Federal Court  Cour fédérale

Date: 20120416

Docket: IMM-5468-11

Citation: 2012 FC 438

Ottawa, Ontario, April 16, 2012

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

LUIS MANUEL MARTINEZ-BRITO

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application brought forth under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], seeking judicial review of an Immigration Appeal Division [IAD] decision dated July 19, 2011. The IAD allowed the respondent's appeal of a refusal of his son Luilly Martinez-Luna's [Luilly] application for permanent residence in Canada. The IAD determined that the respondent had established on a balance of probabilities that Luilly was his biological son and therefore a member of the family class as the respondent's dependent child

within the meaning of section 2 and paragraph 117(1)(*b*) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR].

I. Background

[2] The respondent, Mr. Luis Manuel Martinez-Brito, is a citizen of the Dominican Republic and a permanent resident of Canada since September 21, 2005. In 2008, he sponsored the application for permanent residence of his two sons Luilly and Luilivin, then 13 and 11-years old respectively.

[3] The officer reviewing Luilly's application noted in the Computer Assisted Immigration Processing System [CAIPS] that while the respondent had listed both sons in his own immigration application, filiation had not been established and the officer processing the respondent's application had not excluded the possibility of conducting a DNA test should the respondent eventually sponsor his children. It is also mentioned in the notes that while Luilly was born in 1995, his birth was only declared in 2001 (Trial Record [TR] at 32).

[4] In a letter dated November 16, 2009, the respondent was informed that after reviewing the information provided in support of the application, the officer was not satisfied that there was sufficient evidence to prove the identities of his two "presumed children" (TR at 67):

> A DNA test will serve to verify the relationship between you, Luilly and Luilivin. The decision to be tested is entirely yours and Luilly and Luilivin's responsibility. If you wish to proceed with this application, Luilly and Luilivin will be required to undergo DNA testing to establish the relationship […] If I do not receive word from you or Luilly and Luilivin within the next [two] months, stating that you will be proceeding with the DNA testing, I will assume that you are no longer interested in pursuing the sponsorship and will close the file.

The results of the DNA test, received on May 11, 2010, indicated that while Luilivin was the respondent's biological son, Luilly was not (TR at 36). In a letter dated May 12, 2010, the officer informed Luilly of the results of the DNA test and that as a result, he did not meet the requirements for immigration to Canada as a dependent child under subsections 12(1) of the IRPA and 117(1) of the IRPR (TR at 21-22).

[5] On June 4, 2010, the respondent appealed the officer's decision to the IAD. The respondent filed written submissions and supporting affidavits invoking breaches both of natural justice and the Charter (TR at 223). The Minister of Public Safety and Emergency Preparedness [the minister] argued for its part that the IAD should dismiss the appeal for lack of jurisdiction or in the alternative, that there was no violation of principles of natural justice and no contravention of the Charter (TR at 147).

II. Impugned Decision

[6] In its interlocutory decision rendered on April 11, 2011, the IAD determined that subsection 63(1) of the IRPA gave it jurisdiction over the matter and ruled that, in this particular case, the request for DNA tests to establish a biological link between the respondent and his sons violated procedural fairness and thus constituted a breach of natural justice. As a result, the DNA evidence was excluded from the proceedings, the officer's refusal was set aside, and the appeal was ordered to proceed with the respondent given an opportunity to provide any additional evidence to establish, on a balance of probabilities, that Luilly was his biological son (TR at 103).

[7] Of note, the parties agreed that if the IAD were to determine Luilly was not a dependant child as set out in section 2 and paragraph 117(1)(*b*) of the IRPR, the constitutional question

challenging the validity of these provisions would then be addressed by the IAD on the basis of the written submissions already made.

[8] A hearing to determine the relationship between Luilly and the respondent was held on June 29, 2011. In reasons dated July 19, 2011, the IAD first addressed the minister's position that it did not have jurisdiction to hear the present appeal and that the file should be sent back to the visa office. The IAD concluded that under section 67 of the IRPA, it could substitute the officer's original decision with its own without referring the matter back to the visa office. As to the issue of Luilly's relationship with his father, the IAD determined that the respondent had established on a balance of probabilities that Luilly was his biological son and that he was therefore a member of the family class within the meaning of section 2 and paragraph 117(1)(*b*) of the IRPR.

[9] Addressing the evidence before it, the IAD observed that all the testimonies heard and evidence submitted established that the respondent continued to treat Luilly as his son and that, while there was no documentary evidence to support the respondent's testimony that he continues to provide financial support for Luilly, the IAD had no reason to doubt his testimony. Regarding Luilly's birth certificate, which lists the respondent as his father, the IAD acknowledged the minister's argument that it was legitimate for the officer to investigate further to address his concerns about the respondent's paternity, as confirmed by this Court in *Azziz v Canada (Minister of Citizenship and Immigration)*, 2010 FC 663 at para 68, [2010] FCJ 767 [*Azziz*]. However, the IAD distinguished *Azziz* on the basis that there were reasons to doubt the information on the birth certificate in that case: the mother's advanced age, her decision to give birth at a midwife's rather than at a hospital, and the fact the only evidence of the presumptive birth was a certificate from the midwife (IAD Reasons at para 15).

[10] In the case at bar, the IAD notes that the respondent's paternity was not questioned by the Children Court, the social worker who conducted an evaluation prior to the custody judgment or by the judge who approved the custody agreement between the respondent and the children's mother. According to the IAD, the only factor that would have led the officer to question the respondent's paternity is the late registration of his sons' births. The IAD points out however that the registrations occurred before the respondent met his current wife and so the future prospect of sponsoring his children would play no role in the late registration.

