Federal Court

Cour fédérale

Date: 20211215

Dockets: IMM-1374-21
IMM-1375-21

Citation: 2021 FC 1424

Ottawa, Ontario, December 15, 2021

PRESENT: The Honourable Mr. Justice Manson

Docket: IMM-1374-21

BETWEEN:

LING ZHOU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Docket: IMM-1375-21

AND BETWEEN:

LIPING SONG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This hearing arises from 80 applications for judicial review filed between January 19, 2021 and July 22, 2021 pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the *"IRPA"*]. All of the applications seek review of the determination made by the Respondent, the Minister of Citizenship and Immigration [the "Minister"], between January 5, 2021 and January 11, 2021, when the Respondent determined which potential sponsors would be invited to submit sponsorship applications in accordance with the Parents and Grandparents Sponsorship Program [the "Sponsorship Program"].

[2] The two applications being heard together in this proceeding represent test cases for the 80 applications [the "Test Cases"]. The remaining 78 applications are being held in abeyance/adjourned *sine die* pending the disposition of the Test Cases. The disposition of the Test Cases will apply to all of the applications that are being held in abeyance/adjourned *sine die*.

[3] A further 325 applications for judicial review have been filed in regards to a second determination made by the Respondent between September 23, 2021 to October 4, 2021 in accordance with the Sponsorship Program. These applications are also being held in abeyance/ adjourned *sine die* pending the disposition of the Test Cases.

II. Background

A. *The Sponsorship Program*

[4] On September 29, 2020, the Respondent issued "Ministerial Instructions with respect to the processing of applications for a permanent resident visa made by parents or grandparents of a sponsor as members of the family class and the processing of sponsorship applications made in relation to those applications" [Ministerial Instructions (MI-43), Canada Gazette, Part I, vol 154, no 41, p 2610-2614, (September 29, 2020) [the "MI-43"]].

[5] The MI-43 were given pursuant to section 87.3 of *IRPA* and apply to applications for a permanent resident visa by sponsors' parents or grandparents made under the Family Class, referred to in paragraphs 117(1)(c) and (d) of *the Immigration and Refugee Protection Regulations*, SOR/2002-227 [the *"Regulations"*], respectively, as well as to sponsorship applications made in relation to those applications.

[6] The MI-43 also set out the following instructions for the intake process, *inter alia*:

i. Only individuals who successfully submit a "Sponsor your parents and grandparents: Interest to Sponsor Form" [the "Interest to Sponsor Form"] to Immigration, Refugees, and Citizenship Canada [the "IRCC"] can be issued an invitation to submit an application to sponsor;

ii. The period to submit an Interest to Sponsor Form began at 12:00 p.m. (EDT), on October 13, 2020, and ended at 12:00 p.m. (EST) on November 3, 2020;

iii. Invitations to submit a sponsorship application will be issued to potential sponsors using a randomized selection process among all non-duplicate interests to sponsor;

iv. A maximum of 10,000 sponsorship applications made in relation to the Sponsorship Program will be accepted for processing in 2021; and

v. Individuals who submit an Interest to Sponsor Form in 2020 but who are not invited to apply during that year may be given consideration in a subsequent year in accordance with any instructions the Minister may provide.

[7] From October 13, 2020 to November 3, 2020, the IRCC provided the Interest to Sponsor Form on its website. The Interest to Sponsor Form requires the potential sponsor to submit the following information:

- Personal information of the potential sponsor, including Canadian citizenship or permanent residency status, contact information, and estimated income; and

- Personal information of the potential sponsee (*i.e.* the parent or grandparent). Only the name and birth date are required.

[8] Canadian citizens or permanent residents who were interested in sponsoring their parents or grandparents were instructed to submit an Interest to Sponsor Form in order to provide the IRCC with notice of their interest. Potential sponsors were instructed to only submit one form and that duplications would be removed.

[9] After November 3, 2020, potential sponsors who had submitted an Interest to Sponsor Form were selected using a randomized selection process and invited to apply to sponsor their parents or grandparents.

[10] On January 5, 2021, the Respondent posted a notice on their website informing potential sponsors who had submitted an Interest to Sponsor Form that invitations to submit a sponsorship application in accordance with the Sponsorship Program were being sent.

