *ultra vires*.

A. *Procedural history*

[15] On May 27, 2021, the Court granted leave for judicial review and ordered the Minister to file the CTR by June 17, 2021. Ms. Wong requested that the Minister include in the CTR seven categories of documents that she argued were relevant to the judicial review. The Minister did not agree. This led Ms. Wong to file a motion asking the Court to compel the Minister to provide the seven categories of documents in accordance with Rule 17 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR 93-22 [the *Immigration Rules*].

[16] Ms. Wong also sought an order under Rule 384 of the *FC Rules* that the judicial review continue as a specially managed proceeding, that the existing filing deadlines and hearing date be vacated, and that this case be jointly case managed with 76 related matters [the Related Matters], if the Court grants leave in those matters.

[17] On July 15, 2021, the Court ordered that this proceeding and the Related Matters continue as a specially managed proceeding and vacated the filing deadlines and the hearing date originally set out in the order granting leave. Associate Judge Ring was subsequently assigned as the Case Management Judge.

[18] The Related Matters are not relevant to my determination. The Related Matters proceeded to a judicial review hearing on the basis of two selected test cases and were dismissed (*Zhou v Canada (Citizenship and Immigration)*, 2021 FC 1424). Ms. Wong's case was neither part of nor subject to that proceeding.

B. *Case Management Judge's Order on Document Disclosure*

[19] On November 29, 2021, the Case Management Judge granted Ms. Wong's Rule 17 motion in part, ordering the Minister to produce additional documents in relation to two of the seven categories of documents Ms. Wong sought:

i. Documents regarding the age of the sponsored individuals in the parents and grandparents program, and the age of the sponsored individuals in the spousal program; and

ii. Documents on how individuals are selected from the randomized process.

[20] The Case Management Judge refused Ms. Wong's request to compel the Minister to produce documents in the following five categories defined by Ms. Wong:

i. Documents relating to the steps the Minister took from 2011 to 2020 to address the alleged 2011 backlog;

ii. Documents in respect of any reason or justification for imposing a randomized process for parents and grandparents sponsorship, but not spousal sponsorship;

iii. All documents that were before the Canadian Human Rights Tribunal [CHRT] in the *Attaran* matter, irrespective of whether the documents were ruled admissible or not;

iv. Documents in respect of the alleged “fiscal constraints”; and

v. Any research, studies, or reports relating to the economic contribution and healthcare costs associated with the individuals sponsored under the parents and grandparents program.

C. *Motion to Appeal the Document Disclosure Order*

[21] On December 9, 2021, Ms. Wong filed an appeal under Rule 51 of the *FC Rules* from the Case Management Judge’s decision. Ms. Wong’s appeal only challenged the Case Management Judge’s determination on three of the seven categories of documents Ms. Wong initially sought.

[22] Ms. Wong asked the Court to compel the Minister to produce two of the excluded categories of documents in their entirety: i) documents that were before the CHRT in the *Attaran* matter; and ii) any research, studies, or reports relating to the economic contribution and healthcare costs associated with the individuals sponsored under the parents and grandparents program. Ms. Wong also asked me to vary the Case Management Judge’s Order so that the documents produced in relation to the age of sponsored individuals in the parents and grandparents program and the age of the sponsored individuals in the spousal program were not limited to 2020 sponsorship applications but include all such documents since 2011.

[23] On February 22, 2022, Ms. Wong filed, along with her written representations on the Appeal Motion, a notice of motion asking that the application be converted to an action under section 18.4 of the *Federal Courts Act*. Ms. Wong now asks the Court to first order that the application be converted into an action, allowing the parties to benefit from the procedures set out in the *FC Rules* applicable to actions; and second to consider the appeal from the Case Management Judge's decision as an alternative argument.

III. Analysis

A. *Appeal Motion*

(1) Jurisdiction to Hear the Appeal

[24] As noted above, I am not considering the issues in the order Ms. Wong proposes. I need to first determine whether I have jurisdiction to hear the appeal, given the matters are only before me because Ms. Wong appealed the Case Management Judge's decision.

