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2021 FC 1071

**Abdelhak Sedki, Zineb el Aoud** (*Applicants*)

*v.*

**The Minister of Citizenship and Immigration** (*Respondent*)

***INDEXED AS: SEDKI V. CANADA (CITIZENSHIP AND IMMIGRATION)***

Federal Court, McHaffie J.—By videoconference, September 21; Ottawa, October 15, 2021.

*Citizenship and Immigration — Status in Canada — Permanent Residents — Humanitarian and Compassionate Considerations — Judicial review of decision by officer from Canadian embassy in Morocco rejecting Mr. Sedki's (applicant) application for permanent resident visa on humanitarian and compassionate grounds (H&C application) — Officer rejected applicant's application for permanent resident visa on basis of inadmissibility, without taking into account humanitarian and compassionate considerations applicant cited — Applicant filed application for visitor visa in 2017, was rejected — Officer who evaluated application determined that applicant had made misrepresentations — Applicant was therefore inadmissible for period of five years under Immigration and Refugee Protection Act, s. 40 — Applicant nevertheless filed application for permanent residence in November 2018, sponsored by his wife Ms. el Aoud,, attached H&C application to remove inadmissibility — Follow-up to sponsorship application, H&C application was filed, making explicit reference to Act, s. 25 — Officer's decision rejecting application made no mention of H&C application or humanitarian and compassionate grounds; decision also made no reference to either Act, ss. 40(3) or 25 —Main issue whether it was reasonable for officer to reject applicants' sponsorship application on basis of inadmissibility for misrepresentation without processing their H&C application under Act, s. 25 — Officer's decision had to be read in its administrative context — Even though officer not specifically mentioning H&C application, could be seen that officer examined applicants' application, concluded that entire application, including H&C application, had to be rejected because applicant inadmissible; Act, s. 11(1) required proof that applicant was not — Therefore, mere fact of not referring to H&C application not rendering officer's decision unreasonable —Officer's reference to Act, s. 11(1) sensible — Officer's role to conduct "examination" referred to in s. 11(1), which subsection provides important instructions regarding fact that visa may be issued if officer satisfied foreign national is not inadmissible — However, officer not considering statutory context of Act, s. 11(1) or, in particular, s. 25(1), which applicant's H&C application cited — Even though officer's analysis began in sensible manner, lack of*

*consideration of statutory context undermined its reasonableness — Therefore, officer's decision not demonstrating line of analysis that could reasonably lead to conclusion reached — Officer's reasons not reasonable; decision could not be sustained — Neither text of Act, s. 40(3) nor that of s. 25(1) referring to other — Nevertheless, s. 25(1) explicitly setting out several circumstances in which respondent may not consider H&C application — S. 25(1) not mentioning inadmissibility for misrepresentation under s. 40 —Absence of Act, s. 40 from text of s. 25(1) strongly, clearly suggesting that Parliament's intention was not to prevent foreign national who is inadmissible for misrepresentation from making H&C application — Having considered text, context, purpose of provisions, only reasonable interpretation of Act, ss. 40(3), 25(1) was that foreign national who is inadmissible for misrepresentation is not precluded by prohibition in s. 40(3) from making H&C application under s. 25(1) — Question certified in present case as to whether person in same circumstances as applicant may file H&C application — Application allowed.*

*Citizenship and Immigration — Judicial Review — Federal Court Jurisdiction — Judicial review of decision by officer from Canadian embassy in Morocco rejecting Mr. Sedki's (applicant) application for permanent resident visa on humanitarian and compassionate grounds (H&C application) — Officer rejected applicant's application for permanent resident visa on basis of inadmissibility, without taking into account humanitarian and compassionate considerations applicant cited — Ms. el Aoud, applicant's wife (i.e., applicant's sponsor), filed appeal of decision with Immigration Appeal Division (IAD) — However, she withdrew appeal after respondent filed motion with IAD to dismiss appeal for lack of jurisdiction — At issue was whether Federal Court had jurisdiction to hear application notwithstanding Immigration and Refugee Protection Act (Act), s. 72(2)(a) — Federal Court having jurisdiction to hear applicants' application — However, IAD would have had jurisdiction to hear Ms. el Aoud's appeal as sponsor — Act, s. 72(2)(a) providing that application for leave to Federal Court cannot be made until all avenues of appeal have been exhausted — Pursuant to s. 72(2)(a), if there is right of appeal under Act, application for judicial review can only be made once appeal determined — Act, s. 72 not creating right to judicial review of decision made under Act — That jurisdiction is conferred on Federal Court by Federal Courts Act — Thus, if Act not giving right of appeal to IAD, application for judicial review may be made — Since sponsored application for permanent residence was accompanied by H&C application under s. 25, right of appeal to IAD existed — Nevertheless, in particular circumstances of this case, Federal Court had jurisdiction notwithstanding that of IAD, since Ms. el Aoud had withdrawn her appeal to IAD after respondent had taken position that IAD not having jurisdiction.*

*Citizenship and Immigration — Immigration Practice — Judicial review of decision by officer from Canadian embassy in Morocco rejecting Mr. Sedki's (applicant) application for permanent resident visa on humanitarian and compassionate grounds (H&C application) —Officer rejected applicant's application for permanent resident visa on basis of inadmissibility, without taking into account humanitarian and compassionate considerations cited by applicant — Ms. el Aoud, applicant's wife (i.e., applicant's sponsor), filed appeal of decision with Immigration Appeal Division (IAD) — However, she withdrew appeal after respondent filed motion with IAD to dismiss appeal for lack of jurisdiction — At issue was whether IAD had jurisdiction to hear appeal of officer's decision — Individual who has filed family sponsorship application may appeal to IAD against refusal to issue permanent resident visa under Immigration and Refugee Protection Act (Act), s. 63(1) — There is an exception to this right of appeal in case of refusal based on inadmissibility for misrepresentation — Act, s. 65 limiting appeals in which IAD may consider humanitarian and compassionate grounds — Right of appeal to IAD when foreign national files sponsored application for permanent residence while inadmissible under s. 40 (misrepresentation) existing in specific circumstances, notably when application accompanied by H&C application under Act, s. 25 — Therefore, Ms. el Aoud in this case had right of appeal to IAD — Nevertheless, in special circumstances of this case, Federal Court also had jurisdiction notwithstanding that of IAD, since Ms. el Aoud had withdrawn her appeal to IAD after respondent took position that IAD not having jurisdiction.*

This was an application for judicial review of a decision by an officer from the Canadian embassy in Morocco rejecting Mr. Sedki's (applicant) application for a permanent resident visa on humanitarian and compassionate grounds (H&C application). The officer rejected the applicant's application for a permanent resident visa on the basis of inadmissibility, without taking into account the humanitarian and compassionate considerations cited by the applicant.

The applicant filed an application for a visitor visa in 2017. This application was rejected on December 6, 2017. The officer who evaluated the application determined that the applicant had made misrepresentations about his employment and finances. He was therefore inadmissible for a period of five years under section 40 of the *Immigration and Refugee Protection Act* (Act). The applicant did not challenge this previous decision in the present application for judicial review. He was therefore deemed inadmissible under section 40 of the Act until December 6, 2022. As subsection 40(3) indicates, a foreign national who is inadmissible for misrepresentation may not apply for permanent resident status during the period of inadmissibility. The applicant nevertheless filed an application for permanent residence in November 2018, sponsored by his wife, Ms. el Aoud. In a cover letter, the applicants' consultant highlighted the inadmissibility and noted that she was including with the application "an H&C application to remove the inadmissibility." On October 23, 2019, not having received a response, the consultant filed a follow-up to the sponsorship application and the H&C application, making explicit reference to section 25 of the Act. She also submitted some additional documents, including a letter from Ms. el Aoud. On October 25, 2019, the officer made the decision to reject the application. The officer's decision made no mention of the H&C application or humanitarian and compassionate considerations. The decision also made no reference to either subsection 40(3) or section 25 of the Act. In making this decision, the officer noted that subsection 11(1) of the Act stipulates that a visa will not be issued if a foreign national is inadmissible. Ms. el Aoud filed an appeal of the decision with the Immigration Appeal Division (IAD) on October 30, 2019. However, she withdrew the appeal after the respondent filed a motion with the IAD to dismiss the appeal for lack of jurisdiction. The applicants filed this application for judicial review on December 20, 2019.

The main issue was whether it was reasonable for the officer to reject the applicants' sponsorship application on the basis of inadmissibility for misrepresentation without processing their H&C application under section 25 of the Act; whether the Federal Court had jurisdiction to hear this application notwithstanding paragraph 72(2)(a) of the Act, and whether the IAD had jurisdiction to hear an appeal of the officer's decision.

*Held,* the application should be allowed.

The officer's decision had to be read in its administrative context and was not to be assessed against a standard of perfection. Even though the officer did not specifically mention the H&C application, one could see that the officer examined the applicants' application and concluded that the entire application, including the H&C application, had to be rejected because the applicant was inadmissible and subsection 11(1) required proof that he was not. Therefore, the mere fact that the officer did not refer to the H&C application as part of the analysis did not render the officer's decision unreasonable on the basis of a failure to consider a key aspect of the application. That said, the statutory analysis proposed by the Minister was not the analysis the officer conducted. The officer relied exclusively on subsections 40(1), 40(2) and 11(1) of the Act, while the Minister relied primarily on subsection 40(3). Although a decision maker may have drawn implicit conclusions on a matter of statutory interpretation, in this case it could not be concluded that the officer drew an implicit conclusion regarding the interplay between subsections 40(3) and 25(1) as the officer only referred to subsections 40(1), 40(2), and 11(1) of the Act.

The officer's reference to subsection 11(1) was sensible. The officer's role is to conduct the "examination" referred to in subsection 11(1), and that subsection provides important instructions

regarding the fact that a visa may be issued if the officer is satisfied the foreign national is not inadmissible. However, the officer's analysis ended with this subsection. The officer did not consider the statutory context of subsection 11(1) or, in particular, subsection 25(1), which was raised by the applicant's H&C application. Subsection 25(1) provides that a foreign national outside Canada may apply for a permanent resident visa on humanitarian and compassionate grounds. It is clear from this text that subsection 25(1) is available in at least certain cases of inadmissibility. Therefore, subsection 11(1) cannot mean, as the officer appears to have concluded, that an H&C application for a permanent resident visa should be rejected simply because the applicant is inadmissible. As a result, even though the officer's analysis began in a sensible manner, the lack of consideration of statutory context undermined its reasonableness. Unfortunately, the officer's analysis ended there. Although the officer relied on the inadmissibility for misrepresentation and subsections 40(1) and (2), the officer's decision could not be read as including an implicit analysis of subsection 40(3) or of the interplay between subsection 40(3) and subsection 25(1). Thus, the officer does not appear to have considered the text or context of the applicable provisions before concluding that the applicant's H&C application should be rejected on the basis of his inadmissibility and subsection 11(1). Therefore, the officer's decision did not demonstrate a line of analysis that could reasonably lead to the conclusion that the officer reached. The officer's reasons were not reasonable, and the decision could not be sustained.