B. *The Randomized Selection Process*

[11] As previously stated, the MI-43 provided that the IRCC would be accepting Interests to Sponsor in Fall 2020 and that invitations to submit a sponsorship application would be issued to potential sponsors using a randomized selection process from among all non-duplicate interests to sponsor submissions. Further, a maximum of 10,000 sponsorship applications would be accepted for processing potential.

[12] During the three-week period between October 13, 2020 and November 3, 2020, the IRCC received Interest to Sponsor Forms from Canadians and permanent residents who wished

to sponsor their parents and grandparents to come to Canada. The IRCC received approximately 209,174 Interest to Sponsor Forms.

[13] After the close of the three-week period, the Information Technology Operations Branch of the IRCC ran a de-duplication process to identify duplicate Interest to Sponsor Forms. Interest to Sponsor Forms that were identified as duplicates were provided to IRCC's Centralized Network for review and removal.

[14] After the Centralized Network removed the duplicate Interest to Sponsor Forms, the data from the remaining 203,213 Interest to Sponsor Forms was inputted to an encrypted file.

[15] Under the supervision of the Audit and Accountability Branch of the IRCC, the Operations Planning and Performance Branch of the IRCC performed the randomization process.

[16] The randomization process randomly selects from the de-duplicated pool of potential sponsors who submitted Interest to Sponsor Forms to determine which potential sponsors will be invited to submit applications. The randomization process generates a double-blind randomized list, which is a true randomization (*i.e.* the results cannot be predicted or duplicated), is auditable, is free from internal and external manipulation, and is cryptographically secure. Each potential sponsor had the exact same statistical probability of being invited to submit a sponsorship application under the randomization process.

C. *The Applicants*

[17] On October 23, 2020, in accordance with the MI-43, the Applicant Ms. Zhou (a resident of Canada) submitted one Interest to Sponsor Form expressing her interest in sponsoring her mother, the Applicant Ms. Song, and her father – both Chinese citizens.

[18] Ms. Zhou was not one of the randomly selected potential sponsors invited to apply to submit a sponsorship application for her parents.

[19] The Applicants allege that the Respondent, in the determination of which potential sponsors who submitted an Interest to Sponsor Form would be invited to submit sponsorship applications in accordance with the Sponsorship Program:

i. Acted contrary to the *Canadian Charter of Rights and Freedoms*, s 7, Part 1 of the *Constitution Act*, 1982 being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [the *"Charter"*];

ii. Acted contrary to the *Canadian Bill of Rights*, SC 1960, c 44;

iii. Acted without jurisdiction, acted beyond jurisdiction, or refused to exercise its jurisdiction;

iv. Failed to observe a principle of natural justice, procedural fairness, or other procedure that is required by law to observe;

v. Erred in law in making its decision, whether or not the error appears on the face of the record;

vi. Based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it; and

vii. Acted in any other way that was contrary to law.

III. Decision Under Review

[20] As stated above, the Applicants seek review of the determination made by the Respondent, between January 5, 2021 and January 11, 2021, when the Respondent determined which potential sponsors would be invited to submit sponsorship applications in accordance with the Sponsorship Program.

[21] The Applicants seek the following relief by way of judicial review:

i. A declaration that the act or proceeding of soliciting and accepting Interest to Sponsor Forms from sponsors, under section 87.3 and subsections 92(1.1) and (2) of the *IRPA*, was contrary to section 15(1) of the *Charter* and is not saved under section 1 of the *Charter*;

ii. A declaration that the act or proceeding of soliciting and accepting Interest to Sponsor Forms from sponsors, under section 87.3 of the *IRPA*, was contrary to section 1(b) of the *Canadian Bill of Rights*;

iii. A writ of prohibition to prohibit the Respondent from giving an objective mathematical advantage (*i.e.* multiple lottery tickets) to all parents or grandparents with two or more prospective sponsors, and adversely impacted all parents or grandparents having only one prospective sponsor; and

iv. For such further and other orders and/or relief as counsel may advise and as this Honourable Court may permit.