[11] Rather, the respondent testified that because he did not register his children at the time of their birth, he would have had to pay a fine and so he waited. His former sister-in-law, who worked for 20 years at the hospital where Luilly was born, also confirmed during her testimony that the respondent could not register the boys' births at the hospital. While the IAD noted that the respondent's testimony differed somewhat from his affidavit signed on January 26, 2011 (in which he declared that it was the prohibitive cost of registration which caused the delay), the IAD deemed this insufficient to cast doubt on his credibility.

[12] While acknowledging the minister's position that fictively trying to determine biological filiation on the basis of testimonies and documents alone is very difficult, the IAD stated that this was clearly the situation contemplated by the Federal Court "[...] when it held that because of its intrusive nature, DNA testing should generally be limited to 'those relatively rare cases where viable alternatives to such testing do not exist' and that DNA evidence obtained improperly could be excluded" (IAD Reasons at para 19). It must be clarified that the IAD incorrectly attributed the citation above to the Federal Court when in fact it appears to have been taken from the IAD's decision in *Mohamad-Jabir v Canada (Minister of Citizenship and Immigration)*, [2008] IADD 44 at para 33 [*Jabir*]. However, the IAD also referred to this Court's decision in *MAO v Canada*

(Minister of Citizenship and Immigration), 2003 FC 1406 at paras 84 and 91, [2003] FCJ 1799 [*MAO*], which supports the IAD's statement above:

> 84 I agree with the Applicant that DNA evidence is "qualitatively different" from other forms of evidence. The intrusion into an individual's privacy that occurs with DNA testing means that it is a tool that must be carefully and selectively utilized. The visa officer acted as if this evidence was the only way under the former Act that the Applicant could prove his relationship to his children, instead of regarding it as one of several ways that the Applicant could establish his familial relationship to his children. In this manner, the officer fettered his discretion.
>
> […]
>
> 91 In my opinion, the DNA evidence was obtained as a result of an error by the visa officer in too narrowly interpreting the breadth of his discretion under the former Act. Further, this evidence prompted the IAD to conclude that other evidence was "immaterial". In order to remedy the unfairness to the Applicant that has resulted from this improperly obtained evidence, I direct that the DNA evidence is to form no part of the IAD's decision, upon rehearing of this matter. The Applicant has requested a direction that the DNA evidence is to be regarded as only one factor in the IAD's decision. In my view, total exclusion of this evidence is required in order for the IAD to fairly assess this matter.

[13] Finally, addressing the minister's argument that the legislator has chosen to favour biological over legal filiation, the IAD observed that while documents establishing legal filiation would be insufficient on their own to conclude biological filiation, and that testimony as to the relationship would establish only a *de facto* parent-child relationship, a combination of both types of evidence in this case led to the conclusion that the respondent has established on a balance of probabilities that Luilly was his biological son.

III. Parties' Positions

[14] The minister raises three issues before this Court. First, it argues that the IAD has no jurisdiction to hear an appeal of a decision made by a visa officer not to issue a permanent resident visa when the sponsored foreign national is not the biological or adoptive child of the sponsor. Second, it argues that the IAD's conclusion that Luilly is the respondent's biological child is wholly inconsistent with the evidence. Finally, it argues that the officer's decision to order a DNA test did not contravene the principles of natural justice. The respondent naturally disagrees with the applicant on each of these points, siding instead with the IAD's decision. The respondent also notes that if this Court were to overturn the IAD's decision, the constitutional issue remains to be dealt with and would have to be sent back to the IAD or addressed by this Court.

IV. Issues

1. Did the IAD have jurisdiction to hear the respondent's Appeal under the IRPA?

2. Did the IAD err in finding that the visa officer contravened the principles of natural justice when he requested that the respondent complete a DNA test?

3. Did the IAD err in finding that Luilly is the respondent's biological son and thus a dependent child and member of the family class under the IRPR?

V. Standard of Review

[15] The parties agree that the second issue – whether the officer contravened the principles of natural justice by ordering a DNA test – should be assessed on a standard of correctness (*Sapru v Canada (Minister of Citizenship and Immigration)*, 2011 FCA 35 at paras 25-27, [2011] FCJ 148). When applying this standard, the Court will show no deference to the IAD, instead undertaking its

own analysis to determine the correct answer (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 50, [2008] 1 SCR 190 [*Dunsmuir*]).

[16] The parties also agree that the IAD's determination of whether Luilly is the respondent's biological son is a factual finding to be assessed on the standard of reasonableness (*Dunsmuir*, above, at paras 51 and 53). This standard requires this Court to determine whether the IAD's conclusion falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above, at para 47) and as long as this outcome fits comfortably with the principles of justification, transparency, and intelligibility, it is not open to this Court to substitute its own view for a more preferable outcome (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59, [2009] 1 SCR 339).

