Federal Court  Cour fédérale

Date: 20240703

Docket: IMM-11561-22

Citation: 2024 FC 1037

Toronto, Ontario, July 3, 2024

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

MAHSA BARADARAN ROHANI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a November 4, 2022 decision [Decision] of an officer [Officer] of Immigration, Refugees and Citizenship Canada [IRCC], rejecting the Applicant's application for permanent residence under an immigration program that has been described as the *Temporary Public Policy: Temporary Resident to Permanent Resident Pathway*

(TR to PR Pathway): International Graduates [the Pathway Program], made under section 25.2 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[2] As explained in detail below, this application is dismissed, because I find the Decision to be reasonable. The Applicants' arguments have not convinced me that, in making the Decision, the Officer possessed a discretion that they failed to exercise. Nor have the Applicant satisfied the test for certification of questions that they propose for appeal.

II. Background

[3] The Applicant is a citizen of Iran. She has been in Canada since January 2019, when she arrived on a study permit to study English at the University of Calgary, before beginning her studies at George Brown College in Toronto. At George Brown College, the Applicant completed a Certificate in Information Systems Business Analysis in August 2020 and a Postgraduate Certificate in Health Informatics in December 2020.

[4] The Pathway Program was announced on April 12, 2021, pursuant to a document issued by the Minister entitled "Temporary public policy to facilitate the granting of permanent residence for foreign nationals in Canada, outside of Québec, with a recent credential from a Canadian post-secondary institution" [Policy Document]. The objective reflected in the Policy Document, issued under section 25.2 of *IRPA*, was to allow temporary residents who had earned certain educational credentials in Canada to apply for permanent residence. Applications under the Pathway Program were to be accepted from May 6, 2021 to November 5, 2021, subject to a maximum of 40,000 applications. On May 5, 2021, IRCC released an applicable instruction guide, and that guide was updated the next day.

[5] One of the eligibility requirements stated in the Policy Document was to "[h]ave attained a level of proficiency of at least benchmark 5 in either official language for each of the four language skill areas, as set out in the Canadian Language Benchmarks or the Niveaux de compétence linguistique canadiens. This must be demonstrated by the results of an evaluation by an organization or institution designated by the Minister for the purpose of evaluating language proficiency under subsection 74(3) of the Regulation; and the evaluation must be less than two (2) years old when the permanent residence application is received;" [Language Eligibility Requirement].

[6] The Applicant booked a Canadian English Language Proficiency Index Program [CELPIP] test for April 28, 2021. She received her CELPIP results on May 5, 2021, including a benchmark of 4 under the listening skill, one of the four skill levels tested. Although the Applicant registered to take the International English Language Testing System [IELTS] test on June 25, 2021, she submitted the results from her April 28 CELPIP test with her application materials on May 6, 2021. Those materials included a letter of explanation concerning the CELPIP test results, stating that the Applicant had registered for another English test and would submit the results upon receipt, as well as requesting consideration of her educational background including degrees and other certifications completed in English.

[7] The cap of 40,000 for applications under the Pathway Program was reached by May 7, 2021.

[8] The Applicant received the results of her IELTS test on June 30, 2021, and scored the requisite benchmark of 5 or higher in each of the four language skill areas. She submitted these

results to IRCC via Web form that same day. She subsequently filed the results again on September 3, 2021, October 31, 2021, and November 17, 2021, to ensure they were received. For reasons that are unclear but do not appear to be material to this application, IRCC ultimately received the results on December 21, 2021.

[9] On April 8, 2022, IRCC emailed the Applicant to inform her that, due to a technical issue, they were unable to retrieve any attachments she had provided in the Web form. The IRCC invited the Applicant to resend any documents by filling out the IRCC Web form. On April 12, 2022, the Applicant resubmitted her IELTS results, proof of a job offer from TD Insurance, and proof of graduation from George Brown College.

[10] On November 4, 2022, in the Decision that is the subject of this application for judicial review, the Applicant's permanent residence application was refused.