IV. Issues

[22] The issues are as follows:

1. Whether this Court has jurisdiction under section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 or section 72 of the *IRPA* to conduct a judicial review of the administration of the selection process of the Sponsorship Program; and

2. If this Court does have jurisdiction to conduct this review, whether the selection process of the Sponsorship Program pursuant to section 87.3 and subsections 92(1.1) and (2) of the *IRPA* was contrary to section 15(1) of the *Charter* and is not saved under section 1 of the *Charter*, or is otherwise unlawful.

V. Standard of Review

[23] No standard of review is applicable with respect to whether the Respondent's administration of the selection process of the Sponsorship Program is a reviewable decision [*Sheikh v. Canada (Citizenship and Immigration)*, 2020 FC 199 at paragraph 17 [*Sheikh*]].

[24] Where a Court reviews the merits of an administrative decision, the presumed standard of review is reasonableness. The presumption of reasonableness review is rebutted where the rule of law requires that the standard of correctness be applied, such as for constitutional questions [*Canada (Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paragraph 16-17]. On the issue of whether the selection process of the Sponsorship Program is contrary to the *Charter*, the determination is reviewed on the standard of correctness.

VI. The Parties' Positions

[25] The Applicants claim that the selection process undertaken by the Respondent from among the pool of Interest to Sponsor Forms submitted by potential sponsors discriminates on the enumerated ground of national or ethnic origin for Chinese nationals and of the proposed analogous ground of family status, contrary to section 15 of the *Charter*.

[26] The Applicants submit that, based on the age of prospective sponsors in Canada with China as their national or ethnic origin, these potential sponsors are likely to be from a one-child family resulting from China's implementation of a "one child policy" from 1979 to 2015.

[27] The Applicants claim that the Respondent directly prejudices prospective sponsors with Chinese nationality or origin who are from a one-child family because the Respondent's Sponsorship Program only allowed Interest to Sponsor Form submissions based on the number of potential sponsors available for a parent or grandparent. Thereby, intentionally or unintentionally, favouring those parents or grandparents having more than one potential sponsor, to the detriment of parents or grandparents having just one potential sponsor. In this way, the Applicants claim that the Respondent has improperly created a preference for family reunification based on family size.

[28] Further, the Applicants claim that the Respondent's discriminatory actions are not saved under section 1 of the *Charter* because there is a simple reasonable alternative: that the randomized selection process be based on the name of the parent or grandparent, not the name of the potential sponsor. The Applicants allege that this alternative would correct the favouring of parents or grandparents with more than one potential sponsor and that this alternative is available to legislators.

[29] The Applicants acknowledge that "family status" is not an enumerated ground under section 15 of the *Charter.* However, they argue that family status is listed as a prohibited ground of discrimination under section 3 of the *Canadian Human Rights Act*, RSC, 1985, c H-6, and should therefore be considered as an analogous ground under section 15 of the *Charter*.

[30] In addition, the Applicants submit that that the Respondent's determination of which potential sponsors are invited to submit sponsorship applications is not reasonable. The

Applicants argue that this decision is unintelligible because the selection could be based on the names of the parents or grandparents, instead of the potential sponsors. The Applicants claim that this is especially the case since the quota of 10,000 sponsorship applications is based on the number of parents or grandparents, not the number of sponsors.

[31] The Respondent argues that this Court does not have jurisdiction under section 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7 or section 72 of the *IRPA* because the administration of the Sponsorship Program selection process is not a matter which is properly the subject matter of judicial review.

[32] The Respondent highlights section 87.3(5) of *IRPA*, which provides that the fact that an application or request is retained, returned, or otherwise disposed of, does not constitute a decision not to issue the visa or other document, or grant the status or exemption.

[33] As well, the Respondent submits that, similar to the findings by this Court in *Sheikh*, the Sponsorship Program selection process has not deprived the Applicants of any rights in this matter. The opportunity to be sponsored in accordance with any future Sponsorship Program scheme remains intact. Ms. Zhou was not invited to and did not submit a sponsorship application and therefore such an application has not been refused. No legal obligations have been imposed on the Applicants, and while they may have been disappointed that they were not invited to submit a sponsorship application under the Sponsorship Program, the Applicants have not established that this is a matter that affects their rights, imposes legal obligations upon them, or

prejudicially affects them directly. Consequently, this matter is not judicially reviewable under section 18.1 of the *Federal Courts Act* and section 72 of the *IRPA*.