Subsection 40(3) prevents a foreign national who is inadmissible for misrepresentation from applying for permanent resident status while subsection 25(1) allows a foreign national outside Canada to file an H&C application to obtain permanent resident status, with some exceptions. Neither the text of subsection 40(3) nor that of subsection 25(1) refers to the other. Nevertheless, subsection 25(1) explicitly sets out several circumstances in which the respondent may not consider an H&C application. These include inadmissibility under sections 34, 35 or 37 of the Act. Subsection 25(1) does not mention inadmissibility for misrepresentation under section 40. The absence of section 40 from the text of subsection 25(1) strongly and clearly suggests that Parliament's intention was not to prevent a foreign national who is inadmissible for misrepresentation from making an H&C application. If Parliament wanted to prevent a foreign national who is inadmissible under section 40 from making an H&C application, it would be sufficient to add section 40 to sections 34, 35 and 37 in the text of subsection 25(1). The fact that Parliament did not include section 40 in this list is a clear textual indication. The text of subsections 25(1) and 40(3), read together, preliminarily indicate only one reasonable interpretation, namely that a foreign national who is inadmissible for misrepresentation may make an H&C application under subsection 25(1). The legislative and administrative context of these sections reinforces this conclusion. The context and, in particular, the other provisions of the Act, the Immigration, Refugees and Citizenship Canada (IRCC) manuals and previous examples of H&C applications being processed, support the textual interpretation that a foreign national who is inadmissible for misrepresentation is not precluded from making an H&C application, and do not support the contrary interpretation. Moreover, a consideration of the purpose of the provisions did not greatly affect the interpretation. It was a primarily equivocal factor. Having considered the text, context and purpose of the provisions, the only reasonable interpretation of subsections 40(3) and 25(1) of the Act was that a foreign national who is inadmissible for misrepresentation is not precluded by the prohibition in subsection 40(3) from making an H&C application under subsection 25(1).

The Federal Court had jurisdiction to hear the applicants' application. However, the IAD would have had jurisdiction to hear Ms. el Aoud's appeal as sponsor. Paragraph 72(2)(a) of the Act provides that an application for leave to the Federal Court cannot be made until all avenues of appeal have been exhausted. Pursuant to this paragraph, if there is a right of appeal under the Act, an application for judicial review can only be made once the appeal has been determined. Section 72 of the Act does not create a right to judicial review of a decision made under the Act. That jurisdiction is conferred on the Federal Court by the *Federal Courts Act*. Section 72 simply provides for additional procedural requirements in the immigration context when exercising this right. Thus, if

the Act does not give a right of appeal to the IAD, an application for judicial review may be made. The question was whether the IAD had jurisdiction to hear an appeal of the officer's decision and to consider humanitarian and compassionate grounds.

The IAD's jurisdiction to hear an appeal from an officer's decision depends on the interplay between sections 40, 63 and 64 of the Act, as well as the case law of the Federal Court. An individual who has filed a family sponsorship application may appeal to the IAD against the refusal to issue a permanent resident visa under subsection 63(1) of the Act. There is an exception to this right of appeal in the case of a refusal based on inadmissibility for misrepresentation. Section 65 limits the appeals in which the IAD may consider humanitarian and compassionate grounds. The right of appeal to the IAD when a foreign national files a sponsored application for permanent residence while inadmissible under section 40 (misrepresentation), exists in specific circumstances. In particular, if the application is accompanied by an H&C application, the officer must process the H&C application under section 25. If the application is refused, if the applicant is a member of the family class and is the spouse, common-law partner or child of the sponsor, the sponsor may appeal to the IAD, which has jurisdiction to determine humanitarian and compassionate grounds, and an application for leave and judicial review may only be made after the sponsor's appeal process has been exhausted (Act, paragraph 72(2)(a)). Here, the applicant is the husband of the other applicant, Ms. el Aoud. His sponsored application for permanent residence was accompanied by an H&C application under section 25. Therefore, his claim was eligible and Ms. el Aoud had a right of appeal to the IAD.

Nevertheless, in the particular circumstances of this case, the Federal Court had jurisdiction notwithstanding that of the IAD. The fact that Ms. el Aoud commenced an appeal to the IAD and withdrew it after the respondent took the position that the IAD did not have jurisdiction, could not prevent her from filing or continuing the present application and could not take away the Federal Court's jurisdiction.

A question was certified in this case as to whether a person in the same circumstances as the applicant may file an H&C application.

STATUTES AND REGULATIONS CITED

*Immigration and Refugee Protection Act*, S.C. 2001, c. 27, ss. 3(1)(d),(f.1),(i), 11(1), 15, 20.1, 20.2(1), 25, 34, 35, 36, 37, 40, 46 (1)(c), 48, 49, 63, 64, 65, 72, 74(d).

*Immigration and Refugee Protection Regulations*, SOR/2002-227 (IRPR), ss. 10–12, 66, 70(2), 117.

*Faster Removal of Foreign Criminals Act*, S.C. 2013, c. 16, ss. 9, 16.

*Federal Courts Act*, R.S.C., 1985, c. F-7, ss. 18, 18.1.

CASES CITED

APPLIED:

*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653; *Habtenkiel v. Canada (Citizenship and Immigration)*, 2014 FCA 180, [2015] 3 F.C.R. 327; *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 S.C.R. 909; *Lunyamila v. Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22, [2018] 3 F.C.R. 674.

DISTINGUISHED:

*Gill v. Canada (Citizenship and Immigration)*, 2020 FC 33.

CONSIDERED:

*Canada (Citizenship and Immigration) v. Mason*, 2021 FCA 156, [2022] 1 F.C.R. 3; *Dhillon v. Canada (Citizenship and Immigration)*, 2019 FC 391, [2019] 2 F.C.R. F-17; *Tran v. Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50, [2017] 2 S.C.R. 289; *Pretashi v. Canada (Citizenship and Immigration)*, 2021 FC 817; *Mella v. Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1587; *McMurray v. Canada (Citizenship and Immigration)*, 2021 CanLII 59936 (I.R.B.).

REFERRED TO:

*Sheikh v. Canada (Citizenship and Immigration)*, 2020 FC 199; *Yuzer v. Canada (Citizenship and Immigration)*, 2019 FC 781; *Alexion Pharmaceuticals Inc. v. Canada (Attorney General)*, 2021 FCA 157, [2022] 1 F.C.R. 153; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *Hillier v. Canada (Attorney General)*, 2019 FCA 44, [2019] 2 S.C.R. D-3; *Tan v. Canada (Attorney General)*, 2018 FCA 186, [2019] 2 F.C.R. 648; *Nova Tube Inc./Nova Steel Inc. v. Conares Metal Supply Ltd.*, 2019 FCA 52, [2019] 2 F.C.R. F-7; *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44, [2015] 3 S.C.R. 147; *JK v. Gowrishankar*, 2019 ABCA 316; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654; *Zeng v. Canada (Citizenship and Immigration)*, 2019 FC 1586, [2020] 3 F.C.R. D-2; *Tapambwa v. Canada (Citizenship and Immigration)*, 2019 FCA 34, [2020] 1 F.C.R. 700; *Khandaker v. Canada (Citizenship and Immigration)*, 2020 FC 985, [2020] 4 F.C.R. 638; *Hassan v. Canada (Immigration, Refugees and Citizenship)*, 2019 FC 1096; *Kumari v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1424; *Brar v. Canada (Citizenship and Immigration)*, 2011 FC 691; *Canada (Citizenship and Immigration) v. Mora*, 2013 FC 332; *Balarezo v. Canada (Citizenship and Immigration)*, 2017 FC 1060; *Nguyen v. Canada (Citizenship and Immigration)*, 2017 FC 27; *Mohammed v. Canada (Citizenship and Immigration)*, 2019 FC 271; *Abdullah v. Canada (Citizenship and Immigration)*, 2019 FC 954; *Mun v. Canada (Citizenship and Immigration)*, 2020 CanLII 15298 (F.C.); *Chirwa v. Canada (Minister of Citizenship and Immigration)* (1970), 4 I.A.C. 351 (I.R.B.); *HL v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401; *Canada (Commissioner of Official Languages) v. Office of the Superintendent of Financial Institutions*, 2021 FCA 159, [2022] 1 F.C.R. 000; *Somodi v. Canada (Citizenship and Immigration)*, 2009 FCA 288, [2010] 4 F.C.R. 26; *Zaghbib v. Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 182, [2017] 1 F.C.R. 392; *Seshaw v. Canada (Citizenship and Immigration)*, 2014 FCA 181; *Gill v. Canada (Citizenship and Immigration)*, 2019 CanLII 31073 (I.R.B.); *Lefter v. Canada (Citizenship and Immigration)*, 2017 CanLII 10743 (I.R.B.); *Dhillon v. Canada (Citizenship and Immigration)*, 2018 CanLII 102071 (I.R.B.); *Delos Reyes v. Canada (Citizenship and Immigration)*, IAD TB7-032340, November 19, 2018.

AUTHORS CITED

Immigration, Refugees and Citizenship Canada. Operational Instructions and Guidelines. "Humanitarian and compassionate: Intake and who may apply" (modified 2019/06/21).

*House of Commons Debates*, 41st Parl., 1st Sess., No. 151 (September 24, 2012).

Canada. Parliament. House of Commons. Standing Committee on Citizenship and Immigration. *Evidence*, 41st Parl., 1st Sess., No. 54 (October 24, 2012).

APPLICATION for judicial review of a decision rendered by an officer of the Canadian embassy in Morocco rejecting Mr. Sedki's (applicant) application for a permanent resident visa on humanitarian and compassionate grounds due to inadmissibility, without taking into account the humanitarian and compassionate considerations cited by the applicant. Application allowed.

APPEARANCES

*Guillaume Cliche-Rivard* for applicants.

*Lynne Lazaroff* for respondent.

SOLICITORS OF RECORD

*Cliche-Rivard, Avocats inc*., Montréal, for applicants.

*Deputy Attorney General of Canada* for respondent.

*The following is the English version of the reasons for judgment and judgment rendered by*

MCHAFFIE J.:

## I. Overview

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

[2] Abdelhak Sedki is inadmissible for misrepresentations made in a previous application for a visitor visa. His five-year inadmissibility period continues until December 6, 2022. Pursuant to subsection 40(3) of the IRPA, Mr. Sedki "may not apply for permanent resident status" during this period. Mr. Sedki nevertheless applied for permanent residence as a member of the family class, sponsored by his wife, Zineb el Aoud. The application cited humanitarian and compassionate (H&C) grounds and section 25 of the IRPA. An officer from the Canadian embassy in Morocco rejected the application on October 25, 2019, on the basis of the inadmissibility, without taking into account the H&C grounds cited by Mr. Sedki.

[3] I conclude that the officer's decision was unreasonable. The officer rejected Mr. Sedki's application, citing only his inadmissibility and subsection 11(1) of the IRPA. They did not consider subsection 25(1) or the impact of the prohibition in subsection 40(3) on Mr. Sedki's ability to make an H&C application. In my view, the officer's analysis is not consistent with the text, context, and purpose of the IRPA.

[4] The Minister argues that the lack of analysis on this point does not render the decision unreasonable, as Mr. Sedki was ineligible to file an H&C application in any case. The Minister asserts that the Court should uphold the officer's decision on the ground that subsection 40(3) of the IRPA precludes an H&C application under subsection 25(1).

[5] I do not agree. On the contrary, having heard the arguments of the Minister and the applicants, I find that the only reasonable interpretation of the relevant provisions is that a foreign national who is inadmissible for misrepresentation can still file an H&C application under subsection 25(1). According to the language of section 25, Parliament has expressly precluded certain inadmissible foreign nationals from filing an H&C application. Foreign nationals who are inadmissible under section 40 for misrepresentation are not among those listed in section 25. This strong legislative indication is confirmed by other indications in the IRPA, in certain manuals published by Immigration, Refugees and Citizenship Canada (IRCC), and in this Court's jurisprudence. These indications show, without allowing another reasonable interpretation, that the officer had discretion to process the H&C application, which he did not do.