III. Decision under Review

[11] In a letter dated November 4, 2022, the Officer refused the Applicant's application for permanent residence. The letter stated the following:

> I am not satisfied that you meet the Have **attained a level of proficiency of at least benchmark 5** in either official language for each of the four language skill areas, as set out in the *Canadian Language Benchmarks* or the *Niveaux de compétence linguistique canadiens*. This must be demonstrated by the results of an evaluation by an organization or institution designated by the Minister for the purpose of evaluating language proficiency under subsection 74(3) of the Regulations; and the evaluation must be less than two (2) years old when the permanent residence application is received;
>
> requirement(s) because

> **You must have completed a language test less than two years before application and must have reached a benchmark of 5 in all four language skills areas. You have provided a CELPIP result with a benchmark of 4 under listening you do not meet the minimum proficiency.**
>
> **The IELTS test result you have provided from June 25, 2021 was done after you applied and can not be considered. For results to be considered they must have been provided at the time of application.**
>
> (emphasis in original)

[12] The Officer therefore concluded that the Applicant did not meet the eligibility for the Pathway Program and refused the Applicant's application.

[13] The Officer's Global Case Management System notes provide the following additional reasons for the Decision:

> PA submitted a CELPIP test result at the time of application that did not meet the minimum requirement of 5 for IGR Program. A new IELTS test was submitted after the application was received. This result can not be applied to the application as all documents must be submitted at the time of application. Admissibility not completed as eligibility failed. Application refused as per A25.2

IV. Issues

[14] The Applicant's Further Memorandum articulates the following issues for the Court's determination:

A. Whether the Officer unreasonably fettered their discretion under the public policy when they determine they were prohibited from considering the Applicant's IELTS results provided after the initial application submission but before a final decision; and

B. Whether the Officer erred in failing to assess the Applicant's request not only to consider her English language test results, but her lengthy education history including multiple degrees and certificates obtained through English-language programs, which demonstrated her language ability.

[15] The parties agree, and I concur, that the applicable standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration*) v *Vavilov*, 2019 SCC 65 at 23) [*Vavilov]*.

V. Analysis

[16] While the Applicant's Further Memorandum articulates two issues, ultimately there is a single dispute between the parties in this application. This dispute surrounds whether, in considering the Applicant's application under the Pathway Program, the Officer possessed a discretion that permitted them to take into account the Applicant's late-submitted test results and/or her educational background in considering whether she met the language requirement to be eligible for the program.

[17] I do not understand the parties to disagree that, on a strict reading of the eligibility requirements in the Policy Document, an applicant could satisfy the Language Eligibility Requirement only by submitting evidence of the results of a test provided by a designated organization and by submitting that evidence at the time of application. I also understand it to be common ground between the parties that the Decision demonstrates the Officer approaching the Applicant's application on the basis that the Officer did not possess a discretion to depart from those eligibility requirements. However, the parties take different positions on whether the Officer did have such a discretion.

[18] I also note that the parties agree that an IRCC officer exercising delegated authority under a policy promulgated pursuant to section 25.2 does have discretion where that discretion is expressly afforded by the applicable policy document. By way of example, the Policy Document in the case at hand expressly provides that, while all supporting documentation necessary to assess whether a foreign national meets the conditions of the public policy must be included at the time of application, officers retain discretion to request additional supporting documentation to confirm admissibility and eligibility throughout the processing of the application. However, I do not understand the Applicant to be taking the position that that particular discretion applied in the case at hand. In any event, I would not consider that discretion to assist the Applicant, as it contemplates post-application requests for additional documentation at an officer's initiative, as opposed to a discretion to consider departures from eligibility requirements requested by an applicant.

[19] Against that backdrop, and having considered the parties' submissions, it is clear that the outcome of the dispute between them turns on the legal effect of the Policy Document issued by the Minister under section 25.2 of *IRPA.* The Applicant argues that the Policy Document is in the nature of a set of guidelines, such that IRCC officers considering applications under the Pathway Program retained a discretion to depart from the eligibility requirements set out therein. The Respondent takes the position that such requirements set out in the Policy Document have the force of law and, as such, they are mandatory and officers considering Pathway Program applications had no discretion to depart therefrom.

[20] Distilled to their fundamentals, the Respondent's arguments in support of its position are relatively straightforward. The Respondent notes that the Pathway Program exists by virtue of

the Minister's promulgation of the Policy Document, which was issued pursuant to subsection 25.2(1) of *IRPA*. That subsection provides as follows:

Public policy considerations	**Séjour dans l'intérêt public**
25.2 (1) The Minister may, in examining the circumstances concerning a foreign national who is inadmissible or who does not meet the requirements of this Act, grant that person permanent resident status or an exemption from any applicable criteria or obligations of this Act if the foreign national complies with any conditions imposed by the Minister and the Minister is of the opinion that it is justified by public policy considerations.	**25.2 (1)** Le ministre peut étudier le cas de l'étranger qui est interdit de territoire ou qui ne se conforme pas à la présente loi et lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, si l'étranger remplit toute condition fixée par le ministre et que celui-ci estime que l'intérêt public le justifie.

