Federal Court		Cour fédérale

Date: 20100209

Docket: IMM-3587-09

Citation: 2010 FC 133

Ottawa, Ontario, February 9, 2010

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

BUONG NGUYEN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] [22] Parliament has the right to adopt immigration policy and to enact legislation prescribing the conditions under which non-citizens will be permitted to enter and remain in Canada. This it has done by enacting the IRPA: *Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711 at paragraph 27. The IRPA and Regulations made pursuant to paragraphs 14(2)(*b*) and (*d*) thereof, set out a regulatory scheme that essentially controls the admission of foreign nationals to Canada (*Canada (Minister of Citizenship and Immigration) v. de Guzman*, 2004 FC 1276 at paragraph 35).

[23] Family reunification and the best interest of children are recognized as valid purposes under the IRPA and are to be considered when relevant. The legislation also has other purposes, one of which is the maintenance of the integrity of the Canadian refugee protection system. The Federal Court of Appeal had to consider whether paragraph 117 (9)(d) of the regulations was *ultra vires* the IRPA in *Azizi v.*

Canada (Minister of Citizenship and Immigration) 2005 FCA 406. Justice Rothstein, writing for the majority stated the following at paragraphs 28-29 of his reasons:

> [28] Paragraph 117(9)(*d*) does not bar family reunification. It simply provides that non-accompanying family members who have not been examined for a reason other than a decision by a visa officer will not be admitted as members of the family class. A humanitarian and compassionate application under section 25 of the IRPA may be made for Mr. Azizi's dependants or they may apply to be admitted under another category in the IRPA.
>
> [29] Mr. Azizi says these are undesirable alternatives. It is true that they are less desirable from his point of view than had his dependants been considered to be members of the family class. But it was Mr. Azizi's misrepresentation that has caused the problem. He is the author of this misfortune. He cannot claim that paragraph 117(9)(*d*) is *ultra vires* simply because he has run afoul of it. (My emphasis)

[24] The Court of Appeal has therefore decided that the impugned regulation is not *utltra vires* the IRPA particularly in cases where there is a misrepresentation to immigration authorities. Here, however, the Applicant did not know of his son's existence at the time of his application for permanent residence. He cannot, therefore, be said to have concealed this information or to have misrepresented his circumstances. In my view, it matters not whether non-disclosure is deliberate or not. The regulation is clear, paragraph 117(9)(*d*) makes no distinction as to the reason for which an non-accompanying family member of the sponsor was not disclosed in his application for permanent residence. What matters, is the absence of examination by an officer that necessarily flows from the non-disclosure. This interpretation is consistent with the findings of my Colleague, Justice Mosley in *Hong Mei Chen v. M.C.I.,* 2005 FC 678, where the scope and effect of the impugned regulation were found not to be limited to cases of fraudulent non-disclosure. At paragraph 11 of his reasons, my learned colleague wrote, "… Whatever the motive, a failure to disclose which prevents the immigration officer from examining the dependent precludes future sponsorship of that person as a member of the family class."

[25] The provisions of paragraph 117(9)(*d*) of the Regulations are not inconsistent with the stated purposes and objectives of the IRPA. I am in agreement with the view expressed by Justice Kelen at paragraph 38 of his reasons in *de Guzman*, above, that "The objective of family reunification does not override, outweigh, supersede or trump the basic requirement that the immigration law must be respected, and administered in an orderly and fair manner." Further, in exceptional circumstances where humanitarian and compassionate factors are compelling, an applicant can seek, pursuant to s. 25(1) of the IRPA, a ministerial exemption to the statutory and regulatory requirements for admission to Canada.

> Such an application remains open to the Applicant. If successful, the Applicant could be reunited with his son. (*Chen*, above, at para. 18).
>
> [26] For the above reasons, I find that the impugned regulation is not *ultra vires* the IRPA nor inconsistent with its stated objectives or purposes.

(*Adjani v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 32, 322 F.T.R. 1).

[2] It is true that the operation of paragraph 117(9)(*d*) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (Regulations) in a particular case may appear Kafkaesque; however, one must keep in mind that there are other parts of the immigration system which exist for that very reason, to lessen the consequences of strict applications of the law in exceptional cases, when deemed appropriate. Foremost among these is section 25 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), which gives the Minister the authority to grant an exemption to any legal requirement on the basis of humanitarian and compassionate grounds.