[34] Further, the Respondent submits that the sponsorship scheme is statutory and no right to sponsor a family member exists until an affirmative decision is made in respect to the sponsorship application. In addition, an applicant may not have a right to have their application processed as per section 87.3(4) of *IRPA*.

[35] The Respondent also highlights that section 13 of *IRPA* does not confer an unfettered right to sponsor a family member. The Courts have consistently acknowledged the broad authority of the Respondent to issue Instructions under provisions in the *IRPA* to limit the number of applications to be processed, prioritize sponsored applications, and to provide direction as to how processing is to be undertaken, including the making of regulations that "prescribe, and govern any matter relating" to the family class and sponsorship [*IRPA* at subsection 14(2)].

[36] Moreover, the Respondent claims that the Applicants have not presented any evidence or argument that the randomized selection process is discriminatory based on Chinese national or ethnic origin or on the basis of family status in that it imposes burdens or denies benefits in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage.

[37] Further, the Respondent submits that the Applicants have not presented any evidence or legal arguments sufficient to demonstrate family status (in this case, one-child family status) as

an analogous ground in section 15 of the *Charter* as set out in *Fraser v. Canada (AG)*, 2020 SCC 28 [*Fraser*]. The Respondent argues that the Applicants simply rely on the reference to "family status" in section 3 of the *Canadian Human Rights Act* and suggest an alternative using the names of parents or grandparents in the randomized selection process instead of the potential sponsor.

[38] Lastly, the Respondent claims that even if the Applicants can establish that family status is an analogous ground, the Applicants have not presented any evidence or argument that the randomized selection process created a distinction based on a prohibited ground, and that this distinction is discriminatory in that it imposes burdens or denies benefits in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage. The Respondent claims that this lack of an evidentiary foundation is fatal to the Applicants' *Charter* claim.

VII. Analysis

A. *The Respondent's Objection to the Applicant's Affidavit*

[39] By way of a preliminary issue, the Respondent objects to paragraphs 24 to 29, 32, and 33 of Ms. Zhou's Affidavit dated March 11, 2021 filed in the Applicants' Application Record [the "Zhou Affidavit"]. The Respondent claims that the Zhou Affidavit contains argument and should be struck.

[40] I find that paragraphs 24 to 27, inclusive, and 32 of the Zhou Affidavit do contain argument contrary to *Rule* 81(1) of the *Federal Court Rules*, SOR/98-106, and are hereby struck. Paragraphs 28, 29, and 33 of the Zhou Affidavit are allowed.

B. *Whether this Court has jurisdiction to conduct a judicial review of the administration of the selection process of the Sponsorship Program*

[41] As stated above, the Respondent argues that this Court does not have jurisdiction under section 18.1 of the *Federal Courts Act* or section 72 of *IRPA* because the administration of the Sponsorship Program selection process is not proper subject matter for judicial review under subsection 87.3(5) of *IRPA*.

[42] The Applicants submit that subsection 87.3(5) of *IRPA* does not apply because there is no "application" or "request" as defined in subsection 87.3(1) of *IRPA* – an "interest to sponsor" does not fall within the definition.

[43] Section 13 of the *IRPA* provides that a Canadian citizen or permanent resident may sponsor a foreign national's application for a permanent residence visa, subject to the *Regulations*.

[44] Following their sponsors' application for a permanent resident visa, a foreign national may be selected to receive a permanent resident visa as a member of the family class. The "family class" is a prescribed class under the *Regulations*, which is defined on the basis of an applicant's relationship to a sponsor, as a spouse, common-law or conjugal partner, dependent

child, parents and grandparents of a Canadian citizen, or permanent resident [*IRPA* at section 12; *Regulations* at subsection 1(3) and paragraphs 117(1)(c) and (d)].

[45] The process to become a permanent resident under the family class based on a sponsored application involves two steps:

i. The sponsor must submit a sponsorship application which is processed for an eligibility determination at IRCC Case Processing Centre in Canada; and

ii. The foreign national seeking to come to Canada must submit an application for a permanent residence visa, which is submitted and processed at an overseas visa office and accompanied by a sponsorship application filed pursuant to the *Regulations* [*Regulations* at subsection 10(4) and paragraph 130(1)(c)].