[25] Ms. Wong argues that I have jurisdiction to hear an appeal of an order of an associate judge (formerly known as a prothonotary) under Rule 51 of the *FC Rules*. Rule 51 (1) states: "An order of a prothonotary [now called associate judge] may be appealed by a motion to a judge of the Federal Court." Rule 51 applies to applications for leave and applications for judicial review. The *Immigration Rules* make Rule 51 applicable to immigration proceedings, whereas other parts of the *FC Rules* are expressly excluded from application to immigration proceedings (*Immigration Rules*, Rule 4(1)). The only restriction on the application of Rule 51 is in Rule 1.1(2) of the *FC Rules*, which states: "In the event of any inconsistency between these Rules and

an Act of Parliament or regulation made under such an Act, that Act or regulation prevails to the extent of the inconsistency.” In the same way, Rule 4(1) of the *Immigration Rules* provides that the *FC Rules* apply to applications for leave, applications for judicial review, and appeals as long as they are not inconsistent with the *Citizenship Act*, RSC 1985, c C-29 [*Citizenship Act*] or *IRPA*.

[26] The key issue in dispute is whether the right in Rule 51 to appeal an associate judge’s decision to a judge of the Federal Court is inconsistent with *IRPA*, and in particular paragraph 72(2)(e) of *IRPA* which prohibits appealing certain interlocutory decisions. There is no dispute that the Case Management Judge’s decision is interlocutory. The only issue is whether paragraph 72(2)(e) of *IRPA* applies to interlocutory decisions made after leave is granted. If it does apply, both parties agree that the Appeal Motion would be barred because it improperly seeks to appeal an interlocutory order. If paragraph 72(2)(e) does not apply where leave has already been granted, the Appeal Motion is not barred as there is no basis to find that Rule 51 is inconsistent with *IRPA*. Therefore, I would have jurisdiction to consider the appeal under Rule 51.

[27] The “modern approach” to statutory interpretation instructs that “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament” (*Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at paragraph 21, citing Elmer Driedger in Construction of Statutes, 2nd ed (Toronto: Butterworths, 1983)).

[28] In my view, the text of the provision and the scheme of the statute are clear: paragraph 72(2)(e) applies to the application for leave stage and is part of section 72 that deals with applications for leave:

Application for judicial review

72 (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is, subject to section 86.1, commenced by making an application for leave to the Court.

Application

(2) The following provisions govern an application under subsection (1):

….

(e) no appeal lies from the decision of the Court with respect to the application or with respect to an interlocutory judgment.

Demande d'autorisation

72 (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est, sous réserve de l'article 86.1, subordonné au dépôt d'une demande d'autorisation.

Application

(2) Les dispositions suivantes s'appliquent à la demande d'autorisation :

….

e) le jugement sur la demande et toute décision interlocutoire ne sont pas susceptibles d'appel.

[29] The Minister argued that subsection 72(2) is not limited to applications for leave because the section is titled "applications for judicial review" and this is not necessarily only in reference to applications for leave. The Minister's interpretation is inconsistent with the French version of paragraph 72(2)(e) and the scheme of the statute.

[30] The text of paragraph 72(2)(e) confirms that the provision deals with applications for leave. Subsection 72(2) sets out the "provisions that govern an application under subsection (1)." Subsection 72(1) provides that a judicial review is commenced by filing an application for leave with the Court. In French, it is even clearer that subsection 72(2) deals with applications for

leave because instead of using the term “application” or “an application under subsection (1)” it explicitly uses the term “demande d’autorisation,” meaning an application for leave.

[31] The structure of *IRPA* also confirms that paragraph 72(2)(e) deals with applications for leave. All the other paragraphs under subsection 72(2) deal with matters that relate only to the leave process and which do not arise after leave has already been granted: that an application cannot be made until any right of appeal provided by *IRPA* is exhausted (*IRPA*, paragraph 72(2)(a)); the timeline for filing an application for leave (*IRPA*, paragraph 72(2)(b)); the ability of a judge to order extensions of time for serving the application or notice (*IRPA*, paragraph 72(2)(c)); and that an application has to be disposed of without delay and in a summary way, unless a judge directs otherwise, without personal appearance (*IRPA*, paragraph 72(2)(d)). Section 74 sets out the provisions dealing with the “judicial review” stage. It does not refer to applications for judicial review as in section 72, but only refers to “judicial review,” meaning that leave has already been granted. The paragraphs under section 74 all apply to the judicial review process, after leave has been granted.

[32] The Minister argued that I need to consider paragraph 72(2)(e) in two parts: the first part (“no appeal lies from the decision of the Court with respect to the application”) refers to an application for leave and means that there is no appeal of leave decisions; and the second part (“or with respect to an interlocutory judgment”) refers to all interlocutory judgments, even after leave is granted.