[21] The Respondent submits that, pursuant to subsection 25.2(1) of *IRPA*, in order to create a program such as the Pathway Program, the Minister must have arrived at an opinion that the program is warranted based on public policy considerations. However, the Respondent submits that, while the Policy Document that the Minister issued to give effect to the Pathway Program in the case at hand references the relevant policy considerations underlying the Pathway, the document does not itself represent a promulgation of a policy (of the sort that is intended to guide officers but does not fully constrain them). Rather, it is the vehicle by which the Minister imposes conditions (as contemplated by subsection 25.2(1)) with which a foreign national must comply in order to be eligible for permanent residence under the program.

[22] I consider those submissions to be consistent with the provisions of subsection 25.2(1) and the structure of the Policy Document. The latter begins with a "Background" section,

followed by a “Public Policy Considerations” section, in which the Minister identifies public policy considerations arising from the COVID-19 pandemic that warrant the creation of the Pathway Program. The Minister then states as follows:

> As such, I hereby establish that, pursuant to my authority under section 25.2 of the *Immigration and Refugee Protection Act (Act)*, there are sufficient public policy considerations that justify the granting of permanent resident status or an exemption from certain requirements of the *Immigration and Refugee Protection Regulations (Regulations)* to foreign nationals who meet the conditions (eligibility requirements) listed below.

[23] The Policy Document then states that delegated officers may grant permanent resident status to foreign nationals who meet a number of conditions, including the Language Eligibility Requirement set out earlier in these Reasons. Whether described as eligibility requirements or conditions, these represent prerequisites that the Minister is stating must be met in order for an IRCC officer to grant permanent residence pursuant to the Pathway Program. Officers’ authority to grant permanent residence, as delegates of the Minister, is conferred by section 25.2 of *IRPA*, and that authority is constrained by the conditions imposed by the Minister as expressly contemplated by the language of that section.

[24] Based on the language of section 25.2 and review of the Policy Document, I find no flaw in the Respondent’s analysis.

[25] In contrast, the Applicant takes the position that the Policy Document, and the conditions stated by the Minister therein, represent only guidelines. As such, they are not mandatory, and IRCC officers exercising authority pursuant to the Policy Document retain discretion to depart

from those guidelines. The Applicant relies on a number of authorities of this Court to support this position.

[26] The Applicant's jurisprudential submissions begin with *Lakhanpal v Canada (Citizenship and Immigration)*, 2021 FC 694 [*Lakhanpal*], in which the Court was required to consider the reasonableness of an IRCC officer's decision under another program made under section 25.2 of *IRPA*, called the Interim Pathway for Caregivers Program, which created a pathway to permanent residence for certain in-home caregivers. The officer determined that the applicant did not meet the eligibility requirements of the program, because she failed to provide proof that she had completed at least an equivalent to a Canadian secondary school diploma (see para 7). The Court found that decision unreasonable, because the officer failed to meaningfully evaluate an educational credential equivalency report that the applicant had submitted (see para 12).

[27] In relying on *Lakhanpal*, the Applicant draws the Court's attention to language used in the decision that she argues supports her position that the Policy Document represents a mere guideline without the force of law (at para 13):

> 13. There are no eligibility requirements specific to the Interim Pathway Program set out in statute or regulation. IRCC issued guidelines explaining the eligibility requirements for the program, including the level of language proficiency, the type and length of work experience in Canada, and the minimal level of education.

[28] The Applicant argues that, if the conditions imposed by the Minister in the Policy Document represent mere guidelines, then officers making decisions thereunder retain residual discretion (see *Thamotharem v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198 at 72, 78).