[46] Part 7 - Division 3 of the *Regulations* sets out the provisions relating to sponsors for the purpose of sponsoring a foreign national who makes an application for a permanent resident visa as a member of the family class, including eligibility criteria, a financial undertaking, requirements, and bars for sponsors [*Regulations* at sections 130 to 137].

[47] The *IRPA* contains various provisions that allow the Minister to issue instructions to immigration officers to enable Canada to best attain its immigration goals. The Ministerial Instructions are issued for limited periods and address a range of issues, including processing and application intake measures.

[48] Section 87.3 of the *IRPA* authorizes the Minister to give instructions with respect to the processing of certain applications and requests. This includes establishing conditions by category that must be met before or during the processing of an application, and setting the number of applications or requests to be processed in any year. These Ministerial Instructions are published in the Canada Gazette [*IRPA* at section 87.3].

[49] The Respondent published MI-43 providing the instructions for the Sponsorship Program, as outlined previously, pursuant to section 87.3 of *IRPA*.

[50] The MI-43 states:

> These Instructions are published in the Canada Gazette in accordance with subsection 87.3(6) of the *Immigration and Refugee Protection Act* (the Act).
>
> These Instructions are given, pursuant to section 87.3 and subsections 92(1.1) and (2) of the Act, by the Minister of Citizenship and Immigration as, in the opinion of the Minister, these Instructions will best support the attainment of the immigration goals established by the Government of Canada by seeing families reunited in Canada.

[51] Section 87.3 of *IRPA* states:

> **Instructions on Processing Applications and Requests**
>
> **Application**
>
> **87.3 (1)** This section applies to applications for visas or other documents made under subsections 11(1) and (1.01), other than those made by persons referred to in subsection 99(2), to sponsorship applications made under subsection 13(1), to applications for permanent resident status under subsection 21(1) or temporary resident status under subsection 22(1) made by foreign nationals in Canada, to applications for work or study permits

and to requests under subsection 25(1) made by foreign nationals outside Canada.

Attainment of immigration goals

(2) The processing of applications and requests is to be conducted in a manner that, in the opinion of the Minister, will best support the attainment of the immigration goals established by the Government of Canada.

Instructions

(3) For the purposes of subsection (2), the Minister may give instructions with respect to the processing of applications and requests, including instructions

(a) Establishing categories of applications or requests to which the instructions apply;

(a.1) Establishing conditions, by category or otherwise, that must be met before or during the processing of an application or request;

(b) Establishing an order, by category or otherwise, for the processing of applications or requests;

(c) Setting the number of applications or requests, by category or otherwise, to be processed in any year; and

(d) Providing for the disposition of applications and requests, including those made subsequent to the first application or request.

Application

(3.1) An instruction may, if it so provides, apply in respect of pending applications or requests that are made before the day on which the instruction takes effect.

Clarification

(3.2) For greater certainty, an instruction given under paragraph (3)(c) may provide that the number of applications or requests, by category or otherwise, to be processed in any year be set at zero.

Compliance with instructions

> **(4)** Officers and persons authorized to exercise the powers of the Minister under section 25 shall comply with any instructions before processing an application or request or when processing one. If an application or request is not processed, it may be retained, returned or otherwise disposed of in accordance with the instructions of the Minister.
>
> **Clarification**
>
> **(5)** The fact that an application or request is retained, returned or otherwise disposed of does not constitute a decision not to issue the visa or other document, or grant the status or exemption, in relation to which the application or request is made.
>
> **Publication**
>
> **(6)** Instructions shall be published in the Canada Gazette.
>
> **Clarification**
>
> **(7)** Nothing in this section in any way limits the power of the Minister to otherwise determine the most efficient manner in which to administer this Act.

[52] According to subsection 87.3(1) of *IRPA*, section 87.3 of *IRPA* applies to sponsorship applications made under subsection 13(1) of *IRPA.* I agree with the Applicants that the submission of an Interest to Sponsor Form does not amount to a sponsorship application. The Interest to Sponsor Form is a form to express interest in sponsorship, submitted by a current Canadian citizen or permanent resident.