[33] I do not see any basis for this interpretation, given that paragraph 72(2)(e) cannot be read in isolation. It is one paragraph of a section that governs applications for leave and I do not see a basis to treat one subpart of the paragraph differently. There is nothing in the wording of the section that lends support to the Minister's position.

[34] I was not pointed to any decision where the Court squarely addresses the issue that is before me, namely whether paragraph 72(2)(e) applies if leave has already been granted.

[35] The Minister relied on a number of cases that have considered the bar on appealing interlocutory decisions in paragraph 72(2)(e) of *IRPA*. None of these decisions assist the Minister in their position. All of these cases deal with circumstances where leave had not yet been granted. The issue raised here (whether paragraph 72(2)(e) applies where leave has already been granted) is not dealt with in any of these cases (*Yogalingam v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 540; *HD Mining International Ltd v Construction and Specialized Workers Union, Local 1611*, 2012 FCA 327; *Canada (Minister of Citizenship and Immigration) v Edwards*, 2005 FCA 176; *Canadian Association of Refugee Lawyers v Canada (Citizenship and Immigration)*, 2019 FC 1126; *Wong v Canada (Citizenship and Immigration)*, 2016 FCA 229; and *Harkat v Canada (Attorney General)*, 2021 FCA 209).

[36] In addressing whether a question could be certified, the Minister raised two additional cases (*Canada (Minister of Citizenship and Immigration) v Chen*, 2005 FCA 56; and *Froom v Canada (Minister of Citizenship and Immigration)*, 2003 FCA 331) that deal with whether a party can appeal an interlocutory decision of a judge of the Court to the Federal Court of Appeal

without a certified question. Though the Federal Court of Appeal did not directly comment on this in either decision, it appears to me that leave had already been granted in both of these cases. In both decisions, the Federal Court of Appeal notes both the bar on appeals of interlocutory judgments in paragraph 72(2)(e) of *IRPA* and the need for certifying a question in paragraph 74(d) of *IRPA* as the grounds for its decision to not hear the appeal. While both cases arose after leave had already been granted, it does not appear that the argument made before me (that paragraph 72(2)(e) does not apply where leave has already been granted) was raised in either case. The reference to paragraph 72(2)(e) is brief and in both cases the Federal Court of Appeal would not have heard the appeal in any event because there was no certified question.

[37] Ms. Wong relied on one case, *Douze v Canada (Citizenship and Immigration)*, 2010 FC 1086 [*Douze*], in support of her position that appeals of interlocutory orders of associate judges are permitted where leave has already been granted. *Douze* involved the Minister's appeal to a judge of this Court of an associate judge's order requiring that certain documents be disclosed in the CTR. The circumstances are therefore similar to Ms. Wong's case in that leave had already been granted and the appeal related to a dispute about the contents of the CTR. There was no discussion in the decision about paragraph 72(2)(e) and whether the Court had jurisdiction to hear the appeal where leave had been granted. The Court in *Douze* granted in part the appeal from the associate judge's order.

[38] The Minister makes a further argument about the applicability of paragraph 72(2)(e) to Ms. Wong's circumstances. The Minister argues that even if I find paragraph 72(2)(e) is only applicable to applications for leave, Ms. Wong has not yet really gotten to the judicial review

stage and therefore the prohibition on interlocutory appeals should still apply to her circumstances. The Minister argues that since Ms. Wong's complaint is related to the CTR and the production of the CTR was required by this Court in the Order granting leave, the leave stage has not really concluded.

[39] I do not accept this reasoning. This Court granted leave in May 2021. In the same Order, the Court ordered the Minister to produce a CTR. Ms. Wong brought the underlying motion challenging the contents of the CTR in June 2021 and filed this appeal in December 2021. The legislation does not provide for an "in between" stage after leave is granted but before judicial review commences. I do not see a basis to find that after leave has been granted, the provisions that govern applications for leave in subsection 72(2) should continue to apply.

[40] Based on the above, I am satisfied that the prohibition on appeals from interlocutory decisions in paragraph 72(2)(e) of *IRPA* only applies before leave is granted. Given that leave has been granted in this case, I have jurisdiction under Rule 51 to decide Ms. Wong's appeal of the Case Management Judge's Order.