[6] The application for judicial review is therefore allowed, and Mr. Sedki's H&C application and his application for sponsored permanent residence are returned to a different IRCC officer for assessment on the merits.

[7] That said, I agree with the parties (i) that the question posed in the first paragraph is determinative of this application, (ii) that there is no established answer to this question in the jurisprudence, (iii) that it has significant consequences for many foreign nationals who have been deemed inadmissible for misrepresentation, and (iv) that it therefore transcends the interests of the immediate parties to the litigation. I find that the criteria for a certified question are met, and I grant the parties' request to certify the following question:

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

## II. Issues and standard of review

[8] This application raises the following issues:

A. Was it reasonable for the officer to reject the applicants' sponsorship application on the basis of inadmissibility for misrepresentation without processing their H&C application under section 25 of the IRPA?

B. Does this Court have jurisdiction to hear this application notwithstanding paragraph 72(2)(a) of the IRPA and/or did the Immigration Appeal Division (IAD) have jurisdiction to hear an appeal of the officer's decision?

C. Should the style of cause be amended to remove Ms. el Aoud as an applicant?

[9] The reasonableness standard applies to the review of the officer's decision to reject the applicants' application: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, at paragraphs 16–17 and 23–25. The parties do not argue otherwise. This standard therefore applies to the first issue. I will address the application of this standard in greater depth when discussing the officer's decision.

[10] The second issue relates to the jurisdiction of this Court and the IAD. When the jurisdiction of the Court is in question, the Court often addresses this issue first. In this case, the parties agree that the Court has jurisdiction, and I agree as well. My conclusion on this issue is closely related to that on the first issue. I will therefore address the issue of jurisdiction second. The IAD did not raise the issue of its jurisdiction, even implicitly, as Ms. el Aoud withdrew her appeal to the IAD following the Minister's objection. In my view, the issue of this Court's jurisdiction is to be decided without applying a standard of review, even though it is complementary to the IAD's jurisdiction: *Habtenkiel v. Canada (Citizenship and Immigration)*, 2014 FCA 180, at paragraph 23.

[11] The third issue relates to Ms. el Aoud's ability to participate as an applicant in this application for judicial review. No standard of review applies.

## III. Analysis

### A. *The officer's decision was unreasonable*

#### (1) Background: The inadmissibility and the rejection of the permanent resident application

[12] Mr. Sedki filed an application for a visitor visa in 2017. This application was rejected on December 6, 2017. The officer who evaluated the application determined that Mr. Sedki had made misrepresentations about his employment and finances. He was therefore inadmissible for a period of five years under section 40 of the IRPA, which states:

> **Misrepresentation**
>
> **40 (1)** A permanent resident or a foreign national is inadmissible for misrepresentation
>
> **(a)** for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of this Act;
>
> …
>
> **Application**
>
> **(2)** The following provisions govern subsection (1):
>
> **(a)** the permanent resident or the foreign national continues to be inadmissible for

> misrepresentation for a period of five years following, in the case of a determination outside Canada, a final determination of inadmissibility under subsection (1) or, in the case of a determination in Canada, the date the removal order is enforced; and
>
> …
>
> **Inadmissible**
>
> **(3)** A foreign national who is inadmissible under this section may not apply for permanent resident status during the period referred to in paragraph (2)(a). [Emphasis added.]

[13] Mr. Sedki does not challenge this previous decision in this application for judicial review. It is therefore accepted for present purposes that he is inadmissible under section 40 of the IRPA until December 6, 2022. As subsection 40(3) indicates, a foreign national who is inadmissible for misrepresentation may not apply for permanent resident status during the period of inadmissibility.

[14] Mr. Sedki nevertheless applied for permanent residence in November 2018, sponsored by Ms. el Aoud. In a cover letter, the applicants' consultant highlighted the inadmissibility and noted that she was including with the application [TRANSLATION] "an H&C application to remove the inadmissibility". On October 23, 2019, not having received a response, the consultant filed a follow-up to the sponsorship application and the H&C application, making explicit reference to section 25 of the IRPA. She also submitted some additional documents, including a letter from Ms. el Aoud.

[15] On October 25, 2019, the officer made the decision to reject the application. The substantial analysis of the decision reads as follows:

> [TRANSLATION]
>
> I have now finished reviewing your application and I have come to the conclusion that you do not meet the criteria for admissibility to Canada as a member of the family class-spouse.
>
> Paragraph 40(1)(a) of the Immigration and Refugee Protection Act states that a foreign national is inadmissible for directly or indirectly "misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of this Act". Paragraph 40(2)(a) specifies that the inadmissibility is effective for a period of five years following, in the case of a determination outside Canada, a final determination of inadmissibility.
>
> On December 6, 2017, your application for a temporary resident visa was rejected for misrepresentation. You are therefore inadmissible to Canada until December 6, 2022.
>
> As this period has not passed, you are still inadmissible.
>
> Subsection 11(1) of the Act stipulates that "a foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act". For the reasons given above, I am convinced that you should be inadmissible, and I therefore reject your application. [Emphasis added.]

[16] The officer's decision does not mention the H&C application or H&C grounds. It also makes no reference to either subsection 40(3) or section 25 of the IRPA. The notes in the Global Case Management System (GCMS) do not mention them either, making reference only to subsection 40(2) and inadmissibility until December 6, 2022. The officer simply concluded that Mr. Sedki was inadmissible and noted that subsection 11(1) states that a visa will not be issued if the foreign national is inadmissible.

[17] Ms. el Aoud filed an appeal of the decision with the IAD on October 30, 2019. The applicants filed this application for judicial review on December 20, 2019.

[18] In April 2020, the Minister filed a motion with the IAD to dismiss the appeal for lack of jurisdiction. The Minister claimed that the IAD could not hear the appeal, raising, for the first time, the prohibition in subsection 40(3). After having received the Minister's motion, Ms. El Aoud withdrew her appeal to the IAD on July 29, 2020, and pursued this application for judicial review.

(2) Analytical framework

(a) *Reasonableness and lack of reasoning regarding the H&C application*

[19] In conducting reasonableness review, the Court must consider the outcome of the administrative decision in light of the decision maker's rationale in order to ensure that the decision is "transparent, intelligible and justified": *Vavilov*, at paragraph 15. A reasonable decision must be both based on internally coherent reasoning and justified in light of the legal and factual constraints, including the governing statutory scheme and the submissions of the parties: *Vavilov*, at paragraphs 99–101, 108–10 and 127–28.

[20] The parties' submissions constitute an important constraint that bears on an administrative decision: *Vavilov*, at paragraphs 127–128. The majority of the Supreme Court explained that "[t]he principles of justification and transparency require that an administrative decision maker's reasons meaningfully account for the central issues and concerns raised by the parties": *Vavilov*, at paragraph 127. As the applicants assert, if an administrative decision does not meaningfully grapple with key issues, the reviewing court may question whether the decision maker was actually alert and sensitive to the matter before it: *Vavilov*, at paragraph 128.

[21] In the present case, the officer did not expressly mention the applicants' H&C application. They simply rejected the application in its entirety based on Mr. Sedki's inadmissibility and subsection 11(1) of the IRPA. The applicants claim that the officer's decision was unreasonable and should be quashed because of the sole fact that the officer did not even address the existence of the H&C application.

[22] However, the situation is complicated by the fact that the Minister claims the officer was not obliged to decide the H&C application. The Minister states that Mr. Sedki was precluded from filing an H&C application because of subsection 40(3) and, therefore, the officer was not required to deal with the application or even to address the fact that they were not required to do so. In essence, the Minister claims that the fact

that the officer did not refer to the H&C application cannot render their decision unreasonable, because Mr. Sedki was prohibited from making such an application.

[23] The officer's decision should be read in its administrative context and must not be assessed against a standard of perfection: *Vavilov*, at paragraph 91; *Canada (Citizenship and Immigration) v. Mason*, 2021 FCA 156, [2022] 1 F.C.R. 3, at paragraph 40. The relevant administrative context includes the large volume of sponsorship applications and other visa applications received by Canadian missions: *Sheikh v. Canada (Citizenship and Immigration)*, 2020 FC 199, at paragraphs 51 and 68; *Yuzer v. Canada (Citizenship and Immigration)*, 2019 FC 781, 70 Imm. L.R. (4th) 185, at paragraphs 9, 15 and 20.

[24] Even though they did not specifically mention the H&C application, one can see that the officer examined the applicants' application and concluded that the entire application, including the H&C application, had to be rejected because Mr. Sedki was inadmissible and subsection 11(1) requires proof that he is not. I am therefore not satisfied that the mere fact that the officer did not refer to the H&C application in their analysis renders the decision unreasonable on the basis of a failure to consider a key aspect of the application.

[25] That said, the statutory analysis now proposed by the Minister is not the analysis the officer conducted. The officer relied exclusively on subsections 40(1), 40(2), and 11(1) of the IRPA, while the Minister is relying primarily on subsection 40(3). In my view, we must begin with the officer's reasoning, as the reasons communicate the rationale for the decision: *Vavilov*, at paragraphs 81 and 84.

[26] In this regard, I accept that a decision maker may draw implicit conclusions on a matter of statutory interpretation: *Mason*, at paragraph 41. However, in this case, I cannot conclude that the officer drew an implicit conclusion regarding the interplay between subsections 40(3) and 25(1) as they only referred to subsections 40(1), 40(2), and 11(1). In my view, this would cross the line between a respectful, holistic, and contextual reading of the reasons and the fabrication of new reasons to support a decision: *Vavilov*, at paragraph 96; *Alexion Pharmaceuticals Inc. v. Canada (Attorney General)*, 2021 FCA 157, [2022] 1 F.C.R. 153, at paragraphs 8–10. The issue, for the moment, is not to determine whether the same result could have been reached through different reasoning. An otherwise reasonable outcome cannot stand if it was reached on an improper basis: *Vavilov*, at paragraph 86.

(b) *Reasonableness and statutory interpretation*

[27] As I have mentioned, the officer effectively concluded that in light of subsection 11(1) of the IRPA, Mr. Sedki's inadmissibility under section 40 required that his application, including the H&C application, be rejected. This analysis raises an issue of statutory interpretation.

[28] When such an issue is raised, the "modern principle" of interpretation applies to administrative decision makers as well as courts: *Vavilov*, at paragraph 118. Under this

principle, the words of a provision 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”, that is, in accordance with the text, context, and purpose of the statute: *Vavilov*, at paragraphs 117–121, citing *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, (1998), 154 D.L.R. (4th) 193, at paragraph 21 and *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at paragraph 26.

[29] Although administrative decision makers should apply these principles of interpretation, they are not required in every case to engage in a “formalistic” statutory interpretation exercise, even if they issue written reasons: *Vavilov*, at paragraph 119. However, the interpretation must be consistent with the text, context, and purpose of the statutory provisions: *Vavilov*, at paragraph 120. When reviewing the decision of a decision maker, the reviewing court “does not undertake a *de novo* analysis of the question” and does not look for the “correct” interpretation: *Vavilov*, at paragraphs 116 and 124; *Mason*, at paragraphs 11–13. The analysis seeks simply to determine whether the decision is consistent with the principles of interpretation.