[53] However, section 87.3 of *IRPA* appears to contemplate the submission of an Interest to Sponsor Form as a “request.” Section 87.3 of *IRPA* is entitled “Instructions on Processing Applications and Requests.” The Respondent’s MI-43 regarding the Sponsorship Program were made pursuant to section 87.3 of *IRPA*. Subsection 87.3(3) allows the Respondent Minister to

give instructions with respect to the processing of applications and requests for the purpose of the attainment of immigration goals as set out in subsection 87.3(2). The MI-43 cites its purpose as the attainment of immigration goals. Pursuant to paragraph 87.3(3)(a), the Respondent established an “Interest to Sponsor” category of request in the MI-43. Pursuant to paragraph 87.3(3)(a.1), the Respondent established conditions for the “Interest to Sponsor” category of request in the MI-43. Namely, that potential sponsors who want to sponsor a parent or grandparent may submit Interest to Sponsor Forms and that Interest to Sponsor Forms must be complete and submitted within the set time-period. In addition, any duplicate Interest to Sponsor Forms will be removed.

[54] As such, subsection 87.3(5) of *IRPA* does appear to apply to potential sponsors who have submitted an Interest to Sponsor Form because the submission of an Interest to Sponsor Form constitutes a request, as contemplated under section 87.3 of *IRPA*.

[55] Subsection 87.3(5) provides that the fact that a request is retained, returned, or otherwise disposed of does not constitute a decision not to issue the visa or other document, or grant the status or exemption. As stated previously, the MI-43 provides that “individuals who submit an interest to sponsor in 2020 but who are not invited to apply during the year may be given consideration in a subsequent year in accordance with any Instructions the Minister may provide.” Therefore, the Interest to Sponsor Form requests are retained and this does not constitute a decision not to issue a permanent residence visa to the parent or grandparent listed in the Interest to Sponsor Form.

[56] This Court has recently held in the *Sheikh* decision, referred to above, that the IRCC's return of a sponsorship application under a previous parent and grandparent sponsorship program in 2018 was not a decision subject to judicial review under section 18.1 of the *Federal Courts Act* or section 72 of the *IRPA*. This Court held that the return of the sponsorship application was a purely clerical or administrative act that did not affect a party's rights, impose legal obligations on a party, or prejudicially affect a party directly and, thus, was not subject to judicial review [*Sheikh* at paragraph 63].

[57] Similarly, the retention of the Applicants' Interest to Sponsor Form request does not affect a party's rights, does not impose legal obligations on a party, and does not prejudicially affect a party directly. The right to sponsor a family member does not vest, accrue, or begin to accrue until an affirmative decision is made in respect to an application. Until that time, an applicant may not have a right to have their application processed [*Lukaj v. Canada (MCI)*, 2013 FC 8 at paragraphs 22-23; *Burton v. Canada (MCI)*, 2016 FC 345 at paragraph 24].

[58] Therefore, having not yet made a sponsorship application, there is no right of the Applicants that has been affected. The opportunity to be sponsored in accordance with any future Sponsorship Program scheme remains intact. No legal obligations have been imposed on the Applicants, and while they may have been disappointed that they were not invited to submit a sponsorship application under the Sponsorship Program, the Applicants have not established that this is a matter that affects their rights, imposes legal obligations upon them, or prejudicially affects them directly. Consequently, this matter is not judicially reviewable under section 18.1 of the *Federal Courts Act* and section 72 of *IRPA*.

[59] For the sake of completeness, I have also considered the Applicants' section 15(1) *Charter* argument below, which is the apparent substantive basis for this Application.

C. *Whether the selection process of the Sponsorship Program was contrary to section 15(1) of the* Charter *and is not saved under section 1 of the* Charter

[60] As stated above, the Applicants claim that the Respondent's Sponsorship Program discriminates on the enumerated ground of national or ethnic origin and on the proposed analogous ground of family status, contrary to section 15 of the *Charter*.