[3] Under the separation of powers, it is for the discretion of the appropriate representative of the executive branch of government, in this case the Minister, to decide whether to grant an exemption and not for a member of the judiciary to conclude otherwise.

II. Introduction

[4] This is an application for judicial review pursuant to subsection 72(1) of the IRPA of a June 30, 2009 decision of the Immigration Appeal Division (IAD), Immigration and Refugee Board of Canada (Board), refusing the Applicant's application of December 18, 2008 to reinstate a previously withdrawn appeal.

III. Background

[5] In February 1993, the Applicant, Mr. Buong Nguyen, immigrated to Canada as a UNHCR refugee from Vietnam after having been in a refugee camp in Malaysia since 1989.

[6] In 1988, Mr. Nguyen became involved in a romantic relationship with Ms. Thi Lien Nguyen, in Vietnam. Their relationship ended before Mr. Nguyen fled to Malaysia. In 2005, Mr. Nguyen became aware that he and Ms. Thi Lien Nguyen had a daughter, Thi Dat Nguyen. Ms. Thi Lien Nguyen had contacted Mr. Nguyen to inform him that she wanted him to assume custody of their daughter.

[7] DNA testing confirms that Thi Dat Nguyen is Mr. Nguyen's daughter.

[8] Mr. Nguyen attempted to sponsor his daughter as a member of the Family Class. The application was refused on July 6, 2007 because Mr. Nguyen did not declare his daughter on his original application when he immigrated to Canada and, therefore, could not sponsor her due to the operation of paragraph 117(9)(*d*) of the Regulations which prohibits non-disclosed family members from being members of the Family Class.

[9] Mr. Nguyen filed a Notice of Appeal from the Citizenship and Immigration Canada (CIC) decision, on July 31, 2007, but withdrew this appeal, on March 11, 2008, because the language of paragraph 117(9)(*d*) of the Regulations does not differentiate between deliberate and non-deliberate non-disclosure of family members.

[10] On December 18, 2008, Mr. Nguyen made an application to reinstate the appeal on the ground that the decision of the IAD in the case of *Amal Othman Faki Aziz v. Minister of Citizenship and Immigration*, (IAD File No. VA6-02878) (reasons released on February 1, 2008) is applicable to the facts of this case and makes it likely that this appeal would succeed.

IV. Decision under Review

[11] On June 30, 2009, the IAD denied Mr. Nguyen's application on the ground that there was no reasonable likelihood of success if the appeal were reinstated because *Aziz*, above, does not apply to the Applicant's case.

[12] The IAD rejected Mr. Nguyen's submission that it would be "in the interests of justice" to reinstate the appeal on the grounds that there had been excessive delay in bringing the application for reinstatement.

[13] The application was also denied on the basis that there is Federal Court jurisprudence indicating that paragraph 117(9)(*d*) of the Regulations does not contemplate subjective knowledge of non-disclosure of family members.

[14] The IAD distinguished the case of *Aziz*, above, on the grounds that Mr. Nguyen does not fit within the group identified in *Aziz* as disadvantaged by paragraph 117(9)(*d*) of the Regulations, namely, UNHCR refugee claimants who are disadvantaged because they lack knowledge of Canadian law. The IAD found that Mr. Nguyen did not fit this group because he failed to disclose

the existence of his daughter not because of a lack of knowledge of Canadian laws, but rather because of a lack of knowledge about his daughter's existence.

