Federal Court

Cour fédérale

**Date: 20100805**

**Docket: IMM-804-09**

**Citation: 2010 FC 803**

**Ottawa, Ontario, August 5, 2010**

**PRESENT: The Honourable Mr. Justice Mosley**

**BETWEEN:**

**TAO LI**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP**
**AND IMMIGRATION**

**Respondent**

**<u>REASONS FOR JUDGMENT AND JUDGMENT</u>**

[1] This is an application for judicial review pursuant to Section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) of the decision to charge the applicant the fee payable pursuant to paragraphs 295(1)(a) and 295(3)(a) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations) on August 7, 2003.

[2] The applicant is challenging paragraph 295(3) (a) of the Regulations, alleging that it conflicts with the enabling authority set out in subsection 19(2) of the *Financial Administration Act*,

R.S.C. 1985, c. F-11 (FAA). The applicant has indicated that if the Court agrees that these fees are illegal, he intends to seek conversion of the judicial review into an action, certification of a class, and restitution or damages for members of the class who have been charged such fees.

[3] These are my reasons for concluding that the fees provided for in paragraph 295(3) (a) are not illegal and for dismissing the application.

**BACKGROUND**

[4] The applicant is a 41-year-old Canadian citizen who sponsored his parents, who are citizens of China, to become permanent residents of Canada. The applicant submitted his sponsorship application to the respondent on August 7, 2003, and paid a sponsorship fee of $75.00 and PR application fees totalling $1025.00.

[5] The sponsorship application was approved on October 12, 2005 and the parents submitted applications for permanent residence on November 1, 2005. They were issued permanent resident visas on February 15, 2007.

[6] Family reunification is an important objective of the Canadian immigration system. To this end, Citizenship and Immigration Canada (CIC) allows Canadian citizens and permanent residents to sponsor their close family members to apply for permanent resident status. If successful, this permits the family members to immigrate to Canada even if they do not meet the selection criteria that would otherwise be required.

[7] The Regulations create a two-step process for Family Class applications. First, the sponsor must submit a sponsorship application. Second, once it is approved, the family members can submit "sponsored" applications for permanent residence.

[8] Under the former *Immigration Act*, the sponsor paid a single fee for the processing of both applications. However, under the current Regulations made pursuant to the IRPA, two separate fees are payable: one for processing the sponsorship application under subsection 304(1) ("sponsorship fee"), and one for processing the application for permanent residence under paragraph 295(1) (a), ("PR application fee").

[9] Pursuant to paragraph 295(3) (a), the PR application fee is payable when the sponsorship application is submitted at the first step of the process, even though the fee relates to the second step (processing the application for permanent residence). In effect, this was a continuation of the practice under the former legislative regime. A significant difference is that under the former Act, none of the fee was refunded if the sponsorship application was denied. Under IRPA, the PR application fee is fully refundable if the sponsorship application is rejected or withdrawn.

[10] At the outset of the transition to the IRPA, the delay between processing the two applications was minimal. However the volume since then has grown significantly. As a matter of policy, applications for spouses and dependent children are expedited. The sponsorship application and PR application are submitted together and the government has undertaken to process them within six months.

[11] For parents and other family members, the practice of sequentially processing the applications is maintained. In practice then, the fee for the second step is paid long before that step actually takes place. Indeed, the evidence before the Court suggests that in a typical case, processing of the application for permanent residence for a parent or grandparent, as of March 2010, will not begin until approximately 34 months after the PR application fee is paid. At that point, the sponsor is advised of the result of the eligibility determination. The sponsor may elect to have the PR application considered whether the sponsorship application is successful or not. In either event, the PR application form is not sent out until the sponsorship application is determined.

[12] If the sponsorship application is refused, and the second step never occurs, the PR application fee is fully refundable. Each year, according to the evidence, approximately 2.5% of sponsorship applications are refused. This estimate, while not accepted by the applicant, was not seriously contested in these proceedings. In addition, the sponsor may withdraw the sponsorship application. If the application is withdrawn before the PR application is processed the fee paid is refunded. It is clear, however, that the vast majority of sponsorship and PR applications proceed, as in the instant case.