[30] The Court of Appeal recently highlighted the “danger” created by the fact that both the courts and administrative decision makers apply the same principles of interpretation: *Mason*, at paragraphs 11–13. To avoid this danger, the reviewing court should keep in mind (i) that administrative decision makers may have a range of interpretations open to them; (ii) that decision makers may have a better appreciation of interpretations than the Court because of their expertise; and (iii) that the legislation gives the responsibility to interpret the legislation to decision makers, and not to reviewing courts: *Mason*, at paragraph 16, citing *Hillier v. Canada (Attorney General)*, 2019 FCA 44, [2019] 2 F.C.R. D-3, at paragraphs 13–17.

[31] In *Mason*, the Court of Appeal suggested an approach in which the reviewing court conducts a “preliminary” analysis of the text, context, and purpose of the legislation, without making judgments or conclusions, before examining the administrative decision maker’s interpretation and the parties’ arguments: *Mason*, at paragraphs 17–20. However, one should not assume that the same analysis is appropriate for all administrative contexts or take a “default position of acceptance”: *Mason*, at paragraphs 23–24. The analysis of the decision at issue by the majority of the Supreme Court in *Vavilov* provides another example of an analysis of a statutory interpretation issue applying the reasonableness standard: *Vavilov*, at paragraphs 171–96; see also *Alexion*, at paragraphs 34–69.

(3) The officer’s analysis was not reasonable

[32] The officer referred to Mr. Sedki’s inadmissibility, which is not contested, as well as subsection 11(1) of the IRPA. They concluded the application should be rejected as they were convinced that Mr. Sedki was inadmissible.

[33] In my view, the officer’s reference to subsection 11(1) is sensible. The officer’s role is to conduct the “examination” referred to in subsection 11(1), and that subsection

provides important instructions regarding the fact that a visa may be issued if the officer is satisfied the foreign national is not inadmissible.

[34] However, the officer ended their analysis with this subsection. They did not consider the statutory context of subsection 11(1) or, in particular, subsection 25(1), which was raised by Mr. Sedki's H&C application. Subsection 25(1) provides that a foreign national outside Canada may apply for a permanent resident visa on humanitarian and compassionate grounds:

> **Humanitarian and compassionate considerations — request of foreign national**
>
> **25 (1)** Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected. [Emphasis added.]

[35] It is clear from this text that subsection 25(1) is available in at least certain cases of inadmissibility. This was confirmed by the Supreme Court of Canada: *Kanthasamy v. Canada* (*Citizenship and Immigration*), 2015 SCC 61, [2015] 3 S.C.R. 909, at paragraph 20. In *Kanthasamy*, Justice Abella referred to the general rule of subsection 11(1) in particular, before noting that subsection 25(1) gives the Minister discretion to grant an exemption from the ordinary requirements of the IRPA in certain cases: *Kanthasamy*, at paragraphs 9–10. For example, the Minister admits that a foreign national outside Canada who is inadmissible under section 36 of the IRPA may make an H&C application and may receive a permanent resident visa once that application is processed, notwithstanding subsection 11(1).

[36] Therefore, subsection 11(1) cannot mean, as the officer appears to have concluded, that an H&C application for a permanent resident visa should be rejected simply because the applicant is inadmissible. If it did, a foreign national outside Canada could never successfully make an H&C application for a permanent resident visa, which is obviously not the case. I note that the Minister does not rely on subsection 11(1) to support their position or the reasonableness of the officer's decision.

[37] As a result, I find, as did the Supreme Court in *Vavilov*, that even though the officer's analysis began in a sensible manner, the lack of consideration of statutory context undermines its reasonableness: *Vavilov*, at paragraphs 174–176. Unfortunately, the officer's analysis ended there. As indicated above, the officer relied on the inadmissibility for misrepresentation and subsections 40(1) and (2), but I cannot read their decision as including an implicit analysis of subsection 40(3) or of the interplay between subsection 40(3) and subsection 25(1). In other words, the officer did not explicitly or implicitly consider the text, context, or purpose of subsection 25(1) or

subsection 40(3), or, if they did, their reasons cannot be discerned: *Alexion*, at paragraph 66.

[38] I am therefore not confident that the officer considered the text or context of the applicable provisions before concluding that Mr. Sedki's H&C application should be rejected on the basis of his inadmissibility and subsection 11(1): *Vavilov*, at paragraph 122. This is not a matter of minor aspects or the omission of certain details after a consideration of almost all of the elements of text, context, and purpose: *Vavilov*, at paragraphs 100 and 122; *Mason*, at paragraph 41.

[39] I therefore find that the officer's decision does not demonstrate a line of analysis that could reasonably lead them to the conclusion they reached: *Vavilov*, at paragraphs 102 and 122. The officer's reasons were not reasonable, and the decision cannot be sustained.

[40] However, this does not conclude the analysis. When a decision is unreasonable, the normal recourse is to set it aside and remit the matter: *Vavilov*, at paragraph 141. However, as I have indicated, the Minister asserts that, in this case, Mr. Sedki did not have the right to file an H&C application under subsection 25(1) because of subsection 40(3). The Minister claims that, regardless of the officer's analysis, the only reasonable interpretation of the subsections is that a foreign national who is inadmissible for misrepresentation may not file an H&C application. The Minister states that in these circumstances, the officer was not required to decide the issue and there is no need to remit the matter to the decision maker.

[41] The applicants also argue there is only one reasonable interpretation and that there is no point in remitting the matter to an IRCC officer. However, the applicants submit that the contrary interpretation is the only reasonable interpretation, namely that a foreign national who is inadmissible for misrepresentation may nevertheless file an H&C application.

[42] I agree with the parties that if there is only one reasonable interpretation of the relevant subsections, there is no point in remitting the matter to an IRCC officer to remake the decision simply because this officer did not conduct an adequate or reasonable analysis: *Vavilov*, at paragraphs 142 and 195; *Tan v. Canada (Attorney General)*, 2018 FCA 186, [2019] 2 F.C.R. 648, at paragraphs 121–122, *per* Rennie J. for the majority. Conversely, if the IRPA allows for two or more reasonable interpretations, the Court should remit the matter for reconsideration, as the administrative decision maker should be the first to decide the matter: *Vavilov*, at paragraph 140; *Alexion*, at paragraphs 67–70; *Tan*, at paragraphs 135–141, *per* Pelletier J., dissenting in part.

[43] To answer the question of whether there is only one reasonable interpretation and, if so, which one, one must consider the parties' arguments on statutory interpretation. Should the Court even undertake this exercise? I conclude in this case that the answer is yes. The Supreme Court has pointed out that there are cases in which only one statutory interpretation is reasonable and remitting for reconsideration

would be contrary to the concern for timely and effective resolution: *Vavilov*, at paragraphs 124 and 142. It is impossible to determine whether this case is one of these cases without considering the parties' arguments on the applicable statutory interpretation.

[44] In this regard, the "timely and effective resolution" of Mr. Sedki's application is certainly at stake. His H&C application to join his wife in Canada before his inadmissibility expires was filed almost three years ago. His inadmissibility will only last another 14 months, and his H&C application has not yet been heard on the merits. The application risks becoming moot if the question of whether Mr. Sedki can even file his H&C application, in addition to the processing of the application on the merits, is remitted for reconsideration. Future applicants may also find themselves in the same situation given the length of the inadmissibility and the length of judicial review proceedings. This cannot be Parliament's intention: *Vavilov*, at paragraph 142.

[45] As I have stated, the answer to the interpretation issue also affects the second issue, this Court's jurisdiction in this application. It is therefore necessary to determine whether there is only one reasonable interpretation for this reason as well.

[46] I remain mindful, however, of Parliament's intention to leave the decision to the administrative decision maker and of the need to avoid a "disguised correctness review" in the form of an assessment of the existence of a single reasonable interpretation: *Vavilov*, at paragraphs 140 and 142; *Nova Tube Inc./Nova Steel Inc. v. Conares Metal Supply Ltd.*, 2019 FCA 52, [2019] 2 F.C.R. D-5, at paragraph 61. As the majority in *Vavilov* noted, the Court should "generally pause before definitively pronouncing upon the interpretation of a provision entrusted to an administrative decision maker": *Vavilov*, at paragraph 124.

[47] To try to avoid these problems, I will examine the parties' arguments and analyze the suggested interpretations as if they were the officer's reasoning, applying the principles of the reasonableness standard in matters of statutory interpretation. If both arguments could be considered reasonable, or if the statutory interpretation analysis would lead to two reasonable interpretations, the decision should be remitted. Conversely, if only one of the interpretations could be considered reasonable if it were the officer's decision, this would confirm that remittance would be unnecessary. I am not suggesting that this approach is universal or that it should be undertaken in every case. However, I conclude that this analysis is appropriate for determining the issue put before the Court by the parties in this case.

[48] This analysis requires an assessment of the Minister's arguments that were not part of the officer's reasoning and the applicants' arguments that were not before the officer. Such arguments are generally not permitted on judicial review: *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44, [2015] 3 S.C.R. 147, at paragraphs 65–69; *JK v. Gowrishankar*, 2019 ABCA 316, 438 D.L.R. (4th) 437, at paragraph 51; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at paragraphs 22–26; *Mason*, at paragraph 73.

[49] With respect to the Minister's arguments, I have explained above why I am prepared to consider the issue of whether the prohibition in subsection 40(3) can reasonably be interpreted to preclude an inadmissible foreign national from making an H&C application, despite the absence of such an analysis by the officer. To do so, the Court must, by definition, consider arguments that were not made by the officer.

[50] As for the applicants' arguments, they did not make submissions on the interaction between subsections 25(1) and 40(3) to the officer. This is because it was the officer who raised for the first time in their decision the possibility that the H&C application should be refused solely because Mr. Sedki is inadmissible. Further, the Minister alleged for the first time in the motion to dismiss the appeal to the IAD that subsection 40(3) prevents Mr. Sedki from filing an H&C application. This is not, therefore, a situation where the applicants' arguments could have been argued before the administrative tribunal but were not: *Alberta Teachers*, at paragraph 23. Nor is it a matter in respect of which further evidence is required: *Alberta Teachers*, at paragraph 28. The Minister did not object to the applicants' arguments on the basis of their novelty, an objection that would be difficult to sustain given the Minister's new arguments. In these circumstances, I am satisfied that the Court has, and must exercise, the discretion to consider the arguments of both parties.

(4) There is only one reasonable interpretation

[51] All this leads to the central issue raised by the parties. Is a foreign national who is inadmissible for misrepresentation barred by subsection 40(3) from making an H&C application under subsection 25(1)? Or, to better put the question in the context of this application for judicial review, is there only one reasonable answer to this question? The answer flows from an examination of the text, context and purpose of the provisions of the IRPA.

(a) *The text: the relevant provisions*

[52] Subsection 40(3) of the IRPA is reproduced at paragraph 12 above. At the risk of repeating myself, it provides that "[a] foreign national who is inadmissible [for misrepresentation] may not apply for permanent resident status during the period referred to in paragraph (2)(a)." On its face, this prohibition is not limited. As the Minister argues, it simply refers to "an application for permanent resident status".

[53] The "period referred to in paragraph (2)(a)" runs for five years after (i) the final determination, if the person is outside Canada; or (ii) the enforcement of the removal order, if the person is in Canada. It is worth noting that this period is not necessarily limited to five years. For someone who is in Canada, the consequences of inadmissibility arise from the decision that there has been misrepresentation, not from the enforcement of the resulting exclusion order: *Zeng v. Canada (Citizenship and Immigration)*, 2019 FC 1586, [2020] 3 F.C.R. D-2, at paragraph 43; IRPA, sections 48 and 49. If a removal order is not enforced for a period of time after the order comes into force, the period of inadmissibility can run for more than five years. This result is further confirmed in the English version of the paragraph, which states that the permanent

resident or foreign national “continues to be inadmissible” for five years after the removal order is enforced: IRPA, paragraph 40(2)(a).