(2) No Palpable and Overriding Error in Case Management Judge's Decision

[41] On a Rule 51 appeal, I must review the decision of the Case Management Judge on a standard of palpable and overriding error for questions of fact and questions of mixed fact and law, except where there is an extricable legal principle at issue and then, like on any question of law, the standard is correctness (*Housen v Nikolaisen*, 2002 SCC 33; *Hospira Healthcare*

Corporation v Kennedy Institute of Rheumatology, 2016 FCA 215 at paras 64, 66 [*Hospira Healthcare*]).

[42] In my view, Ms. Wong's challenge relates to questions of mixed fact and law where there is no extricable legal principle at issue. As I explain below, Ms. Wong argued that at least part of her appeal is based on the Case Management Judge's error on a legal principle. I do not find that the legal principle cited by Ms. Wong in support of this characterization is relevant to the issue that she is challenging on appeal. Therefore, the palpable and overriding error standard applies, meaning that I am not to disturb the Case Management Judge's decision except where I find error that is "obvious, plainly seen and apparent, the effect of which is to vitiate the integrity of the reasons" (*Martinez v Canada (Royal Mounted Police)*, 2021 FC 529 at para 6 [*Martinez*]). This standard is "highly deferential" (*Martinez* at para 6).

[43] Ms. Wong challenges the Case Management Judge's decision with respect to three categories of documents that she argues are "indispensable to the reviewing court's fulfilment of its responsibility to engage in a meaningful judicial review of the Minister's policies." The three categories of documents that Ms. Wong argues the Minister should produce are:

1. Documents about the age of sponsored individuals in the parents and grandparents program, and the age of sponsored individuals in the spousal program, not just for the 2020 year (as the Case Management Judge had ordered), but for all years going back to 2011;
2. All documents that were before the CHRT in the *Attaran* matter, irrespective of whether the documents were ruled admissible or not; and

3. Any research, studies, or reports relating to the economic contribution and healthcare costs associated with the individuals sponsored under the parents and grandparents program.

[44] Ms. Wong alleges errors with respect to each of these three categories of documents. Ms. Wong also broadly challenges the Case Management Judge's description of the scope of her judicial review, an error Ms. Wong argues had a "cascading effect." I will first deal with Ms. Wong's broader challenge to the description of the scope of the judicial review and then with the errors specific to each category of documents.

(a) *Scope of the Judicial Review*

[45] The Case Management Judge determined that the essence of the judicial review application was "a challenge to the alleged determination by the Minister on January 11, 2021 whereby the Applicant was not randomly selected to receive an invitation to apply, and the underlying 2020 [Parents and Grandparents Program] pursuant to which that determination was made."

[46] Ms. Wong argues that this characterization is too narrow because her challenge is not limited to only the underlying 2020 Parents and Grandparents Program, but instead begins in 2011 when the Minister began issuing instructions pursuant section 87.3 of *IRPA* to limit the number of parent and grandparent sponsorship applications selected for processing. Ms. Wong characterizes the error as an "incorrect characterization of the legislative provisions that are subject of this judicial review."

[47] Ms. Wong characterizes the particular instructions issued each year by the Minister with respect to the processing of parent and grandparent sponsorship applications as "legislative provisions." She argues that the Case Management Judge failed to see the interrelation of these instructions that were issued each year since 2011 and that aimed to "block" the processing of parent and grandparent applications. Ms. Wong argues that the Case Management Judge erred in defining the scope by failing to apply the guidance from the recent Federal Court of Appeal decision in *Canada (Citizenship and Immigration) v Canadian Council for Refugees*, 2021 FCA 72 [*Canadian Council for Refugees*], specifically that "legislative provisions in an interrelated scheme cannot be taken in isolation and selectively challenged" (*Canadian Council for Refugees* at para 58).

[48] There are a number of problems with this submission. First, it is inaccurate to describe instructions issued independently each year pursuant to the Minister's power under section 87.3 of *IRPA* as "legislative provisions in an interrelated scheme." This guidance from the Federal Court of Appeal is not applicable to the argument Ms. Wong seeks to advance. These are separate instructions issued independently from each other in successive years. That they are similar does not make them legislative provisions in an interrelated scheme.