V. Relevant Legislative Provisions

[15] Subsection 117(9) of the Regulations states:

Excluded relationships	Restrictions
(9) A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if	(9) Ne sont pas considérées comme appartenant à la catégorie du regroupement familial du fait de leur relation avec le répondant les personnes suivantes :
(*a*) the foreign national is the sponsor's spouse, common-law partner or conjugal partner and is under 16 years of age;	*a*) l'époux, le conjoint de fait ou le partenaire conjugal du répondant s'il est âgé de moins de seize ans;
(*b*) the foreign national is the sponsor's spouse, common-law partner or conjugal partner, the sponsor has an existing sponsorship undertaking in respect of a spouse, common-law partner or conjugal partner and the period referred to in subsection 132(1) in respect of that undertaking has not ended;	*b*) l'époux, le conjoint de fait ou le partenaire conjugal du répondant si celui-ci a déjà pris un engagement de parrainage à l'égard d'un époux, d'un conjoint de fait ou d'un partenaire conjugal et que la période prévue au paragraphe 132(1) à l'égard de cet engagement n'a pas pris fin;
(*c*) the foreign national is the sponsor's spouse and	*c*) l'époux du répondant, si, selon le cas :
(i) the sponsor or the foreign national was, at the time of their marriage, the spouse of	(i) le répondant ou cet époux étaient, au moment de leur mariage, l'époux d'un

another person, or	tiers,
(ii) the sponsor has lived separate and apart from the foreign national for at least one year and	(ii) le répondant a vécu séparément de cet époux pendant au moins un an et, selon le cas :
(A) the sponsor is the common-law partner of another person or the conjugal partner of another foreign national, or	(A) le répondant est le conjoint de fait d'une autre personne ou le partenaire conjugal d'un autre étranger,
(B) the foreign national is the common-law partner of another person or the conjugal partner of another sponsor; or	(B) cet époux est le conjoint de fait d'une autre personne ou le partenaire conjugal d'un autre répondant;
(*d*) subject to subsection (10), the sponsor previously made an application for permanent residence and became a permanent resident and, at the time of that application, the foreign national was a non-accompanying family member of the sponsor and was not examined.	*d*) sous réserve du paragraphe (10), dans le cas où le répondant est devenu résident permanent à la suite d'une demande à cet effet, l'étranger qui, à l'époque où cette demande a été faite, était un membre de la famille du répondant n'accompagnant pas ce dernier et n'a pas fait l'objet d'un contrôle.

[16] Section 51 of the *Immigration Appeal Division Rules*, SOR/2002-230 (IAD Rules) states:

Application to reinstate a withdrawn appeal	Demande de rétablissement d'un appel
51. (1) A person may apply to the Division to reinstate an appeal that was made by that person and withdrawn.	**51.** (1) Toute personne peut demander à la Section de rétablir l'appel qu'elle a interjeté et ensuite retiré.

Form and content of application	Forme et contenu de la demande
(2) The person must follow rule 43 and include their contact information in the application.	(2) La personne fait sa demande selon la règle 43; elle y indique ses coordonnées.
Factors	Éléments à considérer
(3) The Division must allow the application if it is established that there was a failure to observe a principle of natural justice or if it is otherwise in the interests of justice to allow the application.	(3) La Section accueille la demande soit sur preuve du manquement à un principe de justice naturelle, soit s'il est par ailleurs dans l'intérêt de la justice de le faire.

VI. Issues

[17] (1) Did the IAD fail to observe the principles of natural justice by refusing to reinstate the appeal?

(2) Did the IAD fail to take into account the Applicant's rights under the *Charter of Rights and Freedoms*, Schedule B, Part I to the *Canada Act 1982*, (U.K.) 1982, c. 11 (Charter)?

(3) Did the IAD misapply prior IAD jurisprudence?

(4) Did the IAD commit a reviewable error by failing to take into consideration the importance of family reunification, as enumerated in subsection 3(1) of the IRPA and the best interests of the child as per the CIC's IP 5 Manual and the guiding principles of the *Convention on the Rights of the Child*?

VII. Standard of Review

[18] In the case of *Wilks v. Canada (Immigration and Refugee Board)*, 2009 FC 306, 243 F.T.R. 194, the court was asked to review a decision of the IAD to refuse to reinstate an appeal (*Wilks* at

para. 17). The court held that the question of whether to reinstate an appeal is one of mixed fact and law and that it attracts a standard of review of reasonableness (*Wilks* at para. 27).

[19] In the case of *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the Supreme Court of Canada held that "[w]here the question is one of fact, discretion or policy, deference will usually apply automatically" (*Dunsmuir* at para. 53). When a court determines that a decision deserves deference, the court will apply the standard of reasonableness. According to *Dunsmuir*, when a court applies the reasonableness standard, intervention is warranted if a decision is outside the realm of reasonable outcomes, is not intelligible, is not supported by evidence, or is not defensible in law and on the facts (*Dunsmuir* at para. 47).

