Federal Court  Cour fédérale

Date: December 16, 2013

Docket: IMM-1514-13

Citation: 2013 FC 1253

Ottawa, Ontario, December 16, 2013

PRESENT: THE CHIEF JUSTICE

BETWEEN:

KUOK MIO IAO

Applicant

And

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This Application for judicial review concerns a decision by the Immigration Appeal Division [IAD] of the Immigration and Refugee Board of Canada. In its decision, the IAD dismissed Ms. Iao's appeal from a decision of a visa officer denying her husband's application for a permanent resident visa.

[2] The IAD's decision was based on its finding that Ms. Iao is not a sponsor within the meaning of paragraphs 130(1)(b) and 133(1)(a) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations].

[3] Ms. Iao submits that the IAD erred by:

i. applying an incorrect test in determining whether she "resides in Canada," within the meaning of the Regulations;
ii. reaching an unreasonable finding of fact in determining that she does not reside in Canada; and
iii. misconstruing the provisions in section 65 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], including its jurisdiction thereunder.

[4] For the reasons that follow, this Application is dismissed.

I. Background

[5] Ms. Iao immigrated to Canada and became a permanent resident in 1997.

[6] Shortly after arriving in Canada with her first husband and their two children, she was divorced. A few years later, she married her second husband in China and applied to sponsor his application for permanent residence in Canada. However, she withdrew her sponsorship of that

application the following year. According to the divorce document, she and her second husband never lived together.

[7] Ms. Iao testified that upon obtaining that divorce she began to develop a romantic relationship with Mr. Qing Shi Zeng. On December 13, 2010, she sponsored the permanent resident applications of Mr. Zeng and his children, as members of the family class, pursuant to section 13 of the IRPA.

[8] On July 28, 2011, the visa officer refused those applications on the following three grounds:

i. Ms. Iao did not continuously reside in Canada between the date of her application and the date of the decision, as contemplated by paragraph 133(1)(a) of the Regulations;
ii. Pursuant to section 4 of the Regulations, the officer was not satisfied that Ms. Iao's marriage to Mr. Zeng is genuine and that the primary reason for the marriage is other than for the purpose of gaining admission to Canada; and
iii. Pursuant to section 39 of the IRPA, the officer was not satisfied that adequate arrangements for the care and support of Mr. Zeng and his dependents had been made.

II. The Decision under Review

[9] The IAD dismissed Ms. Iao's appeal from the visa officer's decision on the basis that she had not met her burden of demonstrating that she resides in Canada, as required by paragraph 130(1)(b) of the Regulations. In addition, the IAD determined that she had failed to establish that

she was residing in Canada from the date of the application until the date of the visa officer's decision, as required by paragraph 133(1)(a). The IAD further determined that if a sponsor failed to meet any of the requirements in sections 130 and 133, it would not have any discretionary jurisdiction to consider humanitarian and compassionate considerations under section 65 of the IRPA.

III. Relevant legislation

[10] For the purposes of this Application, the definition of a "sponsor" is set forth in subsection 130(1) of the Regulations, as follows:

130. (1) Subject to subsections (2) and (3), a sponsor, for the purpose of sponsoring a foreign national who makes an application for a permanent resident visa as a member of the family class or an application to remain in Canada as a member of the spouse or common-law partner in Canada class under subsection 13(1) of the Act, must be a Canadian citizen or permanent resident who:	130. (1) Sous réserve des paragraphes (2) et (3), a qualité de répondant pour le parrainage d'un étranger qui présente une demande de visa de résident permanent au titre de la catégorie du regroupement familial ou une demande de séjour au Canada au titre de la catégorie des époux ou conjoints de fait au Canada aux termes du paragraphe 13(1) de la Loi, le citoyen canadien ou résident permanent qui, à la fois :
(*a*) is at least 18 years of age;	*a*) est âgé d'au moins dix-huit ans;
(*b*) resides in Canada; and	*b*) réside au Canada;
(*c*) has filed a sponsorship application in respect of a member	*c*) a déposé une demande de parrainage pour le compte d'une personne

of the family class or the spouse or common-law partner in Canada class in accordance with section 10.	appartenant à la catégorie du regroupement familial ou à celle des époux ou conjoints de fait au Canada conformément à l'article 10.

[11] The foregoing *definition* of the term "sponsor" is distinct from the provisions in subsection 133(1) of the Regulations, which establish the *requirements* of a sponsor. Among other things, the latter provisions state:

133. (1) A sponsorship application shall only be approved by an officer if, on the day on which the application was filed and from that day until the day a decision is made with respect to the application, there is evidence that the sponsor	133. (1) L'agent n'accorde la demande de parrainage que sur preuve que, de la date du dépôt de la demande jusqu'à celle de la décision, le répondant, à la fois :
(*a*) is a sponsor as described in section 130;	*a*) avait la qualité de répondant aux termes de l'article 130;

[12] When the IAD is considering an appeal in respect of an application based on membership in the family class, section 65 of the IRPA provides that it "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."

[13] The complete versions of sections 130 and 133 of the Regulations and section 65 of the IRPA are set forth in Appendix 1 to these reasons.

IV. Standard of Review

[14] The issue that Ms. Iao has raised regarding the test that was applied by the IAD in determining whether she "resides in Canada," within the meaning of the Regulations, is a question of statutory interpretation.