[49] Second, relying on this dictum from *Canadian Council for Refugees*, Ms. Wong argues that the true essence of her discrimination and fair adjudication arguments on judicial review is: "whether section 87.3 of *IRPA* could enable the Minister to issue Instructions that would/could violate section 15 of the *Charter* and/or section 2 (e) of the *Canadian Bill of Rights*?" Even on a generous reading, this broad scope is not how Ms. Wong framed her challenge in the underlying

judicial review; nor did she frame it in this way in the Rule 17 motion she brought before the Case Management Judge. Ms. Wong has not pointed to an inconsistency in the legal principles relied on by the Case Management Judge in defining the scope of the judicial review. Nor does Ms. Wong argue that the Case Management Judge made any factual errors in describing the nature and scope of the underlying challenge as set out in the Notice of Application and the arguments made in the leave materials. I see no palpable and overriding error in the Case Management Judge's characterization of the scope of the judicial review.

[50] I further note that the draft statement of claim that Ms. Wong filed with respect to the Conversion Motion identifies what is at issue in the challenge using different language than the Notice of Application and the leave materials. Instead of focusing on the underlying lottery scheme and randomized selection process capped at 10,000 applicants used in the 2020 Parents and Grandparents Program, the draft statement of claim refers to "blocking instructions" which it defines to include all ministerial instructions issued since 2011, whether or not a lottery system was used for the selection process. This type of characterization was not before the Case Management Judge when she was determining the scope of the judicial review.

(b) *Documents From Canadian Human Rights Tribunal in the Attaran matter*

[51] Ms. Wong argued that all of the documents filed by the Minister at the CHRT in the matter styled as *Attaran v Immigration, Refugees and Citizenship Canada et al*, CHRT File No. T2163/3716 [*Attaran*] were relevant because *Attaran* was also a case about the Minister discriminating on the basis of age and family status in administering the sponsorship program for

parents and grandparents. Ms. Wong did not request a particular subset of documents but rather made a broad request for all documents filed, regardless of whether the CHRT admitted them.

[52] Ms. Wong argued before the Case Management Judge and me that these documents should all be disclosed because the case before the CHRT and her judicial review were “nearly identical.” The Case Management Judge did not accept this characterization. She found that the *Attaran* matter involved a challenge filed in 2010 against the Minister’s delay in processing the parental sponsorship application filed by Mr. Attaran in 2009. *Attaran* is distinct not only because it was brought under the *Canadian Human Rights Act*, RSC, 1985, c H-6 and not the *Charter*, but also because the basis for the challenge is different. As noted by the Case Management Judge, Mr. Attaran’s challenge related to the length of processing time, whereas Ms. Wong is arguing that her sponsorship application may never be selected for processing because of the use of the lottery system and the cap created by ministerial instructions for the 2020 Parents and Grandparents Program.

[53] Ms. Wong argues that the Case Management Judge made a palpable and overriding error in framing the scope of the *Attaran* matter. The only basis for this claim is Ms. Wong’s assertion that the Case Management Judge overlooked that the majority of the documents filed in the *Attaran* matter postdated Mr. Attaran’s sponsorship application filed in 2009, and that IRCC’s Statement of Particulars in *Attaran* showed that IRCC relied on subsequent “blocking instructions” post-2009. Ms. Wong’s reference to “blocking instructions” in the Statement of Particulars relates the description of changes to the parents and grandparents sponsorship policy

since Mr. Attaran's parents' sponsorship application was filed as well as since it was approved in 2012.

[54] There is no basis to find a palpable and overriding error. I find no basis for Ms. Wong's assertion that documents were overlooked or more importantly that those documents would have made a difference to the Case Management Judge's determination that the two cases are clearly distinct. The difference between the two cases was the key basis for the Case Management Judge's decision to not order disclosure given that Ms. Wong argued that all *Attaran* documents were relevant because the two cases were "nearly identical."

(c) *Comparative Age Documents*

[55] In the Rule 17 Motion before the Case Management Judge, Ms. Wong requested documents relating to the age of sponsored grandparents and parents as well as the age of sponsored spouses. Ms. Wong did not identify a time period limiting the documents she sought. The Case Management Judge found that, without a temporal limit to the scope of the request, it was overly broad and vague. The Case Management Judge ordered the Minister to produce documents limited to the 2020 year. Ms. Wong argues that this is a palpable and overriding error for the same reason that she argues that the scope of the judicial review should have been defined more broadly.

[56] There is no palpable and overriding error in the Case Management Judge's approach. She limited the order based on her determination that the scope of the judicial review related to the

2020 Parents and Grandparents Program. I have already determined that there was no palpable and overriding error in the scope determination.