[13] The affidavit evidence of Michele Naughton, CIC policy analyst, is that it makes practical sense for CIC to collect both fees at the start of the 2-step process because once step 1 is successfully completed, the Department can move on to step 2 in 97.5% of the cases without the time, effort and delay associated with having to request and then wait to collect the PR processing

fee. Ms. Naughton deposed that the addition of an additional step to request and process the PR application fee would result in a greater loss than that currently incurred by the federal government.

[14] The applicant's attempts to recover the PR application fee began with an action commenced in this Court in Court File IMM-5065-05. The action is being specially managed by Mr. Justice Sean Harrington. It was stayed by Order of Justice Harrington on September 5, 2006 and remains stayed pending the outcome of the present application for judicial review.

[15] This judicial review application was filed on February 19, 2009 and is also being specially managed by Justice Harrington. In it, the applicant seeks a declaration that s.295 (3) (a) of the Regulations is *ultra vires* and of no force or effect, and that the respondent behaved illegally in charging him the PR application fee in August 2003. The parties agree, as do I, that according to the Federal Court of Appeal's decision in *Canada v. Grenier*, 2005 FCA 348, [2006] 2 F.C.R. 287, such a declaration is a prerequisite to the action for damages that the applicant intends to bring against the respondent to recover the PR application fee.

**ISSUES**

[16] In written submissions, the applicant challenged the admissibility of certain affidavit evidence filed by the respondent for, among other grounds, containing statements based on information and belief, without specifying the sources of the belief or explaining the failure to provide evidence from people with personal knowledge of the facts: section 81 of the *Federal Courts Rules*, SOR/98-106; *Tataskweyak Cree Nation v. Sinclair*, 2007 FC 1107.

[17] In oral argument, counsel for the applicant chose not to press that challenge and conceded that it was not material to the main issues in the case. I agree but note for the record that I find that the factual content of the impugned affidavits is admissible as necessary and reliable for the determination of the application. Nor is this a case where I would draw an adverse inference from the failure of the respondent to provide evidence of persons having personal knowledge of material facts. The sources of the deponents'information and belief, as representative witnesses for a large government department, was satisfactorily explained.

[18] I agree with the applicant that portions of the Naughton affidavit are argumentative and draw legal conclusions about the appropriateness and validity of the respondent's policy choices. As a result, I have given them little or no weight: *Canadian Tire Corp. v. Canadian Bicycle Manufacturers' Assn.*, 2006 FCA 56.

[19] Although the respondent had taken the position in written submissions that the application for judicial review was moot as the applicant's PR application had been processed and granted, counsel for the respondent acknowledged at the hearing that there remains a live controversy between the parties and did not press the mootness issue. I am satisfied that this matter is not moot. The applicant is claiming that he was charged the PR application fee illegally and seeks to recover those funds, which remains a live issue. In any event, even if it were moot this would be an appropriate case to exercise the Court's discretion in favour of determining the issue: *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342.

[20] Consequently, the remaining issue between the parties to be determined is whether paragraph 295(3) (a) of the Regulations is *ultra vires* in that it conflicts with section 19 of the FAA.

**POSITIONS OF THE PARTIES**

[21] Although the applicant successfully brought his parents to Canada as permanent residents, he asserts that he should not have had to pay the PR application fee in August 2003, since his parents' applications for permanent residence could not be submitted (let alone processed) before October 2005. Indeed, the applicant says, if the timing of the PR application fee makes the fee illegal, he should not have had to pay it at all.

[22] The applicant submits that paragraph 295(3) (a) of the Regulations is illegal because it exceeds the enabling authority found in subsection 19(2) of the FAA. Subsection 19(2) authorizes fees on a cost recovery basis, so a fee can only be charged for a service that is actually provided. The effect of paragraph 295(3)(a), the applicant submits, is to charge a fee for a service, processing applications for permanent residence, that will not be provided for many months and may never be provided at all (if the sponsorship application is refused or withdrawn).

[23] As well, the applicant contends, early collection of the PR application fee is unfair. Even if the service is ultimately provided, or if it is not provided but the fee is refunded, the sponsor has lost the ability to use the money in the interim. The FAA cannot have been intended by Parliament to authorize an interest-free loan to the government.