[15] There is a close connection between the Regulations and the IAD's functions. The IAD also has particular familiarity with the Regulations. Accordingly, the question that Ms. Iao has raised is presumed to be reviewable on a standard of reasonableness, unless it falls in one of the categories of questions to which the correctness standard continues to apply (*McLean v British Columbia (Securities Commission)*, 2013 SCC 67, at paras 21-22 [*McLean*]). Those categories are (i) constitutional questions, (ii) questions of law that are of central importance to the legal system as a whole and that are outside the adjudicator's expertise, (iii) questions regarding the jurisdictional lines between two or more competing specialized tribunals, and (iv) true questions of jurisdiction or *vires* (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654 [*Alberta Teachers*], at paras 30, 34 and 46; *Smith v Alliance Pipeline Ltd*, 2011 SCC 7, [2011] 1 SCR 160, at paras 26-28; *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at paras 54-61 [*Dunsmuir*]. I am satisfied that the question that Ms. Iao has raised does not fall within any of those categories (*McLean*, above, at paras 25-33). Indeed, Ms. Iao has not made any submissions to the contrary. I am also satisfied that this question is not otherwise so exceptional as to warrant review on a standard of correctness (*Alberta Teachers*, above, at para 34). It is therefore reviewable on a standard of reasonableness.

[16] It is common ground between the parties, and I agree, that the second issue raised by Ms. Iao, concerning the reasonableness of the IAD's findings of fact with respect to her residency in Canada, is reviewable on a standard of reasonableness.

[17] I am also satisfied that the third issue raised by Ms. Iao, concerning the IAD's interpretation of section 65 of the IRPA, is reviewable on a standard of reasonableness. Ms. Iao takes the position that this issue is reviewable on a standard of correctness, because the IAD misconstrued its jurisdiction. In her view, this would bring the issue within one of the four categories of statutory interpretation mentioned above, to which a standard of correctness continues to apply.

[18] I disagree. As explained in *Alberta Teachers*, above, at para 34, and confirmed in *McLean*, above, at para 25, the category of true questions of jurisdiction should be interpreted narrowly when the Court is reviewing an administrative tribunal's interpretation of its "home statute." This is because much of what such tribunals do that involves the interpretation of their home statutes is based on their determination of whether they have the authority or jurisdiction to do what is being challenged on judicial review. For this reason, questions arising out of such interpretations are presumed to be reviewable on a standard of reasonableness. Ms. Iao did not advance any argument directed towards displacing this presumption and it is not apparent to me why this situation is so exceptional that the presumption should not apply.

V. Analysis

(A) Did the IAD err by applying an incorrect test in determining that Ms. Iao does not "reside in Canada," within the meaning of the Regulations?

[19] The IAD's determination that Ms. Iao does not reside within Canada was made in the context of its assessment of whether she met the requirements of paragraphs 130(1)(b) and 133(1)(a) of the Regulations.

[20] In this regard, the IAD initially focused upon what the parties have characterized as being the "lock-in" period set forth in paragraph 133(1)(a), namely, the period between the date upon which Ms. Iao's husband filed his sponsored application for permanent residence (December 13, 2010) and the date upon which the visa officer made the adverse decision on that application (July 28, 2011).

[21] In approaching the issue of whether Ms. Iao "resided in Canada" throughout the lock-in period, the IAD applied a modified form of a qualitative test for citizenship that was articulated by Justice Reed in *Koo (Re)*, [1993] 1 FC 286, at para 10 [*Koo*].

[22] In *Koo*, above, Justice Reed identified the following six questions to be addressed in determining whether an applicant for citizenship "regularly, normally or customarily" lives in Canada, within the meaning of a line of jurisprudence that had evolved under paragraph 5(1)(c) of the *Citizenship Act*, RSC 1985 c C-29:

i. Was the individual physically present in Canada for a long period prior to recent absences which occurred immediately before the application for citizenship?

ii. Where are the applicant's immediate family and dependents (and extended family) resident?

iii. Does the pattern of physical presence in Canada indicate a returning home or merely visiting the country?

iv. What is the extent of the physical absences – if an applicant is only a few days short of the 1,095-day total it is easier to find deemed residence than if those absences are extensive?

v. Is the physical absence caused by a clearly temporary situation such as employment as a missionary abroad, following a course of study abroad as a student, accepting *temporary* employment abroad, accompanying a spouse who has accepted temporary employment abroad?

vi. What is the quality of the connection with Canada: is it more substantial than that which exists with any other country?

[23] In *Gao v Canada (Citizenship and Immigration)*, 2011 CanLII 48092 (IRB) [*Gao*], the IAD applied an adapted form of this test in the spousal sponsorship context. The focus of this modified test was stated to be upon whether the appellant had "centralized his mode of living in Canada" (*Gao*, above, at para 18). The adapted formulation of the factors articulated in *Koo*, above, was as follows:

i. Was the individual physically present in Canada for a long period prior to recent absences, which occurred immediately before or during the application to sponsor the applicant for a permanent resident visa?

ii. What is the extent of the appellant's physical absences?

iii. Where are the appellant's immediate family and dependents?

iv. Does the pattern of physical presence in Canada indicate a returning home or merely visiting the country?

v. What is the quality of the connection with Canada: Is it more substantial than that which exists with any other country?

[24] In the decision under review, the IAD adopted the same test and assessment factors that were articulated in *Gao*, above.