[54] Subsections 40(2) and (3) therefore state that an inadmissible foreign national, whether in or outside of Canada, cannot apply for permanent resident status during the minimum five-year period of inadmissibility.

[55] Subsection 25(1), which is reproduced in paragraph 34, provides that an inadmissible foreign national who is in Canada, and any foreign national outside Canada, *may* apply for a permanent resident visa on humanitarian and compassionate considerations. There are two relevant points to note in the text of subsection 25(1).

[56] First, only a foreign national in Canada applying for permanent resident status or a foreign national outside Canada applying for a permanent resident visa may make an H&C application under subsection 25(1): *Kanthasamy*, at paragraph 20. As the Minister points out, this is consistent with section 66 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (IRPR), which provides that an application under subsection 25(1) [of IRPA] must be accompanied by an application to remain as a resident or, in the case of a foreign national outside Canada, an application for a permanent resident visa: *Dhillon v. Canada* (Citizenship and Immigration), 2019 FC 391, [2019] 2 F.C.R. D-13 (*Dhillon (2019)*), at paragraph 12.

[57] Second, the subsection sets out certain situations in which an H&C application may not be made. The subsection is “subject to subsection (1.2)”. This subsection sets out five circumstances in which the Minister may not consider an H&C application made under subsection 25(1). Similarly, the text of subsection 25(1) states that an H&C application cannot be made by a foreign national who is inadmissible under sections 34 (security), 35 (human or international rights violations) and 37 (organized criminality): *Tapambwa v. Canada (Citizenship and Immigration)*, 2019 FCA 34, [2020] 1 F.C.R. 700, at paragraphs 101 and 106.

[58] Thus, reading their texts independently, one sees that subsection 40(3) prevents a foreign national who is inadmissible for misrepresentation from applying for permanent resident status while subsection 25(1) allows a foreign national outside Canada to file an H&C application to obtain permanent resident status, with some exceptions. The question is therefore effectively whether, when read together, subsection 40(3) is an exception to subsection 25(1) or whether subsection 25(1) is an exception to subsection 40(3).

[59] Neither the text of subsection 40(3) nor that of subsection 25(1) refers to the other. Nevertheless, as the applicants point out, subsection 25(1) explicitly sets out several circumstances in which the Minister may not consider an H&C application. These include inadmissibility under sections 34, 35 or 37. The subsection does not mention inadmissibility for misrepresentation under section 40.

[60] I agree with the applicants that the absence of section 40 from the text of subsection 25(1), when several other inadmissibilities are listed, strongly and clearly

suggests that Parliament's intention was not to prevent a foreign national who is inadmissible for misrepresentation from making an H&C application.

[61] If Parliament wanted to prevent a foreign national who is inadmissible under section 40 from making an H&C application, it would be sufficient to add section 40 to sections 34, 35 and 37 in the text of subsection 25(1). The fact that Parliament did not include section 40 in this list is a clear textual indication. This is especially the case since subsection 40(3) was added to IRPA as part of the same legislation that amended subsection 25(1) to exclude from its application a foreign national who is inadmissible by reason of a case described in section 34, 35 or 37: *Faster Removal of Foreign Criminals Act*, S.C. 2013, c. 16, sections 9 and 16.

[62] The Minister argues that section 40 is absent from subsection 25(1) because the prohibition in section 40 is temporary and not permanent like that in sections 34, 35 or 37. I do not see how this fact could reasonably be considered to affect the possibility of including section 40 in subsection 25(1) if Parliament wanted to prevent an H&C application. If section 40 were found in subsection 25(1), foreign nationals who are inadmissible for misrepresentation could only make an H&C application after the five years have elapsed, at which time they would no longer be inadmissible under the section.

[63] In addition, there are other temporary exceptions to the possibility of filing an H&C application. These are listed in subsection 25(1.2). For example, the Minister cannot consider an H&C application if the foreign national has made an H&C application that is still pending or if the foreign national has made a claim for refugee protection that is pending before the Refugee Protection Division or the Refugee Appeal Division: IRPA, paragraphs 25(1.2)(a)–(b). Again, however, Parliament did not include inadmissibility for misrepresentation in this list of exceptions. Parliament has specified that subsection 25(1) is "subject to" subsection 25(1.2) but has not indicated that it is "subject to" subsection 40(3).

[64] The Minister also argues that the absence of a reference to section 40 in subsection 25(1) does not affect the prohibition in subsection 40(3). The Minister argues that the fact that an H&C application must be accompanied by an application for permanent residence means that such an application cannot be made by a foreign national to whom subsection 40(3) applies, because that foreign national cannot make such an application. The Minister therefore argues that the prohibition on filing any application for a permanent resident visa [TRANSLATION] "by ricochet" prevents any H&C application. I do not find this analysis reasonable for two reasons.

[65] First, I find this reasoning circular. It effectively assumes that subsection 40(3) creates an exception to subsection 25(1) in order to conclude that subsection 40(3) creates an exception to subsection 25(1). This presumption cannot be made without considering the text of subsection 25(1) and the absence of section 40 from the list of exceptions.

[66] Second, the argument is undermined by the provisions regarding designated foreign nationals. Subsection 20.2(1), which deals with foreign nationals designated under section 20.1, is the only other provision in the IRPA that states that a foreign national "may not apply to become a permanent resident." Similar to inadmissibility for misrepresentation, this prohibition applies to a designated foreign national for a period of five years, which begins to run at different times depending on the circumstances: IRPA, paragraphs 20.2(1)(a)–(c); 40(2)(a)–(b). Despite this prohibition, which is expressed in the same way as that in subsection 40(3), section 25 includes a specific subsection which provides that a designated foreign national may not make an H&C application under section 25 for the same five-year period: IRPA, subsection 25(1.01). This express prohibition regarding foreign nationals designated under section 20.1 suggests that the absence of an equivalent prohibition for inadmissible foreign nationals under section 40 is a deliberate legislative choice not to prevent the latter from making an H&C application.

[67] In my view, the text of subsections 25(1) and 40(3), read together, preliminarily indicate only one reasonable interpretation, namely that a foreign national who is inadmissible for misrepresentation may make an H&C application under subsection 25(1). For the following reasons, I find that the legislative and administrative context of these sections reinforces this conclusion, while the purpose of the Act has no significant effect on the interpretation.

(b) *The context: other provisions, manuals, administrative context and non-determinative case law*

(i) Other provisions of the IRPA

[68] The legislative context of subsections 25(1) and 40(3) includes notably other relevant provisions of the IRPA. I have referred above to subsection 25(1.2) and sections 34, 35 and 37 of the IRPA. These latter provisions are expressly included in the wording of subsection 25(1). The applicants also rely on section 36 while the Minister relies on sections 63 to 65.

[69] Section 36 of the IRPA deals with inadmissibility on grounds of serious criminality or criminality, under subsections 36(1) and (2), respectively. The former provides, among other things, for inadmissibility for having been convicted of an offence punishable by a maximum term of imprisonment of at least ten years: IRPA, subsection 36(1); *Tran v. Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50, [2017] 2 S.C.R. 289, at paragraphs 2 and 5. The parties agree that subsection 25(1), which refers to sections 34, 35 and 37, and not to section 36, does not preclude an H&C application by a foreign national who has been found to be inadmissible for serious criminality.

[70] The applicants argue that it would be inconsistent for Parliament to allow someone who has been convicted of a serious crime to file an H&C application, but to prevent someone who has not declared, for example, the denial of a previous visa.

[71] As the Minister notes, Parliament can dictate its own legislative priorities. It is not for the Court to question them. Parliament may conclude that the problem of immigration misrepresentation is more serious and deserves greater sanction than the problem of serious crime. On the other hand, one would expect Parliament to express such a conclusion clearly, which it certainly did not do by omitting section 40 from the list of prohibitions against an H&C application in subsection 25(1). I note in this regard that in the Supreme Court of Canada decision in *Tran*, Justice Côté concluded that it would be "absurd" for a person guilty of a less serious crime to receive a more severe consequence with respect to his or her immigration status, and that this absurdity supported the contrary interpretation: *Tran*, at paragraphs 32–34.

[72] The Minister refers to the rights of appeal to the IAD set out in sections 63 to 65 of the IRPA. These sections are discussed in more detail below in the context of the second issue regarding the Court's jurisdiction. For now, it is sufficient to note that subsection 63(1) provides a right of appeal from the refusal to issue a permanent resident visa to the sponsor of a sponsorship application. In the case of a refusal based on inadmissibility for misrepresentation, subsection 64(3) limits this right of appeal to the sponsor's spouse, common-law partner, or child. Finally, section 65 provides that the IAD may only consider humanitarian and compassionate considerations in an appeal of a family class application if the foreign national is a member of that class.

[73] The Minister submits that these provisions help explain why section 40 is not mentioned in subsection 25(1) and why Parliament wants to prevent those who have been found inadmissible for misrepresentation from filing H&C applications. In this regard, the Minister distinguishes between a "first application", namely that in which the determination of misrepresentation is made, and a "second application", namely a subsequent application that is made during the period of inadmissibility for misrepresentation. The Minister notes that a foreign spouse who is found to have misrepresented on the first sponsorship application has a right of appeal to the IAD: IRPA, subsections 63(1) and 64(3). In this appeal, the spouse may raise humanitarian and compassionate considerations: IRPA, section 65. The Minister argues that this fact explains the prohibition on making a second application on humanitarian and compassionate considerations under section 25.

[74] The Minister argues that the distinction between a "first application" and a "second application" is supported by *Gill*, to which I will refer when discussing the Court's jurisdiction: *Gill v. Canada (Citizenship and Immigration)*, 2020 FC 33, 72 Imm. L.R. (4th) 203. In *Gill*, Justice Simpson found that a sponsorship application made during the inadmissibility period is void and therefore cannot be appealed to the IAD: *Gill*, at paragraphs 16 and 21.

[75] I do not find that the Minister's arguments about appeal rights can reasonably support their interpretation. Even if one accepts that the availability of a prior opportunity to present humanitarian and compassionate considerations may support an interpretation that precludes a subsequent H&C application during the inadmissibility period, the IRPA is clear that not all foreign nationals subject to subsection 40(3) would have had a right of appeal. In particular, if the "first application" was not an application

giving a right of appeal to the IAD, such as an application for a temporary visa, or if humanitarian or compassionate considerations are excluded from consideration on appeal, such as for a foreign national who is not a member of the family class, there would be no prior opportunity to raise humanitarian or compassionate considerations: IRPA, sections 63–65. This is the case with Mr. Sedki, who was found to be inadmissible for misrepresentation on a temporary visa application and therefore had no right of appeal to the IAD. In such a situation, the Minister's interpretation would remove any possibility of considering humanitarian and compassionate considerations, even in cases where Parliament has expressly contemplated considering them, such as spousal sponsorship.

[76] The Minister also refers to sections 10 to 12 of the IRPR in their memorandum but did not emphasize these provisions strongly in oral submissions. In my view, these provisions deal with the form and content of any application made under the IRPR and the remittance of applications if they are not compliant. I do not find these provisions relevant to the question of the interpretation of subsections 25(1) and 40(3). I draw the same conclusion with respect to section 15 of the IRPA, which allows an officer to conduct an examination of any application made under the IRPA. This provision does not assist in determining whether or not a particular application is made in accordance with the IRPA.