[24] The applicant submits that this interpretation of the FAA is supported by principles of statutory interpretation, as set out in *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 S.C.R. 84 at para. 27:

> Today there is only one principle or approach; namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[25] The applicant says that Parliament's intention is not to authorize charges of fees for future services that may never be provided. The wording of FAA subsection 19(2) refers, in the past and present tenses, to a service "provided" and the cost of "providing" it; there is no language suggesting it could apply to future services. Another part of the FAA, subsection 20(1), deals with future services by providing for the return of deposits. It would be illogical to interpret subsection 19(2) as also applying to future services, the applicant submits.

[26] The primary position advanced by the respondent was that both the sponsorship fee and the PR application fee apply to the single service of bringing the sponsor's family members to Canada. Processing the application for permanent residence is merely an aspect of that overall service. Section 19 of the FAA is broad enough to authorize two fees that are charged at the same time, for two "services" which are both part of the same process. The respondent relies for this proposition on *Vaziri v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1159, 300 F.T.R. 158.

[27] The respondent also made several other arguments. First, even if each step in the Family Class application process is a separate "service," there are several practical benefits to charging the fees for both services at the same time. As well, the respondent stressed, the current scheme is

friendlier to sponsors than the scheme that existed under the former *Immigration Act*. Under that scheme, CIC charged a single, non-refundable fee to process both applications. Now, CIC charges two separate fees, so if the sponsorship application is refused, the PR application fee can be refunded.

[28] Second, the respondent submits that the applicant's concern is only with the timing of the PR application fee. He does not object in principle to paying it; he only says it should not be payable as early as it is. However, subsection 19(2) of the FAA only deals with the quantum of fees, not with their timing. The FAA does not constrain the government from charging a fee in advance of providing a service.

[29] Third, in *Vaziri*, above, the respondent argues, this Court decided that the length of time that elapses between CIC's collection of service fees and its processing of Family Class applications is an acceptable result of its legitimate policy decisions.

[30] Fourth, the respondent contends, regarding the applicant's concern that the application for permanent residence might never be processed (if the sponsorship application is refused), the evidence indicates that only 2.5% of sponsorship applications are refused, and if this happens, the PR application fee is fully refundable.

[31] Finally, although the respondent admits that the purpose of subsection 19(2) is to authorize cost recovery fees, cost recovery does not have to be perfect. The law only requires that the fees be related to the costs of the service. The respondent says that in the present context, the costs exceed

the fees by approximately $735 per Family Class application, so the fees are clearly a cost recovery measure.

[32] In reply, the applicant argues that it is irrelevant that the current fee structure provides practical benefits to CIC and is more favourable to sponsors than the scheme under the previous *Immigration Act*. That alone does not make the PR application fee justifiable as a cost recovery measure.

[33] As well, the applicant says, *Vaziri* did not decide the issue at bar. *Vaziri* held that CIC is entitled to give priority to certain Family Class applications, and may thereby delay in processing others. *Vaziri* did not decide whether, given that delay, CIC can charge a fee years before processing takes place.

[34] The applicant also submits that it is immaterial that only 2.5% of sponsorship applications are refused, assuming that figure is accurate. As long as some are refused and others are withdrawn, sponsors are being charged the PR application fee for a service that is never performed in those cases. That makes the fee illegal.

[35] While not directly at issue in these proceedings, the applicant challenges the respondent's claim that the costs of providing the service greatly exceeds the fee charged and questions the method used to calculate the costs. Those issues are before the Court in another matter.

**STATUTORY FRAMEWORK:**

[36] Subsections 19 (1) and 19 (2) of the *Financial Administration Act* state:

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| 19 (1) The Governor in Council may, on the recommendation of the Treasury Board, | 19. (1) Sur recommandation du Conseil du Trésor, le gouverneur en conseil peut: |
| (a) by regulation prescribe the fees or charges to be paid for a service or the use of a facility provided by or on behalf of Her Majesty in right of Canada by the users or classes of users of the service or facility; or | a) fixer par règlement, pour la prestation de services ou la mise à disposition d'installations par Sa Majesté du chef du Canada ou en son nom, le prix à payer, individuellement ou par catégorie, par les bénéficiaires des services ou les usagers des installations; |
| (b) authorize the appropriate Minister to prescribe by order those fees or charges, subject to such terms and conditions as may be specified by the Governor in Council. | b) autoriser le ministre compétent à fixer ce prix par arrêté et assortir son autorisation des conditions qu'il juge indiquées. |
| (2) Fees and charges for a service or the use of a facility provided by or on behalf of Her Majesty in right of Canada that are prescribed under subsection (1) or the amount of which is adjusted under section 19.2 may not exceed the cost to Her Majesty in right of Canada of providing the service or the use of the facility to the users or class of users. | (2) Le prix fixé en vertu du paragraphe (1) ou rajusté conformément à l'article 19.2 ne peut excéder les coûts supportés par Sa Majesté du chef du Canada pour la prestation des services aux bénéficiaires ou usagers, ou à une catégorie de ceux-ci, ou la mise à leur disposition des installations. |

[37] Subsection 20(1) of the FAA states:

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| 20. (1) Where money is | 20. (1) Le fonctionnaire public |

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| received by a public officer from any person as a deposit to ensure the doing of any act or thing, the public officer shall hold or dispose of the money in accordance with regulations of the Treasury Board. | qui reçoit des fonds à titre de cautionnement en garantie d'exécution d'un acte ou d'une chose les conserve ou en dispose conformément aux règlements du Conseil du Trésor. |

[38] Subsection 295(3)of the *Immigration and Refugee Protection Regulations* came into effect on June 28, 2002 pursuant to the regulation-making and fee-setting powers granted to the Governor-in-Council under s. 5 (1) and s. 89 of the IRPA and s. 19 (1) of the FAA. Subsection 295 (3) reads as follows:

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| 295. (3) A fee payable under subsection (1) in respect of a person who makes an application as a member of the family class or their family members | 295. (3) Les frais prévus au paragraphe (1) à l'égard de la personne qui présente une demande au titre de la catégorie du regroupement familial ou à l'égard des membres de sa famille sont : |
| (a) is payable, together with the fee payable under subsection 304(1), at the time the sponsor files the sponsorship application; and | *a*) exigibles au moment où le répondant dépose sa demande de parrainage, à l'instar des frais prévus au paragraphe 304(1); |
| (b) shall be repaid in accordance with regulations referred to in subsection 20(2) of the Financial Administration Act if, before the processing of the application for a permanent resident visa has begun, the sponsorship application is withdrawn by the sponsor. | *b*) restitués conformément aux règlements visés au paragraphe 20(2) de la *Loi sur la gestion des finances publiques*, si la demande de parrainage est retirée par le répondant avant que ne débute l'examen de la demande de visa de résident permanent. |

**DISCUSSION**

**<u>Standard of Review</u>**

[39] Considerable deference is owed to the policy choices made by the government: *Thorne's Hardware Ltd. v. Canada*, [1983] 1 S.C.R.106; *Sunshine Village Corp. v. Canada (Parks)*, 2004 FCA 166 and *De Guzman v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436.

[40] These authorities have cautioned that a regulation should only be found to be invalid if it conflicts with the express language of the enabling statute. This application for judicial review asks whether a regulation is *ultra vires* one of its enabling statutes. This is a "true question of jurisdiction or *vires*" which should be reviewed on the standard of correctness: *Sunshine Village*, above at paragraph 10; *Canadian Council of Refugees v. Canada*, 2008 FCA 229, [2009] 3 F.C.R. 136 at paras. 53-63; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 59.

**<u>Is paragraph 295(3) (a) of the Regulations *ultra vires*?</u>**

[41] As stated by the Federal Court of Appeal in *Jafari v. Canada (Minister of Citizenship and Immigration)*, [1995] 2 F.C. 595, at pages 5-6, it is not for a court to determine the wisdom of delegated legislation or to assess its validity on the basis of the court's policy preferences.

[42] I am mindful of the fact that the applicant has submitted evidence that the merits of the policy decision to require payment of the PR application fee at the same time as the sponsorship application fee has been called into question by government officials. Moreover, on cross-examination, the respondent's deponents conceded that it would be administratively feasible to require payment of the PR application fee at the same time as the application form is completed and submitted.

[43] I note that there was also evidence that bifurcating the payments would increase the costs and complexity of administering the scheme. In any event, the issue before the Court is not whether such a policy change would be reasonable or wise but whether the existing policy, as reflected in the regulation, falls within the scope of the enabling authority.