[25] Ms. Iao submits that the IAD erred in applying the *Koo* test for citizenship in essentially "a wholesale manner," in the spousal sponsorship context. In this regard, Ms. Iao asserts that the use of the *Koo* test in a spousal sponsorship context is inappropriate and prejudicial, at least in part because it can place a sponsor in a "catch-22" situation. This can occur when a sponsor considers it to be necessary to spend significant periods of time with an overseas spouse, to establish the genuineness of the marriage. Ms. Iao notes that such periods spent abroad and the allocation of resources to the country where the spouse resides can weigh against the sponsor if the *Koo* test is applied.

[26] Ms. Iao maintains that the *Koo* test makes no concession for this consideration in the spousal sponsorship context. Among other things, she submits that what constitutes a "reasonable" absence from Canada in the spousal sponsorship context may well differ from what is "reasonable" in the citizenship context. She submits that a more liberal test that accomplishes the objectives of the IRPA, presumably including the family reunification objective set forth in paragraph 3(1)(d), is therefore more appropriate. She adds that the test applied in the spousal sponsorship context should recognize the possibility that a sponsor may reside in more than one jurisdiction, as is the case with taxpayers under tax law.

[27] In my view, it was not unreasonable for the IAD to have applied the adapted form of the *Koo* test that it embraced. Contrary to Ms. Iao's submissions, the IAD did not apply the *Koo* test in "a wholesale manner."

[28] The IAD explicitly recognized the potential "catch-22" situation identified by Ms. Iao. In recognition of the fact that "a genuinely married couple would wish to spend time together as much as possible," the IAD observed that a "strict physical residence test is too restrictive." This is why it embraced the modified form of the *Koo* test that was articulated in *Gao*, above. Given the modifications that were made to the *Koo* test, it was entirely reasonable and appropriate for the IAD to proceed in this manner.

[29] The principal differences between the factors assessed in applying the *Koo* test and those considered in applying the test that was embraced by the IAD in both *Gao*, above, and the decision under review in this Application, are as follows:

i. The reference, in the second *Koo* factor, to an applicant's extended family was eliminated;

ii. The fourth factor from *Koo*, relating to the extent of physical absences from Canada, was modified to eliminate both the reference to an applicant being "only a few days short of the 1,095 day total" and the language regarding the potential adverse consequences to the applicant where his or her absences from Canada are more extensive;

iii. The fifth factor, which contemplates that clearly *temporary* absences from Canada should not weigh against an applicant, was entirely eliminated.

[30] On the particular facts of this case, each of these modifications appears to have benefited Ms. Iao. This is because most of her extended family appears to be in China and her absences from Canada were more extensive than what is contemplated by the fourth and fifth factors in the approach that was adopted in *Koo*, above. With the elimination of those considerations in the modified approach, the fact of having a significant extended family abroad and the fact of having had absences that were more than temporary in nature would not necessarily be weighed against Ms. Iao and others in her situation.

[31] More importantly, the factors considered by the IAD in its assessment of whether Ms. Iao was residing in Canada throughout the lock-in period are eminently reasonable in the context of paragraph 130(1)(b) of the Regulations. In brief, those factors require a consideration of the extent of physical presence in Canada prior to sponsoring an application for permanent residence, the extent of physical absences from Canada, the location of immediate family members and

dependents, a comparison between the quality of connection to Canada and any connection with another country, and whether the pattern of physical presence in Canada indicates a returning home or merely visiting Canada. In my view, each of those factors goes to the heart of the issue of whether a person "resides in Canada," for the purposes of paragraph 130(1)(b).

[32] Of course, other factors may also be considered, provided that they assist in the determination of whether the sponsor has "centralized his or her mode of living in Canada." In my view, this is not an unreasonable test to apply in the sponsorship context. Indeed, it is an entirely reasonable one, particularly given the objective set forth in paragraph 3(1)(e) of the IRPA, namely: "to promote the successful integration of permanent residents into Canada, while recognizing that integration involves mutual obligations for new immigrants and Canadian society."

[33] In my view, a test that might allow for a sponsor to continue to have a centralized mode of living outside Canada would be inconsistent with this objective. It would also arguably be inconsistent with the objective set forth in paragraph 3(1)(a) of the IRPA, namely: "to permit Canada to pursue the maximum social, cultural and economic benefits of immigration." In any event, contrary to Ms. Iao's assertion, the IAD is not required to apply a test that allows for the possibility that a sponsor might continue to have a centralized mode of living outside Canada.

(B) Did the IAD reach an unreasonable finding of fact in determining that Ms. Iao does not reside in Canada?

[34] Ms. Iao submits that the IAD made an unreasonable finding of fact with respect to her residence in Canada. Specifically, she asserts that it was unreasonable for the IAD to have ascribed

negative weight to the fact that her immediate family, including her spouse and most of her dependents, reside in China. In addition, she maintains that it was unreasonable for the IAD to conclude that she does not reside in Canada, given the following:

i. Her current permanent resident card was issued in 2009, based on her meeting residency requirements under the IRPA, and does not expire until 2014;
ii. The information contained in her Canadian income tax records for the taxation years 2009, 2010 and 2011;
iii. A daughter from a prior marriage lives in Vancouver with one of her ex-husbands;
iv. She was able to describe the lower level of a house she had been renting for approximately six or seven years, as well as the landlord.