[29] I find *Lakhanpal* of little benefit to the Applicant. I read paragraph 13 above as intended to explain where to look for the source of the authority under which the officer's decision in that case was made. I appreciate that the Court described the program under consideration as not having been created under statute or a set of regulations but rather under what the Court described as "guidelines" issued under section 25.2. However, that case did not engage with the issue that is before the Court in the case at hand, *i.e.*, whether the nature of the instrument issued under section 25.2 was such that eligibility conditions created thereunder were mandatory. As such, I do not read the Court's reference to that instrument as guidelines to be intended as a pronouncement on that issue or as otherwise informing an adjudication of that issue.

[30] The decision in *Lakhanpal* turned not on whether the officer had, or failed to exercise, an available discretion to depart from the requirements of the relevant program, but rather on the officer's failure to articulate an evaluation whether the evidence submitted by the applicant met those requirements (see paras 12, 14, 21, 23). Indeed, the Court agreed with the respondent's submission, that it was the applicant's onus to provide sufficient evidence to meet the eligibility requirements for the program and that it was the officer's task to evaluate the evidence against those requirements (at para 27).

[31] The Applicant also relies on *Obafemi-Babatunde v Canada (Citizenship and Immigration)*, 2024 FC 489, which found to be unreasonable a decision by an officer under another program under section 25.2 (related to workers in the health care sector during the COVID-19 pandemic). The Court held that the officer did not reasonably consider the evidence provided, inferring that certain evidence was overlooked (at para 13). However, as with

Lakhanpal, this decision turned on the officer's failure to articulate an intelligible analysis of the evidence and did not engage with a question whether the program eligibility conditions imposed under the relevant program were mandatory.

[32] The Applicant further refers the Court to *Abraham v Canada (Citizenship and Immigration)*, 2016 FC 449 [*Abraham*], which considered a decision under a temporary public policy [TPP] adopted under section 25.2, that provided a pathway to permanent residence for certain Haitian nationals following the government's lifting of a temporary suspension of removals [TSR] that had been in place following the January 2010 earthquake in Haiti. One of the eligibility requirements under the TPP was that the applicant be the subject of a removal order or have benefited from certain special measures in place at the time of the lifting of the TSR. In challenging the officer's determination that she was ineligible for the program, the applicant advanced arguments requiring interpretation of the TPP's eligibility requirements (see para 14).

[33] The applicant in *Abraham* took the position that the applicable standard of review was correctness, as her arguments related to the implementation of a nondiscretionary power. In rejecting that position, the Court referred to the limited circumstances in which the standard of correctness applies and stated as follows (at para 17):

> 17. None of this applies in this case. Furthermore, the TPP is a policy, not an Act or regulation. Strictly speaking, its interpretation cannot, consequently, be characterized as a question of law (*Rakheja v. Canada (Citizenship and Immigration)*, 2009 FC 633, paragraph 29, 345 FTR 159 [*Rakheja*]). Therefore, insofar as an immigration officer is called upon, in the implementation of a policy instituted by the Minister, according to the discretionary powers conferred upon the Minister under the Act, to interpret

> certain components of the policy, the standard of reasonableness applies (*Rakheja*, at paragraph 33). If the wording of the policy leaves the officer no latitude, a decision that is contrary to this wording will be unreasonable.

[34] As with *Lakhanpal*, the Applicant draws the Court's attention to the reference in the decision to the policy not being a statute or regulation. However, again, that statement must be considered in the context in which it was made, in this case the identification of the applicable standard of review. Moreover, at the end of paragraph 17 of *Abraham*, the Court states that, if the wording of the policy leaves the officer no latitude, a decision that is contrary to this wording will be unreasonable. To similar effect, when considering the merits of the applicant's arguments, the Court held as follows (at para 23):

> 23. In this regard, the Officer did not have any latitude: he had to ensure that a certain number of criteria—all perfectly objective—were met, in order to determine whether the applicant was eligible for the TPP (*Terante v. Canada (Citizenship and Immigration)*, 2015 FC 1064, at paragraph 34). The applicant, as she herself admits, believing she had legitimate reasons for failing to do so, did not concretely take advantage of the HSM, even though she was eligible for them. Despite the unfortunate nature of the situation, the TPP criteria, as stated in the bulletin BO 600, are clear on this, to the point that the Officer, in my opinion, had no other choice under the circumstances but to decide as he did.

[35] This reasoning is consistent with the Respondent's position in the case at hand, that conditions imposed by the Minister in a policy document promulgated under section 25.2 are indeed mandatory and that an IRCC officer exercising delegated authority thereunder does not have discretion to depart from such conditions.