(ii) IRCC manuals

[77] The manuals published by IRCC are another aspect of the context raised by the applicants. IRCC manuals, instructions and operational guidelines do not have the force of law and are not binding on the Court, but they may assist in interpreting a provision of the IRPA and in assessing the reasonableness of its application: *Khandaker v. Canada (Citizenship and Immigration)*, 2020 FC 985, [2020] 4 F.C.R. 638, at paragraph 64; *Hassan v. Canada (Immigration, Refugees and Citizenship)*, 2019 FC 1096, at paragraph 20.

[78] The applicants filed an IRCC manual entitled "Humanitarian and compassionate: Intake and who may apply" (date modified: 2019-06-21). This manual, which appears to be addressed to applicants, includes the following excerpt:

> **Submitting a request**
>
> …
>
> **Overseas**: applicants must use one of the existing departmental application forms for the three immigration classes (family, economic or refugee) and provide additional written information in support of their request for consideration under subsection A25(1).
>
> **Who may apply**
>
> Foreign nationals who are inadmissible or who do not meet the requirements of the *Act* or *Regulations* may make a written request for consideration under subsection A25(1). There are some restrictions with respect to examination of applications for H&C consideration. The restrictions are explained in the following charts.

…

**Restrictions on examination of applications**

There are a number of restrictions on examination of H&C applications including:

- Certain people who have an outstanding H&C request
- Inadmissibilities for which an exemption may not be requested
- Other restrictions on H&C applications. [Emphasis added.]

[79] Each of the "restrictions" is explained in the manual. The section of the manual that explains the restriction "Inadmissibilities for which an exemption may not be requested" refers to inadmissibilities under section 34, 35 or 37, but does not mention section 40. The manual tells applicants that they cannot make an H&C application if they are inadmissible under section 34, 35 or 37, but does not suggest that inadmissibility for misrepresentation prevents such an application. This is consistent with the applicants' interpretation.

[80] Similarly, the IRCC manual "Humanitarian and compassionate: processing applications from outside Canada" (date modified: 2014-07-24), which appears to be addressed to IRCC officers, includes a section entitled "Assessment of exemption requests at Stage 1." This section provides the following guidance:

> When you are assessing an exemption request keep the following in mind:
>
> - The objectives of the Act.
> - Consider exempting any applicable criteria or obligation of the Act, including inadmissibilities (except A34, A35, A37 inadmissibilities if the application is received after June 19, 2013), when the foreign national has specifically requested an exemption or when it is clear from the material that the foreign national is seeking an exemption (see also *Granting exemptions on one's own initiative*). [Emphasis added.]

[81] This manual does not suggest to officers that a foreign national who is inadmissible for misrepresentation cannot make an H&C application. As the Minister acknowledges, there is no reference in the IRCC manuals to the inability of a foreign national who is inadmissible for misrepresentation to make an H&C application.

[82] The Minister claims that this is because the guides apply only to "first applications" and not to "second applications". This explanation is not reasonable. There is no indication in the manuals that they apply only to "first applications" nor are there any other manuals that apply to "second applications" that reveal the Minister's interpretation. IRCC, the government agency that administers the IRPA, has apparently not previously concluded that inadmissibility for misrepresentation precludes an H&C application under subsection 25(1). Thus, if an officer were to conclude that the H&C application of a foreign national who is inadmissible for misrepresentation must be refused because of section 40, that conclusion would not be based on the IRCC

manuals and would, in fact, be contrary to the manuals. This suggests that this interpretation would be unreasonable: *Hassan*, at paragraph 20.

(iii) Administrative context

[83] The Minister underscores the administrative context of visa officers and their heavy workload, to which I referred earlier: *Sheikh*, at paragraphs 51 and 68; *Yuzer*, at paragraph 15. The Minister argues it is unreasonable in this context to ask visa officers to search through an application, which may be hundreds of pages long, to see if the application makes reference to humanitarian and compassionate considerations.

[84] The administrative context is important, but I cannot accept that the Minister's argument reasonably supports their proposed interpretation. To begin with, the argument is only hypothetical in this case. The applicants made it clear on the first page of their cover letter that they were making an H&C application under section 25. In any event, this Court's jurisprudence explains the circumstances in which an application for permanent residence may be considered, in whole or in part, to be an application under section 25, even if the applicant does not refer to it: *Kumari v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1424, at paragraph 9; *Brar v. Canada (Citizenship and Immigration)*, 2011 FC 691, at paragraph 58; *Canada (Citizenship and Immigration) v. Mora*, 2013 FC 332, 17 Imm. L.R. (4th) 126, at paragraphs 35–37; *Balarezo v. Canada (Citizenship and Immigration)*, 2017 FC 1060, at paragraphs 18–20.

[85] Furthermore, I agree with the applicants' observation that administrative convenience cannot justify removing the opportunity to make an H&C application. Nor can it justify an interpretation of the IRPA that is not supported by a contextual reading of its text. In any event, if the administrative context of visa officers and their workload supported the Minister's interpretation, one would assume that the manuals published by IRCC, which would be aware of that context, would make reference to it.

(iv) Jurisprudential context

[86] There is no case law that determines the question that is now before the Court. However, there are a few decisions that touch on it, directly or indirectly. In particular, I refer to the decisions of this Court in *Pretashi v. Canada (Citizenship and Immigration)*, 2021 FC 817 and *Mella v. Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1587, and the decision of the IAD in *McMurray v. Canada (Citizenship and Immigration)*, 2021 CanLII 59936 (I.R.B.), application for leave refused by this Court (IMM-2421-21, June 22, 2021).

[87] The parties brought *Pretashi* to the Court's attention after the hearing. In that case, Mr. Pretashi was found inadmissible for misrepresentation in 2017. His appeal to the IAD was dismissed in January 2019 and an application for judicial review was denied in August 2019: *Pretashi*, at paragraphs 6–7. As a result of that decision and the removal order taking effect, Mr. Pretashi lost his permanent resident status: *Pretashi*, at

paragraphs 39, 41 and 64; IRPA, paragraph 46(1)(c). In December 2019, while still in Canada, Mr. Pretashi submitted an H&C application: *Pretashi*, at paragraph 9.

[88] When his H&C application was submitted, Mr. Pretashi was a foreign national who was inadmissible for misrepresentation and the period of inadmissibility was still running. According to the Minister's interpretation, subsection 40(3) would apply and the H&C application should have been rejected on that basis. However, the H&C application was dealt with and rejected on the merits: *Pretashi*, at paragraphs 9–18. It appears that the officer concluded, at least implicitly, that Mr. Pretashi could make an H&C application despite subsection 40(3). In this context, Justice Kane observed that the section 25 exemption, if granted, would overcome Mr. Pretashi's inadmissibility for misrepresentation: *Pretashi*, at paragraph 44.

[89] In *Pretashi*, the Minister appears not to have taken the position being taken in this judicial review, namely, that the H&C application could not even be made because of subsection 40(3): *Pretashi*, at paragraphs 36–43. Justice Kane therefore did not have to address the issue. Her comments should be considered in that context. At the same time, this decision provides an example of a situation in which an H&C application was dealt with during the inadmissibility period. Other decisions also deal with H&C applications made in Canada during the inadmissibility period without any apparent suggestion by the Minister that subsection 40(3) prevents them from doing so: *Nguyen v. Canada (Citizenship and Immigration)*, 2017 FC 27, at paragraphs 5–6; *Mohammed v. Canada (Citizenship and Immigration)*, 2019 FC 271, at paragraphs 4–6; *Abdullah v. Canada (Citizenship and Immigration)*, 2019 FC 954, at paragraphs 1 and 7–12; *Mun v. Canada (Citizenship and Immigration)*, 2020 CanLII 15298 (F.C.), at paragraphs 2 and 5–6.

[90] Moreover, in *Mella,* Justice Norris also referred to the possibility of filing an H&C application despite a previous inadmissibility for misrepresentation, without deciding the issue. In the context of an application to vacate for misrepresentation, Ms. Mella raised the defence of "duress". Justice Norris upheld the Refugee Protection Division's conclusion that this defence does not apply in the context of vacation because the consequences of misrepresentation are not intended to punish. In this context, Justice Norris noted that vacation results in inadmissibility under section 40, including the prohibition in subsection 40(3): *Mella*, at paragraphs 28–29. On the other hand, he observed that "[i]mportantly, relief from the operation of paragraph 40(2)(a) and section 40(3) of the *IRPA* may be sought on humanitarian and compassionate grounds under section 25(1) of the *IRPA*": *Mella*, at paragraph 30; see also paragraphs 36 and 40. However, the issue of the interaction between subsections 40(3) and 25(1) was again not before Justice Norris as a direct question and his words must be considered in that context.

[91] The Minister raised the *McMurray* case primarily in relation to the jurisdictional issue. However, the IAD decision contains a relevant observation on the interplay between subsections 25(1) and 40(3). Ms. McMurray and her husband filed a sponsorship application while her husband was inadmissible. The application did not include an H&C application. The issue was whether the IAD had jurisdiction to hear an

appeal from the refusal of the sponsorship application on the basis that the marriage was not genuine. Relying on *Gill*, the IAD found that the application was void under subsection 40(3) and that the IAD therefore had no jurisdiction: *McMurray*, at paragraphs 1–5 and 11–13.

[92] Although bound by the decision in *Gill*, the IAD responded to Ms. McMurray's arguments on the merits. One of her arguments was that the existence of section 25 indicates that the IAD should have jurisdiction to hear an appeal from a rejection based on subsection 40(3) and to consider humanitarian and compassionate grounds in the appeal: *McMurray*, at paragraphs 6, 7 and 10. The IAD did not accept this argument, stating that subsection 40(3) "cannot be remedied by section 25(1). To read section 40(3) otherwise would render it meaningless": *McMurray*, at paragraph 17. Since this reference is the only indication from an administrative decision maker that an H&C application is not available to exempt inadmissibility for misrepresentation, I must give it serious consideration.

[93] Nevertheless, I cannot conclude that this *obiter* reasoning is reasonable or contributes to the statutory interpretation. The IAD did not undertake an analysis of its statement that subsection 40(3) cannot be corrected by subsection 25(1), other than to observe that the alternative interpretation would render it meaningless. It did not consider the text of subsection 25(1) and the express exceptions listed there. This is not surprising, since Ms. McMurray did not make an H&C application under subsection 25(1) and therefore the issue was not directly raised. Further, the rationale given, namely that subsection 40(3) would be rendered "meaningless" if a foreign national could still make an H&C application, seems inconsistent with the fact that subsection 40(3) would continue to have the effect of prohibiting any other application and precluding an appeal to the IAD if an H&C application is not made. This was the case in *McMurray*. The only reason given by the IAD for its conclusion therefore seems to me to be unfounded.

[94] This is not to say that the IAD's ultimate conclusion in *McMurray* was unreasonable. As I have indicated, Ms. McMurray had not made an H&C application. The analysis in the above passage was therefore not determinative, especially when the IAD found that it was bound by the decision in *Gill*. The result in *McMurray* on the jurisdiction of the IAD is consistent with my conclusions on this issue in the next part of these reasons.

[95] I therefore conclude that the context and, in particular, the other provisions of the IRPA, the IRCC manuals and the previous examples of H&C applications being processed, support the textual interpretation that a foreign national who is inadmissible for misrepresentation is not precluded from making an H&C application, and do not support the contrary interpretation.