[35] I agree with the Respondent that Ms. Iao is essentially asking the Court to reweigh the evidence that was before the IAD.

[36] The IAD specifically addressed Ms. Iao's submission regarding the significance of her permanent residence card, albeit in the context of discussing the application of section 65 of the IRPA, discussed in the next section below. This demonstrates that the IAD considered this evidence and was alive to Ms. Iao's submissions regarding its potential relevance.

[37] With respect to the years 2009, 2010 and 2011, the IAD did mention Ms. Iao's income tax Notice of Assessments and income tax calculations. However, it considered other evidence to be more probative and reliable, namely, the evidence given by her current spouse to the visa officer on

July 28, 2011. Based on that evidence, the IAD calculated that Ms. Iao had been in China for a total of 404 days of a possible 555 days, or approximately 73% of the time, from the day she left Canada to join her spouse in December 2009 until the time of the visa officer's decision. The IAD added that Ms. Iao also travelled to Malaysia and Singapore on three occasions during that period, and that she spent over 71% of her time in China during the shorter lock-in period. It was not unreasonable for the IAD to conclude that this pattern of physical presence in Canada and China, respectively, was "not a positive factor in her appeal."

[38] The IAD also explicitly addressed the fact that Ms. Iao has a daughter living in Canada who has lived with Ms. Iao's first husband since 1998. However, it chose to place greater weight on the fact that the rest of her immediate family lives in China. This includes her son, who works with her there, her spouse and her parents. It was reasonably open to the IAD to have done so.

[39] In addition, the IAD specifically discussed the house where Ms. Iao stated that she has resided in Canada for the last six or seven years, as well as its owner. However, once again, it was reasonably open to the IAD to conclude that Ms. Iao's pattern of physical presence indicates that she is merely visiting Canada, and not returning home, based on the following:

i. She failed to provide any further evidence of her habitation at that house, such as a lease agreement, cancelled cheques or other documentary evidence;

ii. She provided a vague response when asked how she knew the landlord;

iii. She does not own any property or other assets in Canada;

iv. There is little money in either of her two Canadian bank accounts;

v. She could not provide proof of any sales in Canada, or any other documents, to corroborate her claim that she does business in Canada; and

vi. On the occasions when she returned to Canada, it was for short periods of time.

[40] In addition to the foregoing, it was not unreasonable for the IAD to conclude that Ms. Iao's quality of connection to China is greater than it is to Canada, based on the following:

i. The substantial period of time she spent in China, relative to Canada, in the past several years;

ii. The fact that her business is registered in China;

iii. She has substantial amounts of money in each of her three bank accounts in China; and

iv. Her inability to explain why she could not find a job in Canada or expand her business in this country.

[41] After assessing the various quantitative and qualitative factors that it found weighed in favour of concluding that Ms. Iao does not reside in Canada, the IAD observed that Ms. Iao had provided "little documentary proof of establishment in Canada" and that she had failed to demonstrate that she is committed to residing in Canada in the near future.

[42] Based on all of the foregoing, the IAD concluded that, on a balance of probabilities, Ms. Iao does not reside in Canada, as contemplated by paragraph 130(1)(b) of the Regulations.

[43] In my view, that conclusion falls well "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above, at para 47). The reasons given for this conclusion were also appropriately justified, transparent and intelligible.

(C) Did the IAD err by misconstruing the provisions in section 65 of the IRPA, including its jurisdiction thereunder?

[44] Ms. Iao's submissions on this issue are long and repetitive. Those submissions can be boiled down to the following: The IAD erred by stating that, pursuant to section 65, it has no discretionary jurisdiction to consider humanitarian and compassionate [H&C] considerations if a sponsor fails to meet the requirements set forth in subsection 130(1) of the Regulations and the "other requirements listed in subsection 133(1)." The IAD compounded this error by (i) incorporating the lock-in period described in subsection 133(1) into the definition of the term "resides in Canada" that is set forth in paragraph 130(1)(b), and then by (ii) exclusively or unduly focusing on the lock-in period when it assessed whether Ms. Iao met the definition of a sponsor that is set forth in paragraph 130. Ms. Iao maintains that the IAD should have considered the time that she spent in Canada both before and after the lock-in period, in determining whether she "resides in Canada," as contemplated by paragraph 130(1)(b). Ms. Iao adds that a sponsor may not meet the requirements for a sponsor, as set forth in section 133, but still be eligible for an exception on H&C grounds, provided that he or she "is a sponsor within the meaning of the regulations," as stipulated in section 65 of the IRPA, and as set forth in paragraph 130(1)(b).

[45] I agree with Ms. Iao's position that, in determining whether a "sponsor is a sponsor within the meaning of the regulations" for the purposes of the H&C limitation in section 65 of the IRPA,

section 133 of the Regulations is not relevant. The latter section deals solely with the *requirements* for a sponsor, when a sponsorship application is assessed. In considering the potential application of section 65, the IAD should focus solely on whether the applicant for such a visa is a member of the family class and whether their sponsor is a sponsor within the meaning of section 130. An individual may not meet the *requirements* for a sponsor set forth in section 133, yet still "reside in Canada," within the meaning of paragraph 130(1)(b).