VIII. Summary of the Parties' Positions

Issue 1: Did the IAD fail to observe the principles of natural justice by refusing to reinstate the appeal?

[20] Mr. Nguyen submits the IAD failed to observe the principle of *audi alteram partem* because, in light of the *Aziz* decision, above, he is entitled to a fair hearing, as there is a reasonable possibility that the appeal will be successful if it is heard.

Issue 2: Did the IAD fail to take into account the Applicant's rights under the Charter?

[21] Mr. Nguyen submits the *Aziz* decision recognized his right as a member of an analogous class of protected persons, a UNHCR-accepted refugee, under section 15 of the Charter.

[22] Mr. Nguyen contends that the *Aziz* decision held that in order to respect the rights of UNHCR-accepted refugees, a narrow exception must be read into paragraph 117(9)(*d*) of the Regulations because otherwise it would be "too harsh to prevent a UNHCR-accepted refugee from ever sponsoring a family member if this individual unknowingly breached the obligation imposed on them to declare family members".

Issue 3: Did the IAD misapply prior IAD jurisprudence?

[23] Mr. Nguyen is of the view that the IAD's decision is unreasonable because it was made without regard to his Charter rights and the applicable case law. Specifically, Mr. Nguyen submits the IAD's holding that it would not be in the interests of justice to reinstate the appeal is unreasonable; it failed to consider that *Aziz* held paragraph 117(9)(*d*) of the Regulations to be a violation of a UNHCR-accepted refugee's Charter rights.

[24] Mr. Nguyen argues the IAD was incorrect in distinguishing *Aziz* from the present case. He submits that *Aziz* is applicable to this case because it took into account all of the difficulties faced by UNHCR-accepted refugees, especially the ways in which their difficult situations might hinder their compliance with the requirements of Canadian immigration laws.

[25] In addition, Mr. Nguyen submits the IAD misapplied the case of *Gomez v. Canada*, (October 24, 2008, (IAD File No. TA8-03348)) which held there is no exception to the duty to disclose family members pursuant to paragraph 117(9)(*d*) of the Regulations. Mr. Nguyen submits that *Gomez* is factually distinguishable from the present case because the appellant in *Gomez* was aware of the existence of his son prior to landing in Canada and did not declare him despite having

several opportunities to do so. Mr. Nguyen submits that in this case, the applicant never had an opportunity to declare the existence of his daughter because of circumstances beyond his control. (Applicant's Memorandum of Fact and Law at para. 24).

Issue 4: Did the IAD commit a reviewable error by failing to take into consideration the importance of family reunification, as enumerated in subsection 3(1) of the IRPA and the best interests of the child as per the CIC's IP 5 Manual and the guiding principles of the *Convention on the Rights of the Child?*

[26] Mr. Nguyen contends that he assumed guardianship of his daughter in 2006 when he travelled to Vietnam. He submits that his daughter is leading a very difficult life in Vietnam without family support and it was improper for the IAD to disregard the interests of the daughter when it made its decision not to reinstate the appeal.

[27] Mr. Nguyen submits that the IAD should have taken the best interests of the child and the importance of family reunification into account because these factors are enumerated in the IRPA. Also, Mr. Nguyen submits that Canada is a signatory to the *Convention on the Rights of the Child*, Articles 7 and 9 of which provide that a child has a right to know and be cared for by his/her parents. Mr. Nguyen concludes that the IRPA clearly states that its provisions must be construed in a manner that is consistent with international instruments to which Canada is a signatory, such as the *Convention on the Rights of the Child*.

[28] Mr. Nguyen also contends that the CIC's IP 5 Manual states that "officers must consider the best interests of any child directly affect by the decision". Mr. Nguyen submits the officer was

required by law to follow these guidelines and a failure to do so can also be characterized as a failure to observe procedural fairness.

[29] The Respondent submits that whether paragraph 117(9)(*d*) of the Regulations applies to a set of circumstances is a question of mixed fact and law which attracts the standard of review of reasonableness.