[17] The parties disagree however as to which standard to apply to the IAD's ruling that it had jurisdiction to hear the appeal. The minister submits that this issue raises a question of law to which the standard of correctness applies and relies on *Smith v Alliance Pipeline Ltd*, 2011 SCC 7 at para 37, [2011] 1 SCR 160 [*Alliance Pipeline*], where Justice Fish observed that a tribunal's interpretation of its home statute normally attracts the standard of reasonableness, but not where the question raised demarcates the tribunal's authority from that of another specialized tribunal. The respondent contends that the issue here is not whether the appeal should have been heard by one tribunal or another, but whether it should have been heard at all. The issue called for the IAD to interpret its jurisdiction as set out in the IRPA, and as acknowledged by the Supreme Court in *Alliance Pipeline* and *Dunsmuir* before it, the reasonableness standard should apply to a tribunal's interpretation of its own statute (*Dunsmuir*, above, at para 54).

[18] Having considered that the IAD's jurisdiction to hear the appeal is determined by interpreting the relevant provisions of the IRPA and that the IAD's jurisdiction to hear this appeal would not impede any other specialized tribunal's jurisdiction, this Court finds that the appropriate standard of review is reasonableness. As stated above, this Court will only intervene if it determines that the IAD's decision does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir*, above, at para 47).

VI. Analysis

A. *Did the IAD have jurisdiction to hear the Respondent's Appeal under the IRPA?*

[19] In examining the relevant provisions of the IRPA, this Court bears in mind the remarks of Chief Justice McLachlin and Justice Major in *Canada Trustco Mortgage Co v Canada*, 2005 SCC 54 at para 10, [2005] 2 SCR 601 [*Canada Trustco*] regarding statutory interpretation:

> It has been long established as a matter of statutory interpretation 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": see *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole. [Emphasis added.]

[20] In its interlocutory decision dated April 11, 2011, the IAD determined that it had jurisdiction to hear the appeal, "[c]onsidering that this is an appeal based on [subsection] 63(1) of the [IRPA] against a decision not to issue a permanent resident visa to [Luilly] as a member of

the family class […]" (TR at 103, IAD Interlocutory Reasons at para 10). The subsection of the IRPA to which the IAD refers is as follows:

Immigration and Refugee Protection Act, SC 2001, c 27	*Loi sur l'immigration et la protection des réfugiés*, LC 2001, ch 27
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. [Emphasis added.]	**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. [Nous soulignons.]

[21] Importantly, subsection 10(6) of the IRPR clarifies that for an application to be filed "in the prescribed manner," it must be made in accordance with subsection 10(1):

Immigration and Refugee Protection Regulations, SOR/2002-227	*Règlement sur l'immigration et la protection des réfugiés*, DORS/2002-227
Form and content of application	Forme et contenu de la demande
10. (1) Subject to paragraphs 28(*b*) to (*d*), an application under these Regulations shall	**10.** (1) Sous réserve des alinéas 28*b*) à *d*), toute demande au titre du présent règlement :
(*a*) be made in writing using the form provided by the Department, if any;	*a*) est faite par écrit sur le formulaire fourni par le ministère, le cas échéant;
(*b*) be signed by the applicant;	*b*) est signée par le demandeur;

(*c*) include all information and documents required by these Regulations, as well as any other evidence required by the Act;	*c*) comporte les renseignements et documents exigés par le présent règlement et est accompagnée des autres pièces justificatives exigées par la Loi;
(*d*) be accompanied by evidence of payment of the applicable fee, if any, set out in these Regulations; and	*d*) est accompagnée d'un récépissé de paiement des droits applicables prévus par le présent règlement;
(*e*) if there is an accompanying spouse or common-law partner, identify who is the principal applicant and who is the accompanying spouse or common-law partner.	*e*) dans le cas où le demandeur est accompagné d'un époux ou d'un conjoint de fait, indique celui d'entre eux qui agit à titre de demandeur principal et celui qui agit à titre d'époux ou de conjoint de fait accompagnant le demandeur principal.

The minister has raised no grounds on which to conclude that the respondent's application did not meet these criteria.

[22] The minister is of the view however that the IAD has no jurisdiction to hear an appeal under subsection 63(1) when the sponsored foreign national is not a member of the family class. Paragraph 117(1)(*b*) of the IRPR sets out that a foreign national is a member of the family class if he or she is a dependent child of the sponsor, while section 2 of the IRPR defines a dependent child as the biological or adopted child of the parent. Hence in the case at bar, the minister argues that the IAD committed an error in law in hearing the appeal because Luilly was not the biological or adopted son of the respondent and thus not a member of the family class.

[23] To support its interpretation, the minister relies on three Federal Court decisions (*Bui v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 144, [2001] FCJ 296 [*Bui*]; *Samra v Canada (Minister of Citizenship and Immigration)* (2000), 193 FTR 263, [2000] FCJ 1491

[*Samra*]; *Bistayan v Canada (Minister of Citizenship and Immigration)*, 2008 FC 139, [2008] FCJ 169 [*Bistayan*]) and three IAD decisions which are purported to have adopted the minister's reasoning (*Watson v Canada (Minister of Citizenship and Immigration)*, [2008] IADD 2475 [*Watson*]; *Green v Canada (Minister of Citizenship and Immigration)*, [2008] IADD 1901 [*Green*]; *Guerre v Canada (Minister of Citizenship and Immigration)*, [2011] IADD 836 [*Guerre*]).

[24] For example, the minister refers to *Samra*, above, to argue that "[w]hen a person is found to be outside the member of the family class category, the IAD has no jurisdiction to hear an appeal and must dismiss it" (Applicant's Supplementary Memorandum [ASM] at paras 40-41) and relies on *Bui*, above, to argue that "the IAD cannot entertain appeals when it finds that an individual is not a 'member of the family class' as set forth in the legislation and the regulations [emphasis added]" (ASM at para 40). Yet in this second statement the minister concedes that it is the IAD that must determine that the foreign national is not a member of the family class – it must not simply rely on the finding made by the visa officer. In fact, this distinction reveals the primary flaw in the minister's argument that the IAD did not have jurisdiction to hear the respondent's appeal. This Court will now seek to clear up any confusion that may have arisen over the interpretation of the relevant provisions of the IRPA and the case law referred to by the minister.