[46] To the extent that the IAD may have believed that section 65 precluded it from considering H&C considerations unless Ms. Iao met the requirements of section 133, in addition to those set forth in section 130, it erred. However, on a reading of its decision as a whole, I am satisfied that this error was not material. This is because the IAD also explicitly found that Ms. Iao "does not reside in Canada as required by paragraph 130(1)(b) of the Regulations." Based on that finding, the IAD was precluded by section 65 of the IRPA from assessing H&C considerations.

[47] In reaching its conclusion on the broader issue of whether Ms. Iao "resides in Canada," the IAD noted that she had spent almost 75% of her time since December 2009 in China, as well as additional time in Singapore and Malaysia. In addition, the IAD observed that, apart from her income tax calculations for one year and her Notice of Assessments for the years 2010 and 2011, she had demonstrated little proof of establishment in Canada. The IAD also noted that her establishment in China was greater than her establishment in "China." I am satisfied that this latter reference to China was a typographical error, and that the IAD was in fact referring to Canada at this point in its statement. Moreover, the IAD stated that it had not been persuaded by Ms. Iao that she is committed to residing in Canada in the near future, given her reasons for continuing her

business in China. In my view, the foregoing reasons provided a reasonable basis for the IAD's conclusion that Ms. Iao does not "reside in Canada," within the meaning of paragraph 130(1)(b) of the Regulations.

[48] Turning to the period of time covered by the IAD's assessment, it is settled law that an appeal before the IAD "is a hearing *de novo* in a broad sense" (*Kahlon v Canada (Minister of Employment and Immigration)*, 7 Imm LR (2d) 91, [1989] FCJ No 104, at para 5 (FCA); *Mohamed v Canada (Minister of Employment and Immigration)*, [1986] 3 FC 90, at paras 9-13 (FCA); *Viera v Canada (Minister if Citizenship and Immigration)*, 2012 FC 1086, at paras 10 -11, and 14).

[49] Contrary to Ms. Iao's assertions, the IAD did not confine itself to the lock-in period or focus exclusively or unduly on that period, in the course of reaching its conclusion with respect to paragraph 130(1)(b). As noted at paragraphs 37-41 above, the IAD looked back to December 2009, a year before the beginning of the lock-in period, and also looked forward when it considered whether she was committed to residing in Canada in the near future. Moreover, in the course of assessing the location of Ms. Iao's immediate family and dependents, her pattern of physical presence in Canada, and the quality of her connection to Canada relative to her connection with China, the IAD appears to have assessed the period right up to its decision, dated February 1, 2013. This is reflected in the IAD's use of the present tense throughout its analysis of those factors in its decision.

[50] While the IAD's decision would have been more comprehensive and on a stronger foundation had the IAD explicitly addressed the additional evidence that was on the record with

respect to the period subsequent to the lock-in period (ending July 28, 2011), the fact that it failed to do so does not necessarily lead to the conclusion that it erred in applying section 65 of the IRPA (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708, at para 16; *Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65, [2013] 3 SCR 405, at para 3).

[51] Ms. Iao stated during the IAD's hearing that she normally spends approximately eight months in Canada and four months in China each year. However, as discussed at paragraph 37 above, this was contradicted by evidence provided by her spouse. With this in mind, given that Ms. Iao did not adduce any documentary evidence to establish that she spent a significant period of time in Canada between July 28, 2011 and the date of the IAD's hearing (November 2, 2012), I am satisfied that the failure of the IAD to specifically address her other unsubstantiated claims in this regard did not render the IAD's decision unreasonable.

[52] In my view, the IAD was alive to the relevant facts and its decision on this issue "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above, at para 47). That decision was also sufficiently justified, transparent and intelligible to withstand review.

[53] I would simply add that the IAD noted that there was no evidence on the record regarding the amount of time Ms. Iao spent in Canada prior to 2010, when she travelled to China to marry her current spouse. Ms. Iao herself recognized that her presence in Canada in past years "may not have been abundant." Subsequent to the lock-in period, it appears that she spent only a few additional

months in Canada. On the particular facts of this case, the fact that Ms. Ioa obtained a permanent resident card in 2009 as a member of the investor class, and was able to renew that card until 2014, was not as pertinent as the information that the IAD considered in reaching its decision.

VI. Questions Proposed for Certification

[54] Ms. Iao proposed essentially the following questions for certification in this Application:

i. As a hearing before the IAD is conducted on a *de novo* basis, should the IAD interpret the words "decision… with respect to the application" in subsection 133(1) of the Regulations to include a decision made by the IAD?

ii. What is the relevant time period for the IAD to consider in determining whether a person "resides in Canada" for the purpose of being a "sponsor within the meaning of the regulations," as contemplated by section 65 of the IRPA?

iii. In a spousal sponsorship context in which the legislative requirement is that the sponsor "resides in Canada," is the question of whether the sponsor resides in Canada to be determined on the test for primary residence formulated in *Koo (Re)*, [1993] 1 FC 286?

[55] The Respondent opposed the foregoing proposed questions and did not suggest any other questions for certification.

[56] With respect to the first question proposed by Ms. Iao, as noted at paragraph 48 above, it is settled law that an appeal before the IAD "is a hearing *de novo* in a broad sense." Indeed, this is common ground between the parties. The parties also agree that this means the IAD was not only

required to determine whether the visa officer erred in concluding that Ms. Iao does not "reside in Canada," but also to determine whether she met the requirements of the IRPA at the time the IAD disposed of its appeal, as contemplated by subsection 67(1) of that legislation.