[36] The Applicant also relies on *Kaur v Canada (Citizenship and Immigration)*, 2022 FC 1690 [*Kaur*], which I note considered a decision made under the same Pathway Program and Policy Document that are the subject of the case at hand. When the applicant in that matter submitted her application and supporting documents, she mistakenly uploaded another document in place of the required education documentation. She later notified IRCC of her error and submitted her education documents, requesting that they be added to her file. However, an officer subsequently determined that she had not submitted a complete application and rejected her application on the basis that it was incomplete at the time of submission. The Court found that decision to be unreasonable, as it lacked sufficient transparency and justification. The Applicant argues that *Kaur* supports her position that the Officer possessed a discretion to consider the submissions that were received late or to otherwise depart from the applicable eligibility requirements.

[37] In arriving at the conclusion that the officer's decision was unreasonable, the Court in *Kaur* noted that the Policy Document states as an eligibility requirement that an applicant must include at the time of application all proof necessary to satisfy an officer that the applicable conditions are met. However, the Court observed that, at the time the application was assessed, the education documents were present and the application was therefore complete. The Court also noted the Respondent's concession in argument that, if the applicant had filed the entirety of her application again at the time she submitted her educational documents, the application may not have been refused (see para 27). Significantly, in my view, the Court reasoned that the applicant had taken steps to correct her error within the timeline for application under the Pathway Program and that, if the officer had explained in the decision why her education

documents could not be treated as part of her application, she could have resubmitted the full package before the expiration of that timeline (at para 28).

[38] As I raised with counsel at the hearing of this application, there are factual incongruities between *Kaur* and the case at hand, notwithstanding that both arise out of the same Pathway Program. *Kaur* recognizes at paragraph 2 that the program accepted applications from May 6, 2021 to May 5, 2021, to a maximum of 40,000 applications. However, as noted above, both the Respondent and the Court in *Kaur* approached the circumstances of that case on the basis that it would have been available to the applicant to submit a fresh application when she submitted her education documents on October 6, 2021. In contrast, in the case at hand, the parties agree that the Pathway Program was closed to new applications as of May 7, 2021 when the cap of 40,000 applications was reached. Indeed, the Applicant swears to this point in one of her affidavits filed in this proceeding.

[39] Counsel were unable to provide any concrete explanation for this factual discrepancy between *Kaur* and the case at hand, other than the Respondent's suggestion that the fact that the cap was reached on May 7, 2021, simply may not have been brought to the Court's attention. Regardless, I read the factual premise in *Kaur*, that the Pathway Program was still open for the receipt of applications when the applicant in that case submitted her educational documents, to be critical to an understanding of the reasoning in that decision. As such, *Kaur* does not suggest that the officer in that matter had a discretion to depart from the eligibility requirement in the Policy Document that all supporting documentation be submitted at the time of application.

[40] The Applicant also argues that the Respondent's position in the case at hand is inconsistent with the position it took in another recent matter, which resulted in the decision in *Hamzei v Canada (Citizenship and Immigration)*, 2023 FC 1057 [*Hamzei*]. That case involved a program under a TPP pursuant to section 25.2, related to family members of Canadian victims of certain air disasters. The Applicant refers the Court to the position taken by the Respondent as described in paragraph 24 of that decision:

> 24. Further, the Respondent submits that the Applicants' argument is contrary to the language of subsection 25.2(1) of the IRPA, which provides that a foreign national must comply with <u>any conditions imposed</u> by the Minister when introducing a public policy. The Respondent also submits that subsection 25.2(1) gives the Minister discretion to grant individuals "an exemption from any applicable criteria or obligations <u>of this Act</u> [...]" [emphasis added]. Subsection 2(2) defines "this Act" as the IRPA, the regulations, and any instructions given under subsection 14.1(1). The Respondent asserts that the Policy is not adopted under any of those items and therefore section 25 of the IRPA does not give authority to an officer to grant an exemption from the Policy's criteria, even if an H&C Application had been made.
>
> (Emphasis in original)

[41] The Applicant argues that the Respondent's position in *Hamzei*, that the TPP and its conditions promulgated under section 25.2 do not have the status of a regulation, is inconsistent with a position the Respondent has expressed in its written submissions in the case at hand, that the Policy Document and the conditions imposed thereunder represents an instrument that meets the definition of a regulation under subsection 2(1) of the *Interpretation Act*, RSC 1985, c I-21.