[30] The Respondent cites Rule 51 of the IAD Rules, specifically Rule 51(3), and submits the decision to reinstate an appeal is discretionary. The Respondent also submits that the IAD applied the proper test in determining whether it would be in the best interests of justice to reinstate the appeal.

[31] The Respondent concludes by citing the case of *Ohanyan v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1078, 151 A.C.W.S. (3d) 273, for the proposition that the determination of whether it is in the interest of justice to reinstate an appeal is a discretionary determination of the IAD and leave must be dismissed if the discretion is reasonably exercised.

[32] The Respondent submits that paragraph 117(9)(*d*) of the Regulations applies to Mr. Nguyen's daughter because it does not require the applicant to have deliberately not disclosed the existence of his or her family members, as was the case here.

[33] The Respondent contends the question of whether subjective knowledge is a requirement of paragraph 117(9)(*d*) of the Regulations was answered by the Federal Court in the case of *Adjani*,

above, at paragraphs 29 to 32. In *Adjani* the court held that paragraph 117(9)(*d*) of the Regulations excludes all non-disclosed family members from the Family Class.

[34] The Respondent submits the IAD correctly referenced *Adjani* and distinguished *Aziz*, above.

[35] Mr. Nguyen contends that, in light of his status as a UNHCR-accepted refugee, it would be in the interests of justice to allow a reinstatement of his appeal.

[36] Mr. Nguyen submits that the IAD decision in *Aziz* held that paragraph 117(9)(*d*) of the Regulations violates his rights under section 15 of the Charter because of his status as a UNHCR-accepted refugee.

[37] Mr. Nguyen argues that *Adjani* is distinguishable from the present case because the applicant in *Adjani* was not a UNHCR-accepted refugee.

[38] Mr. Nguyen submits that the case of *Ohanyan* held that the IRB is required to weigh all the circumstances of the case in rendering its decision. Mr. Nguyen submits that the IAD failed to take into account all of the circumstances, particularly his status as a UNHCR-accepted refugee, surrounding this case and, therefore, the decision is unreasonable.

[39] Mr. Nguyen contends that both the Respondent and the IAD failed to take into account the policy objective of family reunification, as enumerated in paragraph 3(1)(*d*) of the IRPA, the best

interests of children pursuant to the *Convention on the Rights of the Child*, as well as the CIC's IP 5 Manual.

IX. Analysis

[40] The primary issue raised by Mr. Nguyen is whether *Aziz* is applicable to his situation.

[41] In *Aziz*, the IAD held that paragraph 117(9)(*d*) of the Regulations violates the rights of UNHCR-accepted refugees under section 15 of the Charter because it fails to take into account the "unique disadvantages faced by prospective immigrants who are accepted as refugees by the UNHCR and referred to Canada". The IAD held that these persons cannot reasonably be expected to have access to information regarding their obligations under the Canadian immigration system. The IAD held that paragraph 117(9)(*d*) of the Regulations violates section 15 because it "applies equally to all permanent resident applicants, without taking into account the substantive differences between the groups identified in this analysis", and this equal application leads to substantively differential treatment between groups of refugee claimants (*Aziz* at para. 37).

[42] The comparator groups chosen by the IAD in *Aziz* were UNHCR-accepted refugee claimants who are referred to Canada by the UNHCR and persons who make refugee claims from within Canada or are sponsored from within Canada by an agency (*Aziz* at para. 35). The IAD held that the rights of the first group are violated by paragraph 117(9)(*d*) of the Regulations because it is not reasonable to prohibit them from sponsoring their non-disclosed family members in light of their understandable lack of knowledge of the obligations placed on them by the Canadian immigration system (*Aziz* at para. 37).

[43] It is noted that the IAD in *Aziz* stated the following regarding the breadth of the group in question: “the said analogous group describes a narrow group of individuals … it is only within the narrow scope of this group that I find merit – in the framework of the facts of this particular case – to the *Charter* challenge in question, within the confines of the Canadian jurisprudence on a section 15 analysis” (*Aziz* at para. 34). This limitation is a significant warning sign for anyone seeking to broaden the *Aziz* precedent.