[57] As discussed at paragraph 49 above, this is precisely what the IAD did with respect to several of the factors it assessed in the course of reaching its conclusion. Accordingly, the question proposed by Ms. Iao does not meet the test for certification for two reasons. First, it is not "a serious question of general importance," as required by paragraph 74(d) of the IRPA. Second, it would not be dispositive of an appeal in this case (*Canada (Minister of Citizenship and Immigration) v Zazai*, 2004 FCA 89, at para 11; *Varela v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 145, at para 28).

[58] The second question proposed by Ms. Iao is not an appropriate question for certification for a different reason. In brief, the relevant time period for the IAD to consider in determining whether a person "resides in Canada" for the purposes of "being a sponsor within the meaning of the regulations," as contemplated by section 65 of the IRPA, will vary with the particular facts of each case. It is common ground between the parties that this period extends forward in time beyond the lock-in period defined in paragraph 133(1)(a) of the Regulations, right up to the day upon which a decision is made on the sponsorship application, whether by a visa officer or the IAD. It is also common ground between the parties that this period extends back in time before the beginning of the lock-in period. How far back in time that extends is an issue that will fall to be determined based on the factual record in each case. As noted in paragraph 53 above, in the

present Application, that record was very sparse, particularly prior to 2010. The proposed question therefore would also not be dispositive of an appeal in this case (*Zazai*, above).

[59] The same is true of the third question proposed by Ms. Iao, regarding whether the requirement for a sponsor to "reside in Canada" within the meaning of paragraph 130(1)(b) should be determined on the test for residency formulated in *Koo*, above. The IAD did not reach its conclusion on this issue by applying the *Koo* test, but rather on the modified *Koo* test, as set forth in *Gao*, above.

[60] Even if Ms. Iao had worded the third of her proposed questions in terms of the test set forth in *Gao*, I would not have considered it to be appropriate to certify the question for two reasons. First, the question has been posed in a virtual vacuum, with no proposed specific alternative tests or submissions by counsel with respect to such possible tests. Ms. Iao has simply suggested that the test should be more liberal, and akin to the test for residency that is used in tax law. In essence, it is "nothing more than a reference of a question to the Court of Appeal" (*Zazai*, above, at para 12). Second, given this virtual vacuum, a "serious issue of general importance" is not immediately apparent. As with certain other questions that have been proposed in the past, this question would benefit from further consideration in the jurisprudence of this Court before it may be ripe for certification. I would simply add that the "unfair conflict" identified by Ms. Iao in her submissions supporting this proposed question was specifically addressed by the IAD, and led the IAD to reject the physical presence test for residence, in favour of the test set forth in *Gao*.

VII. Conclusion

[61] For the reasons given above, this application will be dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that this Application is dismissed.

"Paul S. Crampton"

Chief Justice

APPENDIX 1

Immigration and Refugee Protection Regulations, SOR/2002-227

Sponsor

130. (1) Subject to subsections (2) and (3), a sponsor, for the purpose of sponsoring a foreign national who makes an application for a permanent resident visa as a member of the family class or an application to remain in Canada as a member of the spouse or common-law partner in Canada class under subsection 13(1) of the Act, must be a Canadian citizen or permanent resident who

(*a*) is at least 18 years of age;

(*b*) resides in Canada; and

(*c*) has filed a sponsorship application in respect of a member of the family class or the spouse or common-law partner in Canada class in accordance with section 10.

Marginal note: Sponsor not residing in Canada

(2) A sponsor who is a Canadian citizen and does not reside in Canada may sponsor a foreign national who makes an application referred to in subsection (1) and is the sponsor's spouse, common-law partner, conjugal partner or dependent child who has no dependent children, if the sponsor will

Immigration and Refugee Protection Act, S.C. 2001, c. 27

Qualité de répondant

130. (1) Sous réserve des paragraphes (2) et (3), a qualité de répondant pour le parrainage d'un étranger qui présente une demande de visa de résident permanent au titre de la catégorie du regroupement familial ou une demande de séjour au Canada au titre de la catégorie des époux ou conjoints de fait au Canada aux termes du paragraphe 13(1) de la Loi, le citoyen canadien ou résident permanent qui, à la fois :

a) est âgé d'au moins dix-huit ans;

b) réside au Canada;

c) a déposé une demande de parrainage pour le compte d'une personne appartenant à la catégorie du regroupement familial ou à celle des époux ou conjoints de fait au Canada conformément à l'article 10.

Note marginale : Répondant ne résidant pas au Canada

(2) Le citoyen canadien qui ne réside pas au Canada peut parrainer un étranger qui présente une demande visée au paragraphe (1) et qui est son époux, son conjoint de fait, son partenaire conjugal ou son enfant à charge qui n'a pas d'enfant à charge à condition de résider au Canada au moment

reside in Canada when the foreign national becomes a permanent resident.

Marginal note: Five-year requirement

(3) A sponsor who became a permanent resident after being sponsored as a spouse, common-law partner or conjugal partner under subsection 13(1) of the Act may not sponsor a foreign national referred to in subsection (1) as a spouse, common-law partner or conjugal partner, unless the sponsor

(*a*) has been a permanent resident for a period of at least five years immediately preceding the day on which a sponsorship application referred to in paragraph 130(1)(*c*) is filed by the sponsor in respect of the foreign national; or

(*b*) has become a Canadian citizen during the period of five years immediately preceding the day referred to in paragraph (*a*) and had been a permanent resident from at least the beginning of that period until the day on which the sponsor became a Canadian citizen.