(c) *Purpose: Parliament's intent, IRPA amendments and debates*

[96] The parties did not place much emphasis in their submissions on the purpose of the IRPA generally or on the purpose of subsections 25(1) and 40(3). In my view, a

consideration of the purpose of the provisions does not greatly affect the interpretation. It is a primarily equivocal factor.

[97] As I have stated, subsection 40(3) was enacted in a statute that made several amendments to the IRPA, namely the *Faster Removal of Foreign Criminals Act*. Among other amendments, this Act amended subsection 25(1) to prevent an H&C application for those who are inadmissible under sections 34, 35 or 37, increased the period of inadmissibility under subsection 40(2) from two years to five years, and added the prohibition under subsection 40(3).

[98] The purpose of section 40 is clearly to impose sanctions for misrepresentation and thereby discourage misrepresentation, to emphasize the importance of truth and accuracy in applications and in all communications with IRCC, and to promote the integrity of the administration of the IRPA and the immigration system in Canada. With respect to the purpose of subsection 40(3) in particular, the prohibition also appears to reinforce the seriousness of a false statement and the consequences of such an offence. There may be an administrative aspect as well, as this provision may serve to facilitate the processing of prohibited applications. This purpose is obviously related to the general objective of the IRPA to "maintain, through the establishment of fair and efficient procedures, the integrity of the Canadian immigration system": IRPA, paragraph 3(1)(f.1).

[99] The purpose of subsection 25(1) was explained by Justice Abella in *Kanthasamy*. The purpose of the provision is to provide an equitable remedy where the facts "would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another": *Kanthasamy*, at paragraph 21, citing *Chirwa v. Canada (Minister of Citizenship and Immigration)* (1970), 4 I.A.C. 351 (I.R.B.), at page 364. This purpose, as well as the reference to sections 34, 35 and 37 as exceptions, is clearly related to the general purpose of the IRPA to "promote international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals or security risks": IRPA, paragraph 3(1)(i). In some cases, it may also be linked to the general objective "to see that families are reunited in Canada": IRPA, paragraph 3(1)(d).

[100] Both of these objectives are important. However, there is no clear indication that Parliament intended the important purpose of section 40 to take precedence over the equally important purpose of section 25. Again, the contrast between the treatment of sections 34, 35 and 37 and section 40 is striking.

[101] The Minister filed with the Court excerpts from parliamentary debates on the *Faster Removal of Foreign Criminals Act*. Caution should be exercised in referring to the debates: *Alexion*, at paragraph 53. That said, parliamentary debates can be used to clarify the context and purpose of a statute, despite their limited probative value: *HL v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401, at paragraph 106; *Canada (Commissioner of Official Languages) v. Office of the Superintendent of Financial Institutions*, 2021 FCA 159, [2022] 1 F.C.R. 000, at paragraphs 70–72; *Vavilov*, at paragraphs 180 and 195.

[102] In introducing the legislation to amend the IRPA, the parliamentary secretary to the Minister of Citizenship and Immigration, Rick Dykstra, stated:

> We will restrict access to humanitarian and compassionate consideration for foreign nationals who are inadmissible on grounds of security, human or international human rights violations, or organized criminality. We also will clarify that the Minister of Public Safety may only take public safety and national security considerations into account when examining an application for ministerial relief. We will get specific in terms of what a minister, whether of public safety or citizenship and immigration, can do in terms of making a decision on his or her own.
>
> …
>
> We will increase the consequence for misrepresentation from a two-year inadmissibility to a five-year inadmissibility and, in addition, ban such individuals from applying for permanent resident status within those five years. If there is one thing I have noticed in my close to four years as Parliamentary Secretary to the Minister of Citizenship and Immigration is that time and time again we have bogus applications coming from other countries simply because some individuals lie on their application, misrepresent their situation, misrepresent their family or misrepresent the reason upon which they are applying for permanent resident status in Canada, whether that be through the normal procedures available or whether it be by refugee status. Therefore, if bogus refugees who want to come to this country misrepresent themselves or basically lie on their application, they will face a five-year inadmissibility penalty instead of a two-year penalty. It also would allow the ministry to ensure that these individuals who have misrepresented themselves cannot apply for permanent residency here in Canada for up to five years during that ban. [Emphasis added.]
>
> "Bill C-43: Faster Removal of Foreign Criminal Act", 2nd reading, *House of Commons Debates*, 41st Parl., 1st Sess. No. 151 (September 24, 2012), at page 10316.

[103] It is clear from this passage that the problem of misrepresentation was the reason for the amendments to section 40. However, with respect to subsection 40(3) specifically, Mr. Dykstra has merely paraphrased the provision. No meaningful clue can be inferred as to the purpose or interpretation of this subsection. On the other hand, Mr. Dykstra discussed the amendments to subsection 25(1), stating that an application on humanitarian and compassionate grounds by a foreign national who is inadmissible on grounds of security, violating human or universal rights, or involvement in organized crime will be refused. This is again a paraphrase of subsection 25(1). The refusal of applications on humanitarian and compassionate grounds and inadmissibility for misrepresentation were both directly addressed, without any suggestion that the prohibition in subsection 40(3) extends to applications under section 25.

[104] The other references in the debates are similar. The elimination of the opportunity to make an H&C application for those covered by sections 34, 35 and 37 is treated as a separate issue from the prohibition in subsection 40(3).

[105] The then Minister of Citizenship, Immigration and Multiculturalism, the Honourable Jason Kenney, responded to questions at a session of the Standing Committee on Citizenship and Immigration. In response to a question about how the

prohibition in subsection 40(3) would work, the Minister even suggested that the prohibition already existed in substance, although it was limited to a two-year period:

> **Mr. John Weston (West Vancouver–Sunshine Coast–Sea to Sky Country, CPC):**
>
> …
>
> One of the changes you propose in this bill is to finally impose consequences, that those who make misrepresentations must wait two to five years before they can apply again. My first question is, would you please explain how that would work?
>
> …
>
> **Hon. Jason Kenney:**
>
> …
>
> First of all, under the current provisions of IRPA, someone who is found to have engaged in misrepresentation, in, for example, making an application to visit or immigrate to Canada, can be barred from applying for two years. We are proposing to raise that benchmark to five years because, as you likely know, fraud in the immigration program is a very serious problem.
>
> One of the reasons in some parts of the world we have a fairly high rejection rate for temporary resident visas, for example, is because of the number of fraudulent applications that are often submitted by unscrupulous or crooked immigration agents operating abroad. There is an entire industry, as we know, that will produce, as I pointed out before, everything from fake bank transcripts to fake flight itineraries to fake death certificates or wedding certificates— fake just about everything. It's that industry that really creates serious problems for the efficient administration of our immigration laws and for legitimate, bona fide visitors who want to come here.
>
> We need to send a clear message to people here and abroad that if you are going to commit fraud in an application, there will be serious consequences. You won't be able to apply to come back for five years. This is not going to apply to people who just make a mistake, a good faith error, who forget to enclose a document or make a minor error. It's for those who clearly have the intent to misrepresent. This is why we've increased the penalty. [Emphasis added.]
>
> House of Commons, Standing Committee on Citizenship and Immigration, *Evidence*, 41st Parl., 1st Sess., No. 54 (October 24, 2012), at pages 10–11.

[106] The Minister at the time seems to have seen the amendments to section 40 primarily as an extension of inadmissibility. This does not change the wording of the legislation, of course, but he does not argue that the purpose of the legislation was to remove the ability to make an H&C application under section 25.

[107] Given these rather equivocal references in the legislative debates, I find that they do not significantly influence the interpretation of the relevant provisions of the IRPA.

(d) *Conclusion*

[108] Having considered the text, context and purpose of the provisions, it seems clear to me that their interaction "leaves room for a single reasonable interpretation of the statutory provision … that is at issue": *Vavilov*, at paragraph 124. I conclude that the only reasonable interpretation of subsections 40(3) and 25(1) of the IRPA is that a foreign national who is inadmissible for misrepresentation is not precluded by the prohibition in subsection 40(3) from making an H&C application under subsection 25(1). Like subsection 11(1), subsection 40(3) cannot reasonably be read in isolation as precluding an H&C application without regard to the text of subsection 25(1), which provides for such an application.

[109] Section 25 specifically excludes H&C applications made by those who are inadmissible under sections 34, 35 and 37. The section also excludes H&C applications made by designated foreign nationals, who are also barred from making applications for permanent residence. Despite these express exclusions, foreign nationals who are inadmissible under section 40 are not mentioned in section 25. This indication of an express legislative choice is effectively determinative. The other contextual aspects, including the lack of indication in the IRCC manuals that an H&C application from a foreign national who is inadmissible for misrepresentation is ineligible, further reaffirm this interpretation.

[110] In other words, if the officer in this case had concluded otherwise, even with all the arguments now advanced by the Minister as reasons, I would find that conclusion unreasonable. In this situation, it would be of little use to remit the issue of interpretation back to an officer to have the officer reconsider it or provide better reasons for the decision: *Vavilov*, at paragraphs 124 and 142.

[111] Accordingly, my order granting the application for judicial review will provide that Mr. Sedki's H&C application and the associated sponsorship application be sent back for reconsideration on the merits by another officer.

B. *This Court has jurisdiction to hear the application*

[112] The parties raised the jurisdiction of the Federal Court to hear this application, an issue closely related to the jurisdiction of the IAD. The parties agree that the Court has jurisdiction, but on somewhat different grounds. The Minister therefore asked the Court for [TRANSLATION] "a detailed written order" on the issue of the Court's jurisdiction and, as a corollary, the IAD's jurisdiction.

[113] I agree with the parties that the Court has jurisdiction to hear Mr. Sedki and Ms. El Aoud's application. However, for the reasons that follow, I conclude that the IAD would have had jurisdiction to hear Ms. el Aoud's appeal as a sponsor.

(1) Jurisdiction of the Federal Court on judicial review under the IRPA

[114] Paragraph 72(2)(a) of the IRPA provides that an application for leave to the Court cannot be made until all avenues of appeal have been exhausted:

**Application for judicial review**

> **72 (1)** Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is, subject to section 86.1, commenced by making an application for leave to the Court.
>
> **Application**
>
> **(2)** The following provisions govern an application under subsection (1):
>
> > **(a)** the application may not be made until any right of appeal that may be provided by this Act is exhausted.

[Emphasis added.]

[115] Pursuant to this paragraph, if there is a right of appeal under the IRPA, an application for judicial review can only be made once the appeal has been determined. This rule applies even if the right of appeal is that of the sponsor and not the applicant: *Somodi v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 288, [2010] 4 F.C.R. 26, at paragraphs 21–23 and 29.

[116] As Justice Pelletier noted on behalf of the Federal Court of Appeal, section 72 of the IRPA does not create a right to judicial review of a decision made under the IRPA. That jurisdiction is conferred on this Court by the *Federal Courts Act*: *Zaghbib v. Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 182, [2017] 1 F.C.R. 392, at paragraphs 29–31; *Federal Courts Act*, R.S.C., 1985, c. F-7, sections 18 and 18.1. Section 72 simply provides for additional procedural requirements in the immigration context when exercising this right: *Zaghbib*, at paragraph 31.

[117] Thus, if the IRPA does not give a right of appeal to the IAD, an application for judicial review may be made. The Federal Court of Appeal has also confirmed that a decision on an H&C application can be reviewed by the Court if the appeal panel cannot consider humanitarian and compassionate grounds: *Habtenkiel*, at paragraphs 36–38; *Seshaw v. Canada (Citizenship and Immigration)*, 2014 FCA 181, 462 N.R. 99, at paragraphs 19–22. This is the case if the applicant is not a member of the family class or if the sponsor is not a prescribed person: *Habtenkiel*, at paragraph 37; IRPA, section 65; IRPR, subsection 117(9). An application for judicial review may be made in such a case because the Court's power to conduct a judicial review cannot be suppressed without offending the rule of law principle: *Habtenkiel*, at paragraph 38.