[57] Ms. Wong made an additional argument. She raised for the first time on appeal a complaint about the usability of the documents the Minister produced in response to the Case Management Judge's Rule 17 Order. This issue is not properly before me. Ms. Wong may raise it with the Case Management Judge if she chooses.

(d) *Research Documents on Economic Contributions and Healthcare Costs of Parents and Grandparents*

[58] The Case Management Judge determined that research documents on the economic contribution and healthcare costs of parents and grandparents are not relevant to Ms. Wong's discrimination claim. The Case Management Judge found that the Minister had not raised any arguments under section 1 of the *Charter* and was not relying on the lack of economic contributions or healthcare costs of parents and grandparents to support their position that the discrimination claim had not been made out. Ms. Wong argued in the Rule 17 Motion that these documents were relevant because "the Minister's reasons for restrictions on the [Parents and Grandparents Program] applications is because of the older age of those immigrants, which is the classic situation of discrimination on the basis of age." Given the nature of the arguments in the leave materials, the Case Management Judge found that Ms. Wong had not demonstrated how these documents would be relevant.

[59] Ms. Wong now argues that this finding did not follow the Supreme Court of Canada's guidance in *Fraser v Canada (Attorney General)*, 2020 SCC 28 nor the Federal Court of Appeal's decision in *Canadian Council for Refugees*. The references Ms. Wong makes to these cases do not assist her position. Ms. Wong argues that "allegations of the unconstitutional effects of impugned legislation must be accompanied by admissible evidence of the alleged effects." Ms. Wong says the research documents that she is seeking about economic contributions and healthcare costs of parents are about the "alleged effects" of the Minister's parental sponsorship policy. Ms. Wong has not explained how these research documents relate to the "effects" of processing parental sponsorship applications. I see no basis to disturb the Case Management Judge's determination on this category of documents.

(3) Conclusion on Appeal Motion

[60] I have considered Ms. Wong's Rule 51 appeal of the Case Management Judge's Order. I have found no palpable and overriding error in relation to the three categories of documents Ms. Wong challenges on appeal. The Appeal Motion is dismissed.

B. *Conversion Motion*

[61] As I stated at the outset, I have determined that the Conversion Motion is not properly before me.

[62] Ms. Wong argued that the Appeal Motion and the Conversion Motion are related because the goal of both motions is to ensure that there would be a full evidentiary record before the

judge deciding the judicial review. This is not a basis for me to decide the Conversion Motion. My role sitting in appeal from the Case Management Judge's decision is not to resolve the evidentiary issues in the judicial review, but rather to consider whether there is a basis to intervene and disrupt the findings made by the Case Management Judge. As noted by the Federal Court of Appeal, "it is always relevant for motion judges, on a Rule 51 appeal, to bear in mind that the case managing prothonotary [now called associate judge] is very familiar with the particular circumstances and issues of a case and that, as a result, intervention should not come lightly" (*Hospira Healthcare* at para 103).

[63] Bringing these two motions together also caused confusion because there was a dispute between the parties as to whether I have jurisdiction to hear the Appeal Motion. In these circumstances, one approach could have been to ask that the Appeal Motion be held in abeyance pending a determination on a conversion motion before the Case Management Judge.

[64] Lastly, it became clear to me in the course of hearing arguments on these motions that there remains significant debate about the scope of the underlying judicial review. Ms. Wong argued that she sought to clarify the scope in the draft statement of claim she filed in support of the Conversion Motion. The Minister argued that Ms. Wong attempted to impermissibly expand the scope of what she was challenging in the judicial review. Relying on the Federal Court of Appeal's decision in *Canada (Human Rights Commission) v Saddle Lake Cree Nation*, 2018 FCA 228 at paragraphs 23–24, the Minister asserted that the draft statement of claim is unnecessary for the Conversion Motion, and is being used here as an attempt to expand the scope

of the judicial review, getting around the Case Management Judge's determinations on scope and relevance.

[65] As I have already noted above, the language used in the draft statement of claim to describe the nature and scope of the challenge is different from how the nature and scope are framed in the Notice of Application and other leave materials. There is a dispute between the parties as to whether the new language is an expansion of the scope. Full arguments were not made on this issue. Ms. Wong had not sought leave to amend the originating Notice of Application; nor had the Minister consented to any amendments. This was not the appropriate approach in these circumstances, and in my view added to the complexity of trying to evaluate the Conversion Motion at this stage.