[25] Firstly, as previously mentioned, when a decision is made not to issue a permanent resident visa to a foreign national, subsection 63(1) of the IRPA allows a right of appeal to the IAD to the person who filed that application in the prescribed manner, as set out in subsection 10(1) of the IRPR.

[26] Secondly, to allow such an appeal, subsection 67(1) of the IRPA sets out that the IAD must be satisfied at the time the appeal is disposed of that either (a) the decision appealed was wrong in law or fact or mixed law and fact, (b) a principle of natural justice had not been observed, or (c) sufficient humanitarian and compassionate [H&C] considerations warranted special relief in light of all the circumstances of the case:

Immigration and Refugee Protection Act, SC 2001, c 27	*Loi sur l'immigration et la protection des réfugiés*, LC 2001, ch 27
Appeal allowed	Fondement de l'appel
67. (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,	**67.** (1) Il est fait droit à l'appel sur preuve qu'au moment où il en est disposé :
(*a*) the decision appealed is wrong in law or fact or mixed law and fact;	*a*) la décision attaquée est erronée en droit, en fait ou en droit et en fait;
(*b*) a principle of natural justice has not been observed; or	*b*) il y a eu manquement à un principe de justice naturelle;
(*c*) other than in the case of an appeal by the Minister, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.	*c*) sauf dans le cas de l'appel du ministre, il y a — compte tenu de l'intérêt supérieur de l'enfant directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales.

[27] Thirdly, section 65 of the IRPA makes clear that the final ground to allow an appeal under paragraph 67(1)(*c*) (H&C considerations) may only be considered by the IAD once it has confirmed the foreign national is a member of the family class:

Immigration and Refugee Protection Act, SC 2001, c 27	*Loi sur l'immigration et la protection des réfugiés*, LC 2001, ch 27
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 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. [Emphasis added.]	**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 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. [Nous soulignons.]

Section 65 makes clear that when examining an appeal of a decision that a foreign national is not a member of the family class, as was the case here, the IAD must first determine for itself the status of the foreign national before it may take into account any H&C considerations pursuant to paragraph 67(1)(*c*).

[28] That being said, section 65 does not preclude the IAD from considering any remaining arguments based on an error in law or fact or mixed law and fact (paragraph 67(1)(*a*) of the IRPA) or any arguments concerning whether a principle of natural justice was not observed (paragraph 67(1)(*b*)) when such arguments have a direct bearing on the finding that the foreign national is not a member of the family class. The reason for this requirement is quite simple: if

either the error in law or fact or the breach of natural justice is irrelevant to the finding that the foreign national is not a member of the family class, the appeal would evidently fail because a foreign national who is not a member of the family class cannot be sponsored for permanent residency under subsection 13(1) of the IRPA. But where, as in the case at bar, the applicant successfully raises an issue of natural justice that goes to the finding that they are not a member of the family class, there is no question that the IAD has jurisdiction to hear such an argument under subsections 63(1) and 67(1) and to determine for itself whether this impacts on the final outcome of the decision under appeal.

[29] The IAD acknowledged this very possibility in its letter of December 30, 2010 where it explained how the respondent's appeal would be considered (TR at 181):

> If the member of the IAD decides that the sponsored foreign national is not a member of the family class, the member may dismiss the appeal because the decision to refuse a permanent resident visa would be correct […] If the member does not dismiss the appeal, the parties will be advised in writing and the IAD will continue with the regular process in considering the appeal. [Emphasis added.]

[30] By disputing the mandatory obligation to conduct DNA testing, the respondent raised an issue of natural justice which could be considered under paragraph 67(1)(*b*). Accordingly, this Court disagrees with the minister's allegation that the IAD ignored the "member of the family class" provisions in the IRPA and IRPR and instead crafted itself an appellate jurisdiction by making a finding on an issue of natural justice. Considering the general principles of statutory interpretation repeated in *Canada Trustco* and seeking to read the provisions of the IRPA as a harmonious whole, this Court finds that the application of the ordinary meaning of the precise and unequivocal wording of sections 63, 65, and 67 is reasonable in these circumstances and leads to

the conclusion that the IAD remains free to consider whether any principle of natural justice had not been observed by the visa officer and whether it was directly linked to the determination that Luilly was not a member of the family class.

[31] After hearing from both parties on this issue, the IAD determined there had indeed been a breach of natural justice and so it ordered the results of the DNA testing and any other evidence that had arisen from it to be excluded. Accordingly, whether Luilly was a member of the family class remained a live issue and the IAD was free to continue the regular appeal process. Under subsection 67(2) of the IRPA, the IAD had the jurisdiction to hear the evidence from both parties, set aside the officer's original decision, and substitute its own determination. If the IAD had instead concluded that the DNA testing did not constitute a breach of natural justice or that it did not impact the finding that Luilly was not the respondent's biological son, it could have agreed that based on the DNA evidence, Luilly was not a member of the family class and thus excluded from the possibility of sponsorship under subsection 13(1) of the IRPA.