[. . .]

Requirements for sponsor

133. (1) A sponsorship application shall only be approved by an officer if, on the day on which the application was filed and from that day until the day a decision is made with respect to the application, there is evidence that the sponsor

(*a*) is a sponsor as described in section

où l'étranger devient résident permanent.

Note marginale : Exigence — cinq ans

(3) Le répondant qui est devenu résident permanent après avoir été parrainé à titre d'époux, de conjoint de fait ou de partenaire conjugal en vertu du paragraphe 13(1) de la Loi ne peut parrainer un étranger visé au paragraphe (1) à titre d'époux, de conjoint de fait ou de partenaire conjugal à moins, selon le cas :

a) d'avoir été un résident permanent pendant au moins les cinq ans précédant le dépôt de sa demande de parrainage visée à l'alinéa 130(1)*c*) à l'égard de cet étranger;

b) d'être devenu un citoyen canadien durant la période de cinq ans précédant le dépôt de cette demande et d'avoir été un résident permanent au moins depuis le début de cette période de cinq ans jusqu'à ce qu'il devienne un citoyen canadien.

[. . .]

Exigences : répondant

133. (1) L'agent n'accorde la demande de parrainage que sur preuve que, de la date du dépôt de la demande jusqu'à celle de la décision, le répondant, à la fois :

a) avait la qualité de répondant aux termes de l'article 130;

130;

(*b*) intends to fulfil the obligations in the sponsorship undertaking;

b) avait l'intention de remplir les obligations qu'il a prises dans son engagement;

(*c*) is not subject to a removal order;

c) n'a pas fait l'objet d'une mesure de renvoi;

(*d*) is not detained in any penitentiary, jail, reformatory or prison;

d) n'a pas été détenu dans un pénitencier, une prison ou une maison de correction;

(*e*) has not been convicted under the *Criminal Code* of

e) n'a pas été déclaré coupable, sous le régime du *Code criminel* :

(i) an offence of a sexual nature, or an attempt or a threat to commit such an offence, against any person,

(i.1) an indictable offence involving the use of violence and punishable by a maximum term of imprisonment of at least 10 years, or an attempt to commit such an offence, against any person, or

(ii) an offence that results in bodily harm, as defined in section 2 of the *Criminal Code*, to any of the following persons or an attempt or a threat to commit such an offence against any of the following persons:

(A) a current or former family member of the sponsor,

(B) a relative of the sponsor, as well as a current or former family member of that relative,

(C) a relative of the family member of the sponsor, or a current or former family member of that relative,

(i) d'une infraction d'ordre sexuel ou d'une tentative ou menace de commettre une telle infraction, à l'égard de quiconque,

(i.1) d'un acte criminel mettant en cause la violence et passible d'un emprisonnement maximal d'au moins dix ans ou d'une tentative de commettre un tel acte à l'égard de quiconque,

(ii) d'une infraction entraînant des lésions corporelles, au sens de l'article 2 de cette loi, ou d'une tentative ou menace de commettre une telle infraction, à l'égard de l'une ou l'autre des personnes suivantes :

(A) un membre ou un ancien membre de sa famille,

(B) un membre de sa parenté, ou un membre ou ancien membre de la famille de celui-ci,

(C) un membre de la parenté d'un membre de sa famille, ou un membre ou ancien membre de la famille de celui-ci,

(D) a current or former conjugal partner of the sponsor,

(E) a current or former family member of a family member or conjugal partner of the sponsor,

(F) a relative of the conjugal partner of the sponsor, or a current or former family member of that relative,

(G) a child under the current or former care and control of the sponsor, their current or former family member or conjugal partner,

(H) a child under the current or former care and control of a relative of the sponsor or a current or former family member of that relative, or

(I) someone the sponsor is dating or has dated, whether or not they have lived together, or a family member of that person;

(*f*) has not been convicted outside Canada of an offence that, if committed in Canada, would constitute an offence referred to in paragraph (*e*);

(*g*) subject to paragraph 137(*c*), is not in default of

(i) any undertaking, or

(ii) any support payment obligations ordered by a court;

(D) son partenaire conjugal ou ancien partenaire conjugal,

(E) un membre ou un ancien membre de la famille d'un membre de sa famille ou de son partenaire conjugal,

(F) un membre de la parenté de son partenaire conjugal, ou un membre ou ancien membre de la famille de celui-ci,

(G) un enfant qui est ou était sous sa garde et son contrôle, ou sous celle d'un membre de sa famille ou de son partenaire conjugal ou d'un ancien membre de sa famille ou de son ancien partenaire conjugal,

(H) un enfant qui est ou était sous la garde et le contrôle d'un membre de sa parenté, ou d'un membre ou ancien membre de la famille de ce dernier,

(I) une personne avec qui il a ou a eu une relation amoureuse, qu'ils aient cohabité ou non, ou un membre de la famille de cette personne;

f) n'a pas été déclaré coupable, dans un pays étranger, d'avoir commis un acte constituant une infraction dans ce pays et, au Canada, une infraction visée à l'alinéa *e*);

g) sous réserve de l'alinéa 137*c*), n'a pas manqué :

(i) soit à un engagement de parrainage,

(ii) soit à une obligation alimentaire

imposée par un tribunal;