[66] The proper recourse is to address any further matters or issues to the Case Management Judge. Ms. Wong may seek to amend her application and may also seek further documents based on accepted amendments. Given that I have not decided the Conversion Motion, there is no prejudice to Ms. Wong should she decide to file another motion to convert the application to an action before the Case Management Judge.

IV. Certified Questions

[67] In written submissions following the hearing, Ms. Wong proposed two questions for certification. The first proposed question deals with the jurisdiction to appeal an associate

judge's decision and the second is related to the Conversion Motion:

1. Does section 72(2)(e) or section 74(d) of *IRPA* apply to appeals made pursuant to Rule 51 of the *FC Rules* arising from an associate judge's interlocutory decision on an application for judicial review?
2. Should a more generous test, or lower threshold, apply to "conversion" under section 18.4(2) of the *Federal Courts Act* for *IRPA* judicial reviews involving a policy or program?

[68] The Minister opposed the certification of both questions.

[69] Neither question is dispositive (*Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22 at para 46). I have determined that there was no palpable and overriding error in the Case Management Judge's Order. Therefore, even if I am wrong about my jurisdiction to decide the appeal, the result would be the same and the Case Management's Order on the Rule 17 Motion would stand. I did not decide the Conversion Motion and therefore it would be inappropriate to certify a question on this issue (*Canada (Minister of Citizenship and Immigration) v Zazai*, 2004 FCA 89 at para 12).

[70] I also have doubts as to whether I have the jurisdiction to certify a question for appeal on an interlocutory decision where the judicial review has not yet been heard. Given that the proposed questions could not be certified for the reasons above, I do not need to decide this issue. I note, however, that the Chief Justice recently considered the application of section 74(d) to interlocutory matters in *Canadian Association of Refugee Lawyers v Canada (Citizenship and*

Immigration), 2019 FC 1126 [*CARL*]. In *CARL*, the Chief Justice was not deciding an interlocutory matter but in the course of the judicial review proceeding was asked by the Minister to certify a question on a standing determination that had been made by an associate judge prior to leave being granted (and was therefore not appealed). In the context of considering this request, the Chief Justice clarified that section 74(d) applies to judgments on judicial review and not to interlocutory judgments:

> In my view, the logic of section 74 of the IRPA indicates that the appeal contemplated in paragraph 74(d) is an appeal of the judgment issued in respect of the application referenced in paragraphs 74(a) and (c), and contemplated by paragraph 74(b). Section 74 does not appear to contemplate interlocutory matters whatsoever. It simply addresses the fixing of a date and place for the hearing of an application, the necessity for that date to be no sooner than 30 days and no later than 90 days after leave was granted (absent an agreement on an earlier date), the disposition of the application without delay and in a summary way, and finally, the circumstances in which an appeal of the judgment can be made. I am reinforced in this view by the French version of paragraph 74(d), which refers to "le jugement consécutif au contrôle judiciaire." This makes it abundantly clear that the appeal contemplated by paragraph 74(d) is an appeal of the judgment on the application, and not an appeal of any interlocutory decision that may have been separately issued prior to the hearing of the application.
>
> [Emphasis in original]

[71] I do not need to settle the question of whether I have jurisdiction to certify a question on an interlocutory matter. As I have already noted, I can see no basis to certify the questions that Ms. Wong has proposed.

V. Costs

[72] The Minister seeks costs for special reasons within the meaning of Rule 22 of the *Immigration Rules*, in part because of the Minister's position that Ms. Wong appealed while the jurisprudence is clear that such an appeal is barred. As I have explained above, I do not agree with the Minister's interpretation of section 72(2)(e) of *IRPA* and their position that the appeal is barred. Moreover, while I have described the confusion that resulted from the approach taken by Ms. Wong in bringing these motions together, as well as not seeking leave to amend her notice of application, I do not find that Ms. Wong intended to circumvent a process or to improperly re-litigate an issue. As such, I do not see a basis to award costs for special reasons.

JUDGMENT IN IMM-319-21

THIS COURT'S JUDGMENT is that:

i. The Applicant's appeal of the Order of Associate Judge Ring dated November 29, 2021 is dismissed;

ii. No serious question of general importance is certified; and

iii. No costs are awarded.

"Lobat Sadrehashemi"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-319-21
STYLE OF CAUSE:	WING YU WONG v THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	MARCH 10, 2022
JUDGMENT AND REASONS:	SADREHASHEMI J.
DATED:	NOVEMBER 7, 2022

APPEARANCES:

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