[32] The minister has interpreted section 65 of the IRPA as having an impact on the IAD's jurisdiction to hear an appeal as set out in subsection 63(1). A reading of both provisions makes clear that section 65 does not limit the right of appeal under subsection 63(1), but rather the grounds that may be considered under section 67. Aside from two exceptions set out in subsections 64(1) and 64(3) (where the foreign national or sponsor has been deemed inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality, or where the foreign national in question has been deemed inadmissible for misrepresentation and is not the sponsor's spouse, common-law partner or child), the IAD will continue to have jurisdiction under subsection 63(1) to hear an appeal of a decision not to issue a foreign national a permanent resident visa. However, where there was a finding that the

foreign national was not a member of the family class, the IAD has jurisdiction to hear any argument as to whether an error in law or fact or a breach of natural justice directly impacts this finding. In the absence of such arguments, the appeal cannot continue as the foreign national will not qualify under subsection 13(1) regardless of any other issues raised in the appeal. The following case law from this Court and the IAD, which was raised by the minister, supports the above interpretation of the IRPA.

[33] The minister cited paragraph 32 of *Bui*, above, which reads as follows:

> When the tribunal finds that a spouse is not a "member of the family class" within the meaning of the Act, it is entitled to refuse to undertake consideration of the second part of s. 77(3). The tribunal can only make a ruling in equity when the refusal is of a non-jurisdictional kind, such as for medical reasons. However, when the refusal is jurisdictional in nature it must dismiss the appeal for want of jurisdiction and so has no power to grant special relief in equity. [Emphasis added.]

To clarify, the second part of subsection 77(3) of the old *Immigration Act* mentioned above sets out that a sponsor may appeal to the IAD on the ground that there exist H&C considerations that warrant the granting of special relief. As a result, Justice Lemieux ruled in *Bui* that before the IAD could proceed with H&C considerations, it had to determine whether the sponsored spouse had entered into the marriage in good faith, thereby first confirming his status as a member of the family class. The decision in *Bui* thus reflects precisely what is established by section 65 of the IRPA: when examining an appeal under subsection 63(1) of the IRPA, the IAD must first confirm that the foreign national is a member of the family before it may examine any H&C considerations.

[34] It should also be mentioned that Justice Lemieux confirmed in *Bui* that the hearing before the IAD as to whether the marriage was entered into in good faith was an appeal *de novo*, that the IAD was not required to simply review the officer's decision, and that the plaintiff could present new evidence to the IAD (*Bui*, above, at paras 19, 24 and 27). The same procedure was correctly applied in the case at bar, where the IAD accepted arguments from both parties and once it accepted the argument concerning natural justice, it considered *de novo* the issue of Luilly's relationship with the respondent and allowed both parties to make submissions.

[35] The minister also cited paragraph 11 of *Samra*, above, which reads as follows:

> Once a determination as to membership in the family class has been made, the jurisdictional issue of the Immigration Appeal Division must be considered. As the Appeal Division can hear only those family class appeals where the applicants are found to be within the provided definition, if the applicant is determined to be outside that category, the Appeal Division has no jurisdiction to make a determination regarding the application for landing. This is demonstrated in the decisions of Blais, J. in *Chattat v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 813, (May 26, 1999, IMM-5220-98) and Reed, J. in *Chow v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1131, (July 29, 1998, IMM-5200-97).

In *Samra*, both the immigration officer and the Appeal Division refused the applications for permanent residence on the grounds that the applicants had not been adopted in accordance with the *Immigration Regulations*, 1978 and Indian law. As the respondent rightfully points out, Justice Muldoon found in this decision that the IAD will have no jurisdiction to make a determination regarding the application for landing when the IAD itself (and not an earlier decision-maker) determines that the foreign national is not a member of the family class. In his reasons, Justice Muldoon stated clearly that the IAD refused the applications for permanent residence only after it found the applicants were not members of the family class (*Samra*, above,

at para 2). There is no indication in these reasons that the parties raised any arguments regarding errors of fact or law or breaches of natural justice directly related to the finding of non-membership in the family class.

[36] Similar conclusions were made in the two decisions referred to by Justice Muldoon. In *Chattat v Canada (Minister of Citizenship and Immigration)* (1999), 91 ACWS (3d) 804, [1999] FCJ 813, Justice Blais confirmed that the Appeal Division examined the evidence before it and determined for itself that the applicant and appellant did not have a husband-and-wife relationship. Only then did it determine that it did not have jurisdiction to proceed further. Meanwhile in *Chow v Canada (Minister of Citizenship and Immigration)* (1998), 153 FTR 236, [1998] FCJ 1131 [*Chow*], the appellant commenced an appeal to the IAD in a case where her brother had not been admitted. However, siblings did not fall under the definition of family member under the provisions of the Immigration Regulations. Hence on its face the application could not be allowed as it was not in dispute that the foreign national sponsored in the application did not meet the definition of family member as set out in the Immigration Regulations.

[37] In the same way, the three IAD decisions referred to by the minister confirm this reasoning. First, in both *Watson* and *Green*, the IAD did not question its jurisdiction to determine whether the appellant was a member of the family class. Meanwhile in *Guerre*, a one-page decision where the appellant failed to even respond to the minister's argument regarding jurisdiction, the appellant had attempted to directly sponsor a cousin, but cousins also do not fall under the definition of a member of the family class. Thus just as in *Chow*, above, it was clear from the outset that the foreign national did not qualify as a member of the family class and no arguments alleging an error in fact or law or breach of natural justice was raised in this regard.