[61] In considering the validity of a *Charter* challenge, the observations of the Federal Court of Appeal in *Canada (Minister of Citizenship and Immigration) v. Canadian Council for Refugees*, 2021 FCA 72 at paragraphs 56 to 59 are instructive:

> 56 The Charter sets out rights and freedoms and guarantees them subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. But nowhere does the Charter invite courts to depart from their role as courts. Nor does it invite judges — career lawyers who happen to hold a judicial commission — to follow whatever procedures they wish. Rather, the Charter is a document of law, surrounded, suffused and sustained by law. In fact, tens of thousands of cases have been decided under it, a veritable mountain of guidance.
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> 57 From this mountain, certain immutable principles bind us all. One of the most basic is that Charter claimants must show that some state action — for example, legislation or administrative conduct by state officials — has caused an infringement of rights or freedoms. Inherent in this are two requirements: the Charter claimants must identify the state action responsible for the infringement, *i.e.*, demonstrate a causal link between the state action and the infringement, and place enough evidence before the Court to prove causation and infringement. See, *e.g.*, Operation Dismantle Inc. v. The Queen [1985] 1 S.C.R. 441, 18 D.L.R. (4th) 481 at 447 and 490 S.C.R.; Symes v. Canada [1993] 4 S.C.R. 695, 110 D.L.R.

(4th) 470 at 764-765 S.C.R.; Blencoe v. British Columbia (Human Rights Commission) 2000 SCC 44, [2000] 2 S.C.R. 307 at para. 60; Canada (Attorney General) v. Bedford 2013 SCC 72, [2013] 3 S.C.R. 1101 at paras.73-78; Kazemi Estate v. Islamic Republic of Iran 2014 SCC 62, [2014] 20143 S.C.R. 176 (S.C.C.) at paras. 126, 131-134; R. v. Kokopenace 2015 SCC 28, [2015] 2 S.C.R. 398 at paras. 251-254 and cases cited therein. Common to these requirements is causation. Causation is key.

58 From this, two practical rules have emerged in the jurisprudence:

(a) Legislative provisions in an interrelated legislative scheme cannot be taken in isolation and selectively challenged: Canada (Attorney General) v. PHS Community Services Society 2011 SCC 44, [2011] 3 S.C.R. 134. The provisions, taken in isolation, may not have caused the Charter infringement. Other related provisions may be responsible or may prevent or cure any possible defects. This sort of artificial and narrow challenge often results in the creation of an unduly artificial and narrow evidentiary record.

(b) Where administrative action or administrative inaction under legislation is the cause of a rights infringement, it, not the legislation, must be challenged: Little Sisters Book and Art Emporium v. Canada (Minister of Justice) 2000 SCC 69, [2000] 2 S.C.R. 1120. Challenging the legislation and ignoring the administrative action or administrative inaction will not satisfy the requirement of causation between the state action and the rights infringement. This can also lead to the development of an unduly artificial and narrow evidentiary record.

59 In considering a Charter challenge, another basic principle must be kept front of mind: courts are courts and have to act like courts. Thus, courts can deal only with the challenge the Charter challengers have advanced and courts can work only with the evidence the parties have offered concerning that challenge. Courts cannot go beyond the challenge and address a different challenge. Nor can they help themselves to evidence as if they are a roving commission of inquiry. Instead, Courts dealing with a Charter challenge are "firmly grounded in the discipline of the common law methodology": Brian Morgan, "Proof of Facts in Charter Litigation," in Robert J. Sharpe, ed., Charter Litigation

> (Toronto: Butterworths, 1987), 159 at 162, cited with approval by the Supreme Court in MacKay v. Manitoba [1989] 2 S.C.R. 357, 61 D.L.R. (4th) 385 at 363 S.C.R. and Danson v. Ontario (Attorney General) [1990] 2 S.C.R. 1086, 73 D.L.R. (4th) 686 at 1099-1101 S.C.R.

[62] Section 15 of the *Charter* states:

> 15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Section (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[63] To prove a *prima facie* violation of section 15(1) of the *Charter*, a claimant must demonstrate, on a balance of probabilities, that the impugned law or state action:

1. On its face or in its impact, creates a distinction based on an enumerated or analogous ground; and

2. Imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage [*R v. CP*, 2021 SCC 19 at paragraph 56; *Fraser* at paragraph 27; *Ontario (AG) v. G*, 2020 SCC 38 at paragraphs 39-43]

[64] Section 1 of the *Charter* is engaged only after a finding has been made that a right has been limited. Section 1 of the *Charter* allows the state to justify a limit on a *Charter* right as

"demonstrably justified in a free and democratic society." The onus of proof is on the person seeking to justify the limit – in this case, the Respondent [*R v. Oakes*, [1986] 1 SCR 103].