[42] In oral submissions, the Respondent explained its position that subsection 2(1) of the *Interpretation Act* defines the term "regulation" as including various categories of instruments, including (again) a "regulation" and any "… other instrument issued, made or established … in

the execution of a power conferred by or under the authority of an Act…". The Respondent takes the position that the Policy Document is an instrument issued in the execution of a power conferred by section 25.2 of *IRPA* and therefore meets the definition of a "regulation" for purposes of the *Interpretation Act*. The Respondent contrasts this position with that taken in *Hamzei*, where the dispute surrounded the possible availability of humanitarian and compassionate [H&C] relief, under section 25 of *IRPA*, from conditions imposed under a policy promulgated under section 25.2 of *IRPA*. Section 25 affords potential relief against the requirements of "this Act. In that context, in arguing that no such relief was available, the Respondent was referencing the defined term "this Act" in subsection 2(2) of *IRPA*, which includes regulations made under *IRPA*. The Respondent argued in that case that section 25.2 conditions were not regulations within the meaning of that particular definition and therefore were not subject to requests for H&C relief.

[43] Without commenting on the merits of the Respondent's positon in *Hamzei*, I understand the distinction that the Respondent is drawing, based on different statutory definitions and the fact that the issues and arguments being advanced in *Hamzei* and in the case at hand are not the same. However, more importantly, I regard arguments advanced by both parties, surrounding whether the Policy Document and conditions imposed thereunder are a particular type of statutory instrument, as somewhat of a distraction from the issues at hand. Neither party has advanced any compelling explanation why it particularly matters whether the Minister's exercise of authority under section 25.2 falls within a particular definition of a particular category of statutory instrument. Rather, what matters is whether the conditions imposed by the Minister

pursuant to such authority are mandatory and thereby leave IRCC officers acting thereunder without any available discretion (other than as contemplated in those conditions.)

[44] In making that observation, I am conscious of the Applicant's efforts to argue the possible relevance of various provision of *IRPA* related to the issuance of ministerial instructions and constraints thereon. The Applicant references sections 10.2, 13.2, 14.1, 15, 24 and 87.3 of *IRPA* as examples of provisions that contemplate the issuance of ministerial instructions (with which IRCC officers must then comply) and impose constraints upon the issuance of such instructions. The Applicant also refers to subsection 2(2) of *IRPA*, which (as referenced earlier in these Reasons) defines the term "this Act" within *IRPA* to include regulations made under it and instructions given under subsection 14.1(1). (That subsection affords the Minister authority to give instructions establishing a class of permanent residents as part of the economic class and related matters.)

[45] As I understand the Applicant's position, she argues that that conditions imposed by the Minister under section 25.2 (such as through the Policy Document) do not represent a ministerial instruction. However, in the alternative, she takes the position that, in order for such conditions to be binding on IRCC officers (and therefore eliminate any residual discretion), they must fall within one of the sections of *IRPA* that authorize the issuance of ministerial instructions and must comply with the parameters of those sections. The Applicant further argues that, unless such conditions are imposed under the authority of subsection 14.1(1) and comply with that provision, they do not constitute regulations for the purposes of *IRPA* as the Respondent submits.

[46] Again, I find little relevance to these arguments. Section 25.2 authorizes the Minister (on the basis of public policy considerations) to impose conditions with which a foreign national must comply in order for that foreign national to be granted permanent residence status. Consistent with the Respondent's position and the jurisprudential consideration of section 25.2 canvassed above, IRCC officers exercising delegated authority under section 25.2 must act in accordance with such conditions. Those conditions have the force of law because they are imposed under the statutory authority of section 25.2 of *IRPA*. The Applicant has advanced no compelling argument as to why the Minister must have recourse to other provisions of *IRPA* in order to exercise that authority.

[47] Before leaving the jurisprudence, I note that the Respondent relies on the decisions of the Federal Court of Appeal in *Tapambwa v Canada (Citizenship and Immigration)*, 2019 FCA 34 [*Tapambwa*] and of this Court in *Bello v Canada (Citizenship and Immigration)*, 2023 FC 1094 [*Bello*], in support of its position in this application.