[38] Finally, in referring to this Court's decision in *Bistayan*, above, the minister attempts to draw a parallel with paragraph 117(9)(*d*) of the IRPR. This provision sets out that a foreign national shall not be considered a member of the family class if 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 (with one exception provided for in cases where an officer had determined the foreign national was not required to be examined).

[39] The minister argues that the Federal Court has consistently found the IAD not to have jurisdiction to hear appeals where paragraph 117(9)(*d*) has come into play, but as Justice Shore rightfully points out in *Bistayan*, first "the IAD had to assess if Ms. Bistayan was a person described in paragraph 117(9)(*d*) of the Regulations before deciding if it had jurisdiction or not" (*Bistayan*, above, at para 26). The IAD thus had to determine for itself whether the foreign national fell under paragraph 117(9)(*d*) and the appellant had a right to make submissions on this issue. In fact, Justice Shore points out that the IAD did not dismiss the appellant's appeal for lack of jurisdiction, but rather that it considered the appeal, but found that the appellant's son was a person described in paragraph 117(9)(*d*) and so it did not have jurisdiction to consider H&C grounds pursuant to section 65 of the IRPA (*Bistayan*, above, at paras 31-33). Once again, this is precisely the interpretation given in these reasons to paragraph 63(1) and section 65 of the IRPA.

[40] Having determined that the IAD had jurisdiction to determine for itself Luilly's status and also to hear any arguments concerning natural justice raised by the respondent in that regard, it also bears repeating the following warning raised by the respondent when considering the validity of the minister's argument that the IAD should have no jurisdiction to consider the respondent's appeal (respondent's Supplementary Memorandum at paras 20-25):

> Moreover, the [IAD] would be unable to condemn a breach of natural justice from the moment that proof obtained by such breach had a material effect on the qualification of an Applicant as a member of the family class;
>
> It seems unlikely that the legislator would have wanted to reward breaches of natural justice, shielding officers from an Appeal whenever proof obtained illegally is probing;
>
> It is especially so given the fact that the [IAD] was clearly given jurisdiction in breaches of natural justice at [section] 67 of the IRPA;
>
> Applicant's logic deprives article 67 of any meaning;
>
> If one were to follow Applicant's logic, the IAD would only have jurisdiction on a natural justice issue when the result of such a breach is immaterial to the file;
>
> An Appeal on a question of natural justice would thus become an illusory recourse; […]

This Court agrees with the respondent's concerns that if the IAD were not to have jurisdiction to consider this matter, then an appellant in a similar situation could very well find him or herself with no recourse despite an apparent breach of natural justice which impacts on the qualification to be made. The respondent points out that such an outcome would clearly contradict the Supreme Court's recognition that: "[…] there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual" (*Cardinal v Kent Institution*, [1985] 2 SCR 643 at para 14, [1985] SCJ 78).

[41] Finally, it is worth mentioning that this Court has ruled in similar cases that where sponsors proceeded immediately with an application for judicial review, they had not exhausted their right of appeal to the IAD (*Li v Canada (Minister of Citizenship and Immigration)*, 2006

FC 1109 at para 20, [2006] FCJ 1409 and *Landaeta v Canada (Minister of Citizenship and Immigration)*, 2012 FC 219 at para 24, [2012] FCJ 258).

B. *Did the IAD err in finding that the visa officer contravened the principles of natural justice when he requested that the respondent complete a DNA test?*

[42] In determining that the officer had contravened the principles of natural justice, the IAD relied predominantly on this Court's decision in *MAO*, above, where Justice Heneghan examined a case that shares many parallels with the matter before us. Among her conclusions, Justice Heneghan determined that the IAD had committed an error in law by interpreting the former Act as requiring a visa officer to demand that the applicant provide DNA evidence and also by failing to inquire as to whether the visa officer erred in requesting the DNA evidence from the applicant (*MAO*, above, at para 78).

[43] Of particular importance to Justice Heneghan was the fact that the officer in that case had requested the DNA tests from the applicant in a manner that left no choice but to undergo the testing: "Failure to undergo a DNA blood test will likely lead to the refusal of an application […] If we do not hear from you within 3 months of the date of this letter we will assume that there is no interest in doing the test and we will proceed accordingly with the refusal of the application" (*MAO*, above, at para 81). In strikingly similar fashion, the officer in the present case also left the respondent no choice: "If you wish to proceed with this application, Luilly and Luilivin will be required to undergo DNA testing to establish the relationship […] If I do not receive word […] within the next [two] months, stating that you will be proceeding with the DNA testing, I will assume that you are no longer interested in pursuing the sponsorship and will close the file" (TR at 67).

[44] In light of the fact the former Act contained no requirement that an applicant undergo DNA testing when other traditional forms of documentation were not available (and the minister has given no indication the IRPA or IRPR now contains such a requirement), Justice Heneghan considered the letter from the officer to be "[…] improper and unfair. While in some circumstances DNA evidence may be considered necessary by the deciding officer, in the present case, the visa officer did not consider whether the applicant could provide other evidence" (*MAO*, above, at para 83). In the present case it is apparent the officer also treated DNA testing as if it were the only option available to confirm the respondent's paternity, failing to even raise the possibility that other evidence could be provided. Yet Justice Heneghan warned against precisely this type of behaviour (*MAO*, above, at paras 83-84):

> 83 In my opinion, the visa officer's letter requesting the DNA evidence, stating that if it was not provided the application would "likely" be refused, was improper and unfair. While in some circumstances DNA evidence may be considered necessary by the deciding officer, in the present case, the visa officer did not consider whether the Applicant could provide other evidence.
>
> 84 […] The intrusion into an individual's privacy that occurs with DNA testing means that it is a tool that must be carefully and selectively utilized. The visa officer acted as if this evidence was the only way under the former Act that the Applicant could prove his relationship to his children, instead of regarding it as one of several ways that the Applicant could establish his familial relationship to his children. In this manner, the officer fettered his discretion. [Emphasis added.]