[65] The Applicants claim that the Sponsorship Program creates a distinction based on the enumerated ground of national and ethnic origin, namely Chinese nationality and origin. The Applicants argue that as a result of China's "one-child policy", potential sponsors of Chinese nationality or origin are likely to have been a part of a single child family. As a result, it is more likely that those of Chinese nationality or origin will only be able to submit one Interest to Sponsor Form to express interest in sponsoring a parent. The Applicants claim the Sponsorship Program directly prejudices these potential sponsors who may only submit one Interest to Sponsor Form compared to those families who may have multiple potential sponsors.

[66] The Respondent argues that the Applicants have not provided any evidence to support their claims. Further, the Respondent submits that the existence of China's former one-child policy does not create a nexus between the Respondent's Sponsorship Program and the enumerated ground of national and ethnic origin.

[67] The Applicants have provided evidence that a one-child policy did exist in China from 1979 to 2015 and that China is the number two source country for immigrants to Canada. However, the Applicants' evidence does not demonstrate how the Sponsorship Program creates a distinction based on the enumerated ground of Chinese nationality or origin.

[68] As stated previously, the Respondent's Sponsorship Program randomly selects from the de-duplicated pool of potential sponsors who submitted Interest to Sponsor Forms to determine which potential sponsors will be invited to submit applications. The randomization process generates a double-blind randomized list, which is a true randomization (*i.e.* the results cannot be predicted or duplicated), is auditable, is free from internal and external manipulation, and is cryptographically secure. Each potential sponsor had the exact same statistical probability of being invited to submit a sponsorship application under the randomization process. The selection process does not choose based on nationality or ethnic origin.

[69] While it may be likely that potential sponsors in Canada of Chinese nationality or ethnic origin come from one child families as a result of the one-child policy, the Applicants have not provided evidence of a nexus between the Respondent's Sponsorship Program and a distinction based on Chinese nationality and ethnic origin.

[70] Further, the Applicants' evidence does not demonstrate how the Sponsorship Program imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage.

[71] Given that the Applicants have not provided evidence to establish a violation under section 15(1) of the *Charter* on the enumerated ground of nationality and ethnic origin, section 1 of the *Charter* is not engaged.

[72] The Applicants also submit that this Court should find that “family status” is an analogous ground, and that the Sponsorship Program violates section 15(1) of the *Charter* on the basis of a single child family status.

[73] To establish an analogous ground, the Applicants must meet the test described in *Corbiere v. Canada (Minister of Indian & Northern Affairs)*, [1999] 2 SCR 203. Analogous grounds are similar to the enumerated grounds in that they identify a basis for stereotypical decision-making or a group that has historically suffered discrimination. Analogous grounds describe personal characteristics that are either immutable or constructively immutable (characteristics that are changeable only at unacceptable cost to personal identity).

[74] The Supreme Court of Canada has recently stated that detailed evidence and submissions are required to establish an analogous ground [*Fraser* at paragraphs 117 to 123]. The Applicants submissions simply state that family status is a recognized ground in the *Canadian Human Rights Act* and, as such, should be recognized as an analogous ground under section 15(1) of the *Charter*. The Applicants have not provided sufficient submissions required to establish that a single child family status is an analogous ground.

[75] Given that the Applicants have not provided the submissions and evidence necessary to determine an analogous ground of single child family status, it is not necessary to determine whether there is a violation of section 15(1) of the *Charter* on this proposed analogous ground.

JUDGMENT in IMM-1374-21 and IMM-1375-21

THIS COURT'S JUDGMENT is that

1. The applications are dismissed.
2. There is no question for certification.

"Michael D. Manson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1374-21
STYLE OF CAUSE:	LING ZHOU v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
AND DOCKET:	IMM-1375-21
STYLE OF CAUSE:	LIPING SONG v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	DECEMBER 6, 2021
REASONS FOR JUDGMENT AND JUDGMENT:	MANSON J.
DATED:	DECEMBER 15, 2021

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