[48] *Tapambwa* addressed a circumstance where the applicants were excluded from refugee protection under section 98 of *IRPA*, as a result of which they were entitled to only a restricted Pre-Removal Risk Assessment (per sections 112(3) and 113(d)). Among other issues, their appeal raised a certified question whether, upon request of the appellants, although in the absence of a pre-established policy under section 25.2, the Minister was obliged to consider whether to exercise discretion under section 25.2 to exempt the appellants from the application of section 112(3). The Federal Court of Appeal [FCA] answered this question in the negative (at

para 93), including because the appellants' argument amounted to an effort to impose a requirement that the Minister establish a policy that applied to them (see para 107).

[49] The Respondent emphasizes that in the course of its analysis the FCA described the discretion afforded to the Minister under section 25.2, explaining at paragraph 102 that "… the foreign national must comply with any ministerial conditions and the Minister must be satisfied that the waiver is justified by public policy."

[50] In *Bello*, this Court considered an application for judicial review of an IRCC officer's rejection of an application for permanent residence under a TPP program established under section 25.2 for refugee claimants working in Canada's health-care sector during the pandemic. It was a condition of that program that an applicant not be inadmissible to Canada other than for a prescribed set of reasons set out in the TPP (see para 31). The applicant was inadmissible for serious criminality, which was not one of the prescribed reasons. As such, an IRCC officer rejected her application because she did not meet the program's eligibility requirements (see para 2). Among other submissions, she argued that the officer erred by failing to consider, under either section 25(1) or section 25.2 of *IRPA*, H&C factors that she raised in support of her application (see para 41).

[51] In considering this argument, the Court in *Bello* noted at paragraph 44 that *Tapambwa* (at para 104) had rejected the appellants' position that the Minister had an open-ended obligation to consider requests for waiver of legislative requirements and to establish a relevant policy within which to consider such a request. The Court also relied on *Abraham* at paragraph 17 (as

considered by this Court in *Aje v Canada (Citizenship and Immigration)*, 2022 FC 811 at para 29) in concluding that the officer did not have the power to ignore or waive the eligibility requirements established by the Minister under section 25.2. *Bello* adopted the reasoning in those authorities that, if the wording of a ministerial policy under section 25.2 left an officer implementing that policy no latitude in its interpretation, a decision that was contrary to that wording would be unreasonable (at para 45).

[52] The Applicant argues that these authorities do not address the issue in the case at hand, whether an officer making a decision in a section 25.2 case has a discretion to depart from the eligibility requirements of the relevant program created pursuant to a ministerial policy. She submits that *Tapambwa* addresses an effort to seek to compel the minister to establish a public policy, while *Bello* concerns an effort to seek a waiver of a statutory requirement (criminal inadmissibility), neither of which she considers to be comparable to the issue at hand.

[53] With resect to *Tapambwe*, I largely agree with the Applicant. While there is language in that case that favours the Respondent's position, as it speaks to the requirement that a foreign national applying under a section 25.2 program comply with any ministerial conditions (see para 102), that is not the *ratio* of the case.

[54] However, I disagree with the Applicant's position that *Bello* is not on point. By the very nature of a program under section 25.2, it involves an applicant for permanent residence who, but for the relief available under the program, is inadmissible or otherwise does not meet a statutory requirement under *IRPA*. In *Bello*, the applicant's position was premised on the officer having a

discretion to depart (based on H&C considerations) from the conditions imposed by the Minister under the relevant program, and the Court rejected that position. Similarly, the Applicant in the case at hand argues that the Officer had such a discretion (to entertain and grant her application notwithstanding that she had not met certain ministerial conditions). I find *Bello* very much on point in supporting the Minister's position that no such discretion exists.

[55] Finally, I note that the Applicant refers to the Instrument of Designation and Delegation (see Department of Citizenship and Immigration (CIC), Instrument of Designation and Delegation*: Immigration and Refugee Protection Act and Regulations* (Ottawa: CIC, 2023)) [Delegation Instrument], applicable to *IRPA*, and observes that pursuant thereto the Minister's authority to establish public policy and eligibility criteria thereunder is not delegable (see p 75), although the authority to grant permanent residence in accordance with such a policy and criteria established by the Minister is delegated to various categories of IRCC officers. I agree with the Applicant's characterization of how the Delegation Instrument operates in relation to these authorities. However, I find nothing instructive in that submission that warrants a departure from the jurisprudence canvassed above or, indeed, that particularly supports the Applicant's position in this application.