Justice Heneghan determined that the only appropriate relief in that case was to send the matter back for redetermination and to order that the DNA evidence form no part of the IAD's decision upon rehearing the matter.

[45] Should there be any doubt as to whether Justice Heneghan's views are still applicable today, almost a decade later, Citizenship and Immigration Canada's [CIC] operation manuals are certainly enlightening in this case. Section 5.10 of operating manual *OP 1 – Procedures* advises immigration officers of the following: "5.10 When is a DNA test appropriate? A DNA test to prove relationship is a last resort. When documentary submissions are not satisfactory evidence of a bona fide relationship, officers may advise applicants that positive results of DNA tests by a laboratory listed in Appendix E are an acceptable substitute for documents." Also of note is the suggested sample letter for requesting DNA tests provided in Appendix D, which includes the following excerpts that reveal important differences between it and the letter sent by the officer:

> […]
>
> Since the documentary evidence you have provided does not enable us to establish parentage between you and the child, and you are unable to obtain other documentary evidence, in place of documentary evidence we will accept the results of a DNA analysis carried out by a laboratory accredited by the Standards Council of Canada for DNA testing.
>
> […]
>
> **DNA tests are not mandatory.**
>
> If we are not advised within 90 days by a laboratory that you will undergo DNA testing, we will assume that you are no longer interested in providing a DNA test result and will render a decision based on the information available to us at that time.
> [Emphasis added.]

[46] The officer in the case at bar appears never to have considered – let alone suggested – any alternative to DNA testing. Instead, without analyzing the evidence already submitted, basing himself solely on the fact the respondent had not registered his children until 2001, and without giving an opportunity to explain this omission or to provide any other documentary

evidence, the officer simply demanded that the respondent and his sons undergo DNA testing or the file would be closed (see CAIPS notes in TR at 32-33). In doing so, the officer completely disregarded this Court's warning that DNA testing is "a tool that must be carefully and selectively utilized" (*MAO*, above, at para 84) and ignored the CIC's operation manual which makes clear that DNA testing "is a last resort." While not law and not binding, these manuals have been recognized by this Court as valuable guidelines to the immigration officers in carrying out their duties (*Frank v Canada (Minister of Citizenship and Immigration)*, 2010 FC 270 at para 21, [2010] FCJ 304 and *John v Canada (Minister of Citizenship and Immigration)*, 2010 FC 85 at para 7, [2010] FCJ 100).

[47] Many of the considerations which explain why officers should not consider DNA testing as the only means to determine filiation were set out by the IAD in *Jabir*, above, at paragraph 33:

> A request for DNA testing should be limited generally to those relatively rare cases where viable alternatives to such testing do not exist. The reason for this relates to the intrusive nature of such testing, the high costs involved in undertaking the same, the accompanying delays in the immigration process in obtaining such testing, and religious and philosophical reasons for refusing or being reluctant to undertake such testing. The concern is ultimately a question of whether it is reasonable to obtain such testing in the context on the one hand of practical considerations such as efficiency and the like and on the other hand in the context of personal considerations involving such concerns as cultural and religious categorical imperatives. It involves in part a balancing process with a view to achieving a meaningful and fair disposition of the issue involved.

[48] In spite of this, the minister submits that the officer's request to conduct a DNA test did not constitute a violation of natural justice as there were concerns raised by the late registration of Luilly's birth more than six years after it occurred. The minister invokes section 55 of the *Dominican Civil Code*, which requires that births in the country be registered within 5 or 15 days

of the birth of a child depending on the circumstances (TR at 169-171). While the minister blames the IAD for not mentioning this law in its reasons, there is also no mention of it in the CAIPS notes and so no evidence that the law was of any concern to the officer. The respondent also adds that there is no proof the law was in place at the time of Luilly's birth nor is there any evidence that the law was ever enforced by authorities.

[49] The minister points to events that followed the officer's decision, including certain contradictions found in the respondent's testimony, as raising further questions and concerns as to the delay to register Luilly's birth. However, as the respondent rightfully points out, these subsequent events have no role to play in determining whether the officer's initial decision to order DNA tests constituted a breach of natural justice.

[50] The applicant's attempt to distinguish *MAO*, above, by emphasizing Justice Heneghan's remarks that she was dealing with a unique factual situation fail to sway this Court. As previously established, the same factors that led Justice Heneghan to her decision (the fact that the officer completely disregarded alternatives to DNA testing and left the applicants with no choice but to proceed with it) were present in this case and lead this Court to draw the same conclusion. As a result, this Court finds the IAD's determination that a breach of natural justice had occurred to be correct.