(*h*) is not in default in respect of the repayment of any debt referred to in subsection 145(1) of the Act payable to Her Majesty in right of Canada;

h) n'a pas été en défaut quant au remboursement d'une créance visée au paragraphe 145(1) de la Loi dont il est redevable à Sa Majesté du chef du Canada;

(*i*) subject to paragraph 137(*c*), is not an undischarged bankrupt under the *Bankruptcy and Insolvency Act*;

i) sous réserve de l'alinéa 137*c*), n'a pas été un failli non libéré aux termes de la *Loi sur la faillite et l'insolvabilité*;

(*j*) if the sponsor resides

j) dans le cas où il réside :

(i) in a province other than a province referred to in paragraph 131(*b*), has a total income that is at least equal to the minimum necessary income, and

(i) dans une province autre qu'une province visée à l'alinéa 131*b*), a eu un revenu total au moins égal à son revenu vital minimum,

(ii) in a province referred to in paragraph 131(*b*), is able, within the meaning of the laws of that province and as determined by the competent authority of that province, to fulfil the undertaking referred to in that paragraph; and

(ii) dans une province visée à l'alinéa 131*b*), a été en mesure, aux termes du droit provincial et de l'avis des autorités provinciales compétentes, de respecter l'engagement visé à cet alinéa;

(*k*) is not in receipt of social assistance for a reason other than disability.

k) n'a pas été bénéficiaire d'assistance sociale, sauf pour cause d'invalidité.

Marginal note: Exception — conviction in Canada

Note marginale : Exception : déclaration de culpabilité au Canada

(2) Despite paragraph (1)(*e*), a sponsorship application may not be refused

(2) Malgré l'alinéa (1)*e*), la déclaration de culpabilité au Canada n'emporte pas rejet de la demande de parrainage dans les cas suivants :

(*a*) on the basis of a conviction in Canada in respect of which a pardon has been granted and has not ceased to have effect or been revoked under the *Criminal Records Act*, or in respect of which there has been a final determination of an acquittal; or

a) la réhabilitation — sauf révocation ou nullité — a été octroyée au titre de la *Loi sur le casier judiciaire* ou un verdict d'acquittement a été rendu en dernier ressort à l'égard de l'infraction;

(*b*) if a period of five years or more has elapsed since the completion of the sentence

b) le répondant a fini de purger sa peine au moins cinq ans avant le dépôt de la

imposed for an offence in Canada referred to in paragraph (1)(*e*).

Marginal note: Exception — conviction outside Canada

(3) Despite paragraph (1)(*f*), a sponsorship application may not be refused

(*a*) on the basis of a conviction outside Canada in respect of which there has been a final determination of an acquittal; or

(*b*) if a period of five years or more has elapsed since the completion of the sentence imposed for an offence outside Canada referred to in that paragraph and the sponsor has demonstrated that they have been rehabilitated.

Marginal note: Exception to minimum necessary income

(4) Paragraph (1)(*j*) does not apply if the sponsored person is

(*a*) the sponsor's spouse, common-law partner or conjugal partner and has no dependent children;

(*b*) the sponsor's spouse, common-law partner or conjugal partner and has a dependent child who has no dependent children; or

(*c*) a dependent child of the sponsor who has no dependent children or a person referred to in paragraph 117(1)(*g*).

Marginal note: Adopted sponsor

demande de parrainage.

Note marginale :Exception : déclaration de culpabilité à l'extérieur du Canada

(3) Malgré l'alinéa (1)*f*), la déclaration de culpabilité à l'extérieur du Canada n'emporte pas rejet de la demande de parrainage dans les cas suivants :

a) un verdict d'acquittement a été rendu en dernier ressort à l'égard de l'infraction;

b) le répondant a fini de purger sa peine au moins cinq ans avant le dépôt de la demande de parrainage et a justifié de sa réadaptation.

Note marginale : Exception au revenu minimal

(4) L'alinéa (1)*j*) ne s'applique pas dans le cas où le répondant parraine l'une ou plusieurs des personnes suivantes :

a) son époux, conjoint de fait ou partenaire conjugal, à condition que cette personne n'ait pas d'enfant à charge;

b) son époux, conjoint de fait ou partenaire conjugal, dans le cas où cette personne a un enfant à charge qui n'a pas d'enfant à charge;

c) son enfant à charge qui n'a pas lui-même d'enfant à charge ou une personne visée à l'alinéa 117(1)*g*).

Note marginale : Répondant adopté

(5) A person who is adopted outside Canada and whose adoption is subsequently revoked by a foreign authority or by a court in Canada of competent jurisdiction may sponsor an application for a permanent resident visa that is made by a member of the family class only if the revocation of the adoption was not obtained for the purpose of sponsoring that application.

(5) La personne adoptée à l'étranger et dont l'adoption a été annulée par des autorités étrangères ou un tribunal canadien compétent ne peut parrainer la demande de visa de résident permanent présentée par une personne au titre de la catégorie du regroupement familial que si l'annulation de l'adoption n'a pas été obtenue dans le but de pouvoir parrainer cette demande.

Immigration and Refugee Protection Act, SC 2001, c 27

Loi sur l'immigration et la protection des réfugiés, L.C. 2001. ch. 27

Humanitarian and compassionate considerations

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.

Motifs d'ordre humanitaires

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.

FEDERAL COURT

SOLICITORS OF RECORD

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