[44] In the decision under review, the IAD distinguished *Aziz* on the ground that the applicant does not fit in the disadvantaged group because the group consists of persons who do not disclose family members because they cannot be reasonably expected to have knowledge of Canadian immigration laws. In this case, Mr. Nguyen failed to comply with his obligations because he was unaware of the existence of his daughter, not because of a lack of knowledge of his obligations under the Canadian immigration system (Applicant’s Record at p. 9).

[45] It is the Court’s conclusion that the IAD properly distinguished Mr. Nguyen’s situation from the facts of *Aziz*. It is clear, as the IAD notes, that *Aziz* is concerned with UNHCR refugees who are disadvantaged because of their reasonable lack of knowledge of Canadian immigration law, not their reasonable lack of knowledge of the existence of family members.

[46] In this case, Mr. Nguyen became a permanent resident before he discovered that he had a daughter. As a result of this, the daughter’s exclusion from the Family Class was not caused by the strict operation of paragraph 117(9)(*d*) of the Regulations, but rather by unfortunate circumstances in his life; therefore, it is the Court’s conclusion that Mr. Nguyen does not fall within the analogous

group identified in *Aziz* and paragraph 117(9)(*d*) of the Regulations does not raise an issue under section 15 of the Charter.

[47] It is the Court's conclusion that the IAD was correct in relying on the precedent of *Adjani*. In *Adjani*, Justice Edmond Blanchard was asked to certify the following question:

> Does subsection 117(9)(*d*) of the IRPR apply to exclude non-accompanying family members from membership from the family class in circumstances where the sponsor was unaware of their existence at the time of his/her application for Permanent Residence and Landing in Canada?

(*Adjani* at para. 29)

[48] The court held that this question suggested that an element of subjective knowledge was required so that deliberate non-disclosure would be required for paragraph 117(9)(*d*) of the Regulations to exclude someone from the Family Class (*Adjani* at para. 30). The court refused to certify the question on the ground that paragraph 117(9)(*d*) of the Regulations is plain and unambiguous; it does not contemplate subjective knowledge (*Adjani* at para. 31). The court definitively stated that paragraph 117(9)(*d*) of the Regulations means "[n]on-disclosed, non-accompanying family members cannot be admitted as members of the family class" (*Adjani* at para. 32). It is the Court's conclusion that *Adjani* applies to the Mr. Nguyen's situation, notwithstanding the IAD's decision in *Aziz*.

Was the IAD incorrect in distinguishing the case of *Gomez v. Canada*?

[49] Mr. Nguyen submits that the IAD was incorrect in applying the case of *Gomez v. Canada*, October 24, 2008 (IAD File No. TA8-03348) to this case on the ground that the two are distinguishable. In *Gomez*, the applicant knew about the existence of his son but did not disclose this

information, thus excluding the son from the Family Class due to the operation of paragraph 117(9)(*d*) of the Regulations (*Gomez*, at para. 2). Mr. Nguyen submits that the two cases are distinguishable because in *Gomez*, the applicant knew about his son and did not disclose his existence, whereas in this case, Mr. Nguyen did not disclose the existence of his daughter because he was unaware she was alive (Applicant's Memorandum of Fact and Law at para. 24).

[50] The IAD cited *Gomez* for the proposition that there are no exceptions to the duty to disclose the existence of family members. It is the Court's conclusion that the IAD was correct in citing *Gomez* because its holding regarding the duty to disclose was correct, especially in light of the aforementioned ruling in *Adjani*. The IAD in *Gomez* aptly expresses the operation of paragraph 117(9)(*d*) of the Regulations in the following terms, "[t]his is a strict question of the application of fact to law. The panel finds as proven that the applicant is the biological child of the appellant born prior to his immigration to Canada. He was not declared on his application for permanent residence" (*Gomez* at para. 33). It is the Court's conclusion that these factors operated to exclude the applicant's son from obtaining membership in the Family Class in *Gomez* and the same factors operate to exclude Mr. Nguyen's daughter in this case.

> Did the IAD commit a reviewable error by failing to take into consideration the importance of family reunification, as enumerated in subsection 3(1) of the IRPA and the best interests of the child as per the CIC's IP 5 Manual and the guiding principles of the *Convention on the Rights of the Child*?