[56] Having canvassed the authorities and the statutory provisions to which the parties refer, I find no compelling jurisprudential or legislative support for the Applicant's interpretation of the nature of the Policy Document, and in particular the conditions imposed thereunder, as guidelines without the force of law. Rather, the jurisprudence (including some of the jurisprudence cited by the Applicant) favours the Respondent's position.

[57] Before concluding, I note that I am conscious that this is an application for judicial review. As such, the Court's role is to consider the reasonableness of the Decision by the Officer, as informed by the principles of *Vavilov*. While the Officer did not have the benefit of the parties' arguments on what amounts to an exercise in statutory interpretation and therefore does not contain express reasoning adjudicating those arguments, the justification for the Decision is nevertheless clear. The Applicant's application for permanent residence was not submitted in accordance with the eligibility requirements of the Pathway Program, as it did not include at the time of application documentation satisfying the Language Eligibility Requirement. As such, consistent with the analysis in *Bello*, the Officer acted reasonably in rejecting an application that did not comply with the conditions of the program. My Judgment will therefore dismiss this application for judicial review.

VI. Certified Questions

[58] The Applicant proposes the following two questions for certification for appeal:

A. Are the conditions established by the Minister pursuant to section 25.2 of *IPPA* obligations imposed by statute or public policy guidelines where officers retain limited discretion?
B. Must the Minister rely on applicable sections of *IRPA* that apply ministerial instructions, should the Minister seek to establish a category of applications pursuant to section 25.2 of *IRPA*, to constitute a ministerial instruction?

[59] As the Applicant notes, the FCA in *Obazughanmwen v Canada (Public Safety and Emergency Preparedness)*, 2023 FCA 151, has recently reiterated the well-established jurisprudence with respect to certified questions. A question cannot be certified unless it is serious, would be dispositive of an appeal, and transcends the interests of the parties. It must also

have been raised and dealt with by the court below, and it must arise from the case rather than from the judge's reasons. Finally, and as a corollary to the requirement that the question be of general importance pursuant to section 74 of *IRPA*, it cannot have been previously settled by the decided case law (see *Liyanagamage v. Canada (Minister of Citizenship and Immigration)*, [1994] F.C.J. No. 1637 (QL) at para. 4; *Mudrak v. Canada (Citizenship and Immigration)*, 2016 FCA 178 at para. 36; *Lewis v. Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at paras. 36, 39).

[60] I agree with the Applicant's submission that the first question posed above would be dipositive of an appeal. It is a question that the Court has dealt with in this application and, if it were to be decided on an appeal that the Court has erred and that conditions imposed by the Minister under section 25.2 are indeed guidelines, without the force of law, then the Applicant's position that Officer had an applicable discretion, and unreasonably failed to exercise it, would have merit on appeal. I also agree that this question transcends the interests of the parties to this particular application.

[61] However, I do not agree with the Applicant's argument that this question is unsettled in the jurisprudence. My Reasons have canvassed the jurisprudence cited by both parties that, in my view, unequivocally favours the Respondent's position that these ministerial conditions impose obligations upon officers who are tasked with applying them, *i.e.*, the obligation not to depart from those conditions in exercising delegated authority to grant permanent residence under section 25.2.

[62] As such, the first question is not appropriate for certification.

[63] With respect to the second question, as explained earlier in these Reasons, I have found that the Applicant has advanced no compelling argument as to why the Minister must have recourse to provisions of *IRPA* other than section 25.2 in order to exercise its authority thereunder. The Applicant has referenced several such provisions in connection with this submission, without articulating with any precision her position as to how such provisions would potentially constrain the exercise of the Minister's authority. As such, the Court is unable to conclude that, even if this question were to be answered in the positive, that answer would necessarily be dispositive of an appeal.

[64] Moreover, as canvassed above, the jurisprudence that has considered section 25.2 supports the Respondent's position that the Officer acted reasonably in making the Decision. I appreciate that those authorities have not addressed arguments related to the range of other provisions of *IRPA* that are the premise of the proposed certified question. However, in the absence of a sufficiently developed argument as to how those provisions would apply so as to produce a result that departs from the jurisprudence, the Court cannot conclude that the Applicant has proposed a serious question for certification.

[65] As such, the second question is not appropriate for certification.

JUDGMENT IN IMM-11561-22

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. No question is certified for appeal.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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