[118] The question is therefore effectively whether the IAD had jurisdiction to hear an appeal of the officer's decision and to consider humanitarian and compassionate grounds.

(2) Jurisdiction of the Immigration Appeal Division

[119] The IAD's jurisdiction to hear an appeal from an officer's decision depends on the interplay between sections 40, 63 and 64 of the IRPA, as well as the jurisprudence of this Court.

[120] As mentioned above, an individual who has filed a family sponsorship application may appeal to the IAD from the refusal to issue a permanent resident visa under subsection 63(1) of the IRPA:

> **Right to appeal - visa refusal of family class**
>
> **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.

[121] There is an exception to this right of appeal in the case of a refusal based on inadmissibility for misrepresentation. This exception is also subject to an exception in certain cases, which is set out in subsection 64(3) of the IRPA:

> **64** ….
>
> **Misrepresentation**
>
> **(3)** No appeal may be made under subsection 63(1) in respect of a decision that was based on a finding of inadmissibility on the ground of misrepresentation, unless the foreign national in question is the sponsor's spouse, common-law partner or child. [Emphasis added.]

[122] Section 65 limits the appeals in which the IAD may consider humanitarian and compassionate grounds:

> **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. [Emphasis added.]

[123] A refusal based on inadmissibility for misrepresentation can therefore only be appealed to the IAD if the foreign national is the spouse, common-law partner, or child of the sponsor. In this case, the foreign national (Mr. Sedki) is the spouse of the sponsor (Ms. el Aoud). Does this mean that an appeal to the IAD was available?

[124] The Minister submits that the answer to this question can be found in the recent *Gill* case, to which I referred earlier. In that case, Justice Simpson found that an application for permanent residence made during the inadmissibility period is void because it is contrary to subsection 40(3) of the IRPA. Since the application is void, there is no valid decision to review and the IAD has no jurisdiction to hear an appeal: *Gill*, at paragraphs 16 and 21.

[125] *Gill* dealt with the situation of a simple sponsored application for permanent resident status. There was no H&C application under section 25, as the IAD observed in its decision: *Gill v. Canada (Citizenship and Immigration)*, 2019 CanLII 31073 (CanLII) (*Gill (IAD)*), at note 16. The application in *Gill* was therefore barred by subsection 40(3),

rendering it void. The IAD could not therefore hear an appeal from its dismissal. As noted above, the IAD applied *Gill* in its decision in *McMurray*.

[126] However, as I have concluded above, an H&C application under section 25 is not prohibited by subsection 40(3). Such an application is therefore not void and *Gill* does not apply.

[127] Section 66 of the IRPR provides that an H&C application under subsection 25(1) made outside Canada must be accompanied by an application for a permanent resident visa. As seen in the IRCC manual on H&C applications, reproduced in paragraph 79 above, an applicant outside of Canada must use one of the Department's three application forms corresponding to the three immigration classes (family, economic or refugee): *Dhillon (2019)*, at paragraph 12; IRPR, subsection 70(2).

[128] An H&C application under section 25, accompanied by an application in the economic or refugee class, does not create a right of appeal to the IAD. On the other hand, if the H&C application is accompanied by or made in the context of a sponsorship application, the sponsor is someone who has "filed […] an application to sponsor a foreign national as a member of the family class". Such a person may appeal the rejection of such an application under subsection 63(1) of the IRPA, provided that the exception in subsection 64(3) does not apply.

[129] If the H&C application is made when the applicant is inadmissible for misrepresentation, the rejection of the application means that the officer has concluded that the H&C considerations do not justify an exception to the inadmissibility. In my view, such a refusal remains a rejection "based on inadmissibility for misrepresentation". The subsection 64(3) exception then applies, and an appeal is available only if the applicant is the spouse, common-law partner or child of the sponsor. In addition, if the person is not a member of the family class, the IAD cannot consider humanitarian and compassionate grounds, as was the case in *Habtenkiel*: IRPA, section 65; *Habtenkiel*, at paragraphs 7–10 and 36–37.

[130] On the basis of these provisions of the IRPA and the judgments in *Gill* and *Habtenkiel*, I conclude that the right of appeal to the IAD when a foreign national files a sponsored application for permanent residence while inadmissible under section 40 applies as follows:

(1) If the application is not accompanied by an H&C application under section 25, it is void and there is no right of appeal to the IAD even if the officer has processed the application. The IAD has no jurisdiction and an application for leave and judicial review may be filed: *Gill*, at paragraph 16.

(2) If the application is accompanied by an H&C application, the officer must process the H&C application under section 25. If the application is refused, meaning that the officer has concluded expressly or implicitly that H&C grounds do not justify an exemption from the inadmissibility:

(a) if the applicant is not a member of the family class, the IAD has no jurisdiction to determine humanitarian and compassionate grounds and an application for leave and judicial review may be filed: *Habtenkiel*, at paragraph 38; IRPA, section 65; IRPR, section 117;

(b) if the applicant is a member of the family class, but is not the spouse, common-law partner or child of the sponsor, there is no appeal to the IAD and an application for leave and judicial review may be filed: IRPA, subsection 64(3); and

(c) if the applicant is a member of the family class and is the spouse, common-law partner or child of the sponsor, the sponsor may appeal to the IAD, which has jurisdiction to determine humanitarian and compassionate grounds, and an application for leave and judicial review may only be made after the sponsor's appeal process has been exhausted: IRPA, paragraph 72(2)(a).

(3) Application to this case

[131] Mr. Sedki is the husband of Ms. el Aoud. It was not suggested that he is not a member of the family class. His sponsored application for permanent residence was accompanied by an H&C application under section 25 or, viewed another way, his H&C application under section 25 was accompanied by a sponsored application for permanent residence. In accordance with the above findings, her application was eligible, and Ms. el Aoud had a right of appeal to the IAD.

[132] Nevertheless, in the current special circumstances, I find the Court has jurisdiction notwithstanding that of the IAD. My reasons are as follows.

[133] In the present case, Ms. el Aoud filed an appeal with the IAD following the officer's decision. In April 2020, the Minister filed an application with the IAD to dismiss the appeal for lack of jurisdiction. The Minister argued that the IAD could not hear the appeal, referring to subsection 40(3) and four IAD decisions, *Gill (IAD)*, at paragraphs 24–28; *Lefter v. Canada (Citizenship and Immigration)*, 2017 CanLII 10743 (I.R.B.), at paragraphs 9–11; *Dhillon v. Canada (Citizenship and Immigration)*, 2018 CanLII 102071 (I.R.B.) (*Dhillon (2018)*), at paragraphs 15–16; and *Delos Reyes v. Canada (Citizenship and Immigration)* (November 19, 2018), IAD TB7-032340 (I.R.B.), at paragraph 5. It should be noted that the application was filed after Justice Simpson's decision in *Gill*, but the Minister only referred to the IAD decision in the case.

[134] Following the Minister's request, Ms. el Aoud withdrew her appeal to the IAD.

[135] For the reasons explained above, I conclude that the Minister's request was ill founded. Ms. el Aoud's situation is different from that of the appellants in *Gill*, *Lefter*, *Dhillon (2018)* and *Delos Reyes* because Ms. el Aoud was appealing the refusal of her H&C application and her sponsored application and the IAD could have considered humanitarian and compassionate grounds under section 65. The IAD would therefore have had jurisdiction in Mr. Sedki and Ms. el Aoud's situation. Normally, this jurisdiction

would mean that an appeal must be brought before the IAD before an application for judicial review could be made to this Court.

[136] In the current situation, I conclude that the fact that Ms. el Aoud commenced an appeal to the IAD and withdrew it after the Minister took the position that the IAD did not have jurisdiction cannot prevent her from filing or continuing the present application and cannot take away the Court's jurisdiction. In other words, having commenced an appeal to the IAD and withdrawn it in the face of an objection by the Minister challenging the IAD's jurisdiction, Ms. el Aoud has "exhausted" her avenue of appeal to the IAD and the application for judicial review is not barred by paragraph 72(2)(a) of the IRPA. The Court therefore has jurisdiction to hear this application.

C. *Ms. el Aoud will not be removed from the style of cause as applicant*

[137] The Minister requests that the style of cause be changed so that only Mr. Sedki is the applicant. The only comment made in support of this request is that [TRANSLATION] "it is self-evident that only the applicant, Mr. Sedki, can be the applicant in the style of cause". Without further reasons to support this request, I am not satisfied that Ms. el Aoud should be removed from the style of cause.

[138] Section 18.1 of the *Federal Courts Act* provides that an application for judicial review may be made "by anyone directly affected by the matter in respect of which relief is sought." The Minister has not suggested that Ms. el Aoud is not directly affected by the refusal of her sponsorship application or the accompanying H&C application by Mr. Sedki. I note that in *Dhillon (2019)*, which involved an H&C application accompanied by a family class sponsorship application, the citizen sponsors as well as the sponsored applicant were all applicants on judicial review: *Dhillon (2019)*, at paragraphs 1, 3 and 4.

[139] In the absence of further justification from the Minister, I am not prepared to strike Ms. el Aoud's name from the style of cause.

D. *Certified question*

[140] The parties request that I certify a question under paragraph 74(d) of the IRPA. I agree with the parties that the question of the interpretation of subsections 25(1) and 40(3) of the IRPA is "a serious question of general importance": IRPA, paragraph 74(d).

[141] The Federal Court of Appeal has confirmed that a certified question "must be a serious question that is dispositive of the appeal, transcends the interests of the parties and raises an issue of broad significance of general importance": *Lunyamila v. Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22, [2018] 3 F.C.R. 674, at paragraph 46. This test means that the question must arise from the application itself and not simply from the manner in which the Court decided the application. A question that does not need to be decided should not be certified: *Lunyamila*, at paragraph 46.

[142] In my view, the question of whether a foreign national who is inadmissible for misrepresentation can make an H&C application meets these criteria. As to the first criterion, the question arises from the application itself. It was raised by the parties as a

dispositive question and the parties focused their submissions on it. Although I have concluded that the officer's rejection of the applicants' H&C application based on subsection 11(1) was unreasonable, the reversal of the decision and the remittance for determination of the H&C application could not have been determined without deciding the interpretive issue in subsection 40(3).

[143] As for the second criterion, subsection 40(3) applies to any foreign national found to be inadmissible for misrepresentation. The question of whether all such foreign nationals are precluded from making an H&C application therefore transcends the interests of the parties. This was the factual context in *Pretashi*. The issue was also raised before me in *Zeng*, but I did not need to address it: *Zeng*, at paragraphs 12–13 et 56–57. I also note that it is relevant that the issue has not been previously determined. There is therefore no jurisprudential guidance from this Court for officers receiving an H&C application from a person who is inadmissible for misrepresentation.

[144] Given the importance and scope of the issue, I certify the following issue for appeal:

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

## IV. Conclusion

[145] For these reasons, the application for judicial review is allowed. Mr. Sedki's H&C application, together with the applicants' sponsorship application, is referred to another IRCC officer for examination on the merits.

## JUDGMENT in IMM-7772-19

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is allowed. Mr. Sedki's H&C application, together with the applicants' sponsorship application, is referred to a different IRCC officer for examination on the merits.

2. The following question is certified for an appeal:

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