[51] Mr. Nguyen submits the IAD disregarded the best interests of his daughter by refusing to reinstate the appeal. Mr. Nguyen also submits that Articles 7 and 9 of the *Convention on the Rights of the Child* provide that a child has the right to know and be cared for by his/her parents and children shall not be separated from their parents against their will. Mr. Nguyen submits that the

IRPA requires its provisions be construed in a manner that would be consistent with international instruments to which Canada is a signatory).

[52] The compliance of paragraph 117(9)(*d*) of the Regulations with the Convention was dealt with in *De Guzman v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436, [2006] 3 F.C.R. 655. In that case, counsel argued that paragraph 117(9)(*d*) of the Regulations did not comply with Articles 3(1) and 10 of the Convention. Specifically, Article 3(1) provides that "[I]n all actions concerning children … by … courts of law, administrative authorities or legislative bodies…" The court held that not every statutory provision is required to take into account the "best interests of the child" in order for the IRPA to comply with the Convention. The court held that the existence of section 25 makes the IRPA compliant with the Convention because "it obliges the Minister to consider the best interests of a child when deciding whether, in his opinion, humanitarian and compassionate circumstances justify exempting an applicant from the normal selection criteria and granting permanent residence status" (*De Guzman* at para. 105).

[53] The court also rejected the argument that paragraph 117(9)(*d*) of the Regulations does not comply with Article 10 of the Convention which provides that "applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner" (*De Guzman* at para. 106). The court rejected this argument on the same ground as before, namely, that section 25 renders paragraph 117(9)(*d*) of the Regulations compliant with Article 10 (*De Guzman* at para. 107).

[54] In this case, Mr. Nguyen argues that the best interests of the daughter were disregarded by the IAD when it decided not to reinstate the appeal. It is the Court's conclusion that the best interests of a child are not a consideration when determining the application of paragraph 117(9)(*d*) of the Regulations and as such, the IAD acted reasonably when it refused to reinstate the appeal. Paragraph 117(9)(*d*) of the Regulations only operates to exclude persons from the Family Class and does not result in a complete exclusion from obtaining permanent residence in Canada. Section 25 exists to lessen the sometimes harsh application of paragraph 117(9)(*d*) of the Regulations and it is at that stage that the best interests of the child will be considered.

[55] Similarly, Mr. Nguyen submits that the IRPA is to be construed in accordance with Canada's international obligations, specifically Articles 7 and 9 of the Convention. It is the Court's conclusion that the IRPA complies with Canada's obligations under the Convention because section 25 of the IRPA takes those obligations into account. Paragraph 117(9)(*d*) of the Regulations is a strict provision that serves a specific purpose within the scheme of the IRPA. Likewise, section 25 also serves the specific purpose of lessening the sometimes harsh application of strict provisions such as paragraph 117(9)(*d*) of the Regulations.

[56] Mr. Nguyen submits that the IAD erred by failing to consider the importance of the CIC's IP 5 Manual when it refused to reinstate the appeal. The Court notes that the IP 5 Manual is entitled "Immigrant Applications in Canada made on Humanitarian and Compassionate Grounds" and deals with the considerations to be taken into account when determining an application under section 25 (IP 5 Manual at section 5.19). It is the Court's conclusion that the IAD was not wrong in

disregarding these considerations, as they do not apply to the operation of paragraph 117(9)(*d*) of the Regulations.

X. Conclusion

[57] It is the Court's conclusion that the IAD did not misapply the law or violate natural justice when it exercised its discretion to refuse to reinstate Mr. Nguyen's appeal.

[58] The Respondent cites the case of *Ohanyan*, above, for the proposition that the determination of whether it is in the interest of justice to permit a reinstatement of an appeal is a discretionary determination of the IAD which requires the Board to weigh all of the circumstances in the case. The court held that reinstatement is the exception to the norm (*Ohanyan* at para. 13). It is the Court's conclusion that in this case the IAD reasonably exercised its discretion.

JUDGMENT

THIS COURT ORDERS that

1. The application for judicial review be dismissed;

2. No serious question of general importance be certified.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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