[51] Regarding the decision to exclude the DNA evidence, the respondent refers this Court to the following statement made by the Supreme Court in *R v G (B)*, [1999] 2 SCR 475 at para 33, [1999] SCJ 29, arguing there is no reason not to apply this ruling to the present procedure:

> To reintroduce an involuntary statement in this way would run counter to the most fundamental aspect of trial fairness. In many cases, as here, the guilt of the accused will depend solely on his or

> her credibility and on that of the other witnesses. To allow the statement to be used, even for the limited purpose of undermining the credibility of the accused, could lead to abuse and serious injustice. That is why the traditional rule, which is still in force in Canadian law, must be interpreted in such a way that no use may be made of an inadmissible statement at any stage whatsoever of the trial.

The minister did not raise any argument concerning whether exclusion of the DNA evidence was the appropriate remedy in these circumstances and this Court sees no reason to question the IAD's decision, which is consistent with what was ordered in *MAO*, above.

C. *Did the IAD err in finding that Luilly is the respondent's biological son and thus a dependent child and member of the family class under the IRPR?*

[52] The minister submits that it was unreasonable for the IAD to conclude that the respondent had established that he was Luilly's biological father and that it ignored or failed to consider "the most significant evidence in this case" (ASM at para 67). The minister refers for example to the respondent's written submissions sent in response to the IAD's preliminary letter of December 30, 2010, in which the respondent acknowledges that only one of his two children is his biological child (TR at 235 and 606). A similar admission is made in the Notice of Constitutional Question filed by the respondent (TR at 183). Finally, the minister highlights the respondent's affidavit of January 26, 2011, in which the respondent alludes to the DNA test results (TR at 260 and 262), and the transcript of the hearing, which shows that the respondent is fully aware that he is not Luilly's biological father (TR at 613-614).

[53] This Court rejects the minister's arguments and agrees with the respondent that the order to exclude the DNA evidence also excludes not only the arguments or declarations made in order to obtain that exclusion, but also any evidence that is attributable only to the DNA test. To do otherwise would justify the breach of natural justice. Consequently the issue is whether, after

having excluded any evidence that arose directly from the DNA testing, the respondent was able to establish on a balance of probabilities that he was the biological father of Luilly. In light of the testimonial and documentary evidence in this case, this Court finds that the IAD's decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law as called for by *Dunsmuir*, above, at paragraph 47.

[54] The parties were invited to submit questions for certification and the minister submitted the following:

> Under section 63(1) of the *Immigration and Refugee Protection Act*, does the Immigration Appeal Division have jurisdiction to hear an appeal when the foreign national who filed an application for permanent residence is not, in relation to his sponsor, his biological or adopted child pursuant to the definitions of "dependent child" and "member of the family class" at sections 2(1) and 117(1)*b*) of the *Immigration and Refugee Protection Regulations*?

[55] For its part, the respondent submitted three questions for certification, of which the first reiterates the minister's question with the underlined addition:

> 1. Under section 63(1) of the *Immigration and Refugee Protection Act*, does the Immigration Appeal Division have jurisdiction to hear an appeal when the foreign national who filed an application for permanent residence is not, <u>as deemed by the minister acting through its local representative in a Canadian visa office</u>, in relation to his sponsor, his biological or adopted child pursuant to the definitions of "dependent child" and "member of the family class" at sections 2(1) and 117(1)*b*) of the *Immigration and Refugee Protection Regulations*?
>
> 2. Does the Immigration Appeal Division have jurisdiction to determine whether or not there has been a breach of natural justice with respect to a decision made by the Minister acting through its local representative in a Canadian visa office, as to whether or not a foreign national who filed an application for

> permanent residence in the prescribed manner is, in relation to his sponsor, his biological or adopted child?
>
> 3. If a genetic test of paternity is conducted in violation of the basic rights of an applicant for permanent residence as a sponsored person in the family class, in the category of a "dependent child," and is set aside for this reason by the Immigration Appeal Division, can the Immigration Appeal Division render a fresh decision on paternity on such other evidence that may be available in the file?
>
> [Emphasis added.]

[56] This Court agrees with the minister's submission that the second and third questions raise an argument as to the scope of the jurisdiction of the IAD that need not be raised as stand-alone questions and may already be addressed within the confines of the first question.

[57] With regard to the first question, the minister submits that the first question should not assume that the application was filed in the "prescribed manner," but this Court disagrees with the minister's assertion that the addition to the question proposed by the respondent lacks neutrality. In this case, it is not in dispute that the determination Luilly was not a member of the family class was a determination made by the minister acting through its local representative in a Canadian visa office. The question remains whether in such cases, the IAD has jurisdiction to hear an appeal of this type of decision and on what grounds. Accordingly, the question will be certified as follows:

> Under section 63(1) of *the Immigration and Refugee Protection Act*, does the Immigration Appeal Division have jurisdiction to hear an appeal when the foreign national who filed an application for permanent residence is not, in relation to his sponsor, his biological or adopted child pursuant to the definitions of "dependent child" and "member of the family class" at sections 2(1) and 117(1)*b*) of the *Immigration and Refugee Protection Regulations*, as deemed by the minister acting through its local representative in a Canadian visa office?

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed and the following question is certified:

> Under section 63(1) of the *Immigration and Refugee Protection Act*, does the Immigration Appeal Division have jurisdiction to hear an appeal when the foreign national who filed an application for permanent residence is not, in relation to his sponsor, his biological or adopted child pursuant to the definitions of "dependent child" and "member of the family class" at section 2 and paragraph 117(1)(*b*) of the *Immigration and Refugee Protection Regulations*, as deemed by the minister acting through its local representative in a Canadian visa office?

"Simon Noël"

_____

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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