[44] The applicant's interpretation of s.19(2) appears at first impression to be supported by the use in the English version of the enactment of the words "providing" and "provided," in the present and past tenses. "Providing" is used in the phrase, "the cost to Her Majesty in Right of Canada of providing the service." This seems to refer to the cost of the service whenever it is provided. It does not imply, however, that the service must be provided at a particular time. The phrase "fees or charges for a service . . . provided by on or on behalf of Her Majesty in Right of Canada" appears to refer to a service that has been provided at a point in time prior to the imposition of the fee or charge.

[45] Read as a whole, in my view, in a manner consistent with the modern approach to statutory interpretation, the English and French versions of s. 19 (2) do not preclude the imposition of a fee to

recover the costs incurred by the government in providing services well in advance of the delivery of those services. The subsection requires that the fee charged may not exceed the cost (*ne peut excéder les coûts supportés par Sa Majesté)* to the Crown in providing the service. Nor does FAA 19 (2) require that the service for which the fee is charged be performed in a reasonable time-period.

[46] In *Vaziri* a delay of 34 months was found to be acceptable in the circumstances. However, I agree with the applicant that *Vaziri* is not helpful in resolving the issue at bar. *Vaziri* was an application for a *mandamus* order to force CIC to make a decision on a Family Class application. The Court held that CIC was entitled to make policies prioritizing sponsorship applications for spouses and children over applications for parents and grandparents. In light of CIC's valid policy decision, the delay was not excessive. This finding has little relevance to the question of whether a cost recovery fee is authorized under the FAA when the service may never be performed. *Vaziri* holds that the applicant cannot legitimately expect to have the service provided earlier.

[47] The applicant's interpretation of the scope of s. 19 (2) is not, in my view, assisted by the fact that deposits for future services are dealt with expressly in s.20(1) of the FAA. Such deposits are fundamentally different from service fees. Future services can be dealt with under a deposit-return regime while also attracting fees. FAA 19 (2) does not impose a temporal limitation on the delivery of the services for which the fee is charged. I think it also self-evident that where a fee is charged in advance of delivery some proportion of the services may never be performed.

[48] The respondent has relied on three cases in support of the propositions that the only requirement for a cost recovery fee is that the quantum of the fee be related to the cost of the service

and that there is no requirement as to timing: *Thorne's Hardware Ltd. v. Canada*, above, *Eurig Estate (Re)*, [1998] 2 S.C.R. 565, and *620 Connaught Ltd. v. Canada (Attorney General)*, 2008 SCC 7, [2008] 1 S.C.R. 131. Two of these decisions deal with regulatory charges, not user fees. In *620 Connaught* the Supreme Court explains the difference at paras. 19-20:

> A user fee, by definition, is a fee charged by the government for the use of government services or facilities. In the case of user fees, as stated by this Court in Eurig, there must be a clear nexus between the quantum charged and the cost to the government of providing such services or facilities. The fees charged cannot exceed the cost to the government of providing the services or facilities [. . .].
>
> By contrast, regulatory charges are not imposed for the provision of specific services or facilities. They are normally imposed in relation to rights or privileges awarded or granted by the government. The funds collected under the regulatory scheme are used to finance the scheme or to alter individual behaviour. The fee may be set simply to defray the costs of the regulatory scheme. Or the fee may be set at a level designed to proscribe, prohibit or lend preference to a behaviour
> [. . .].

[49] It is clear that s.19 of the FAA authorizes user fees, not regulatory charges. The issue in the case at bar is whether the impugned fee is a proper user fee at the time at which it is imposed. *620 Connaught* does not assist with this question, because in that case there was "no suggestion" that user fees were involved (paras. 17, 21). Consequently, the Court did not analyse the requirements for user fees in any detail.

[50] Similarly, as I read *Thorne's Hardware*, the Supreme Court upheld the fee in question because the relevant legislation authorized regulatory charges. A harbour could charge a fee to a ship that did not use any services at all, because it was entitled to charge fees "reasonably related to the [overall] costs of operating the harbour." I am not persuaded that the Court would have upheld the fees had it interpreted the legislation as only authorizing user fees for specific services.

[51] The third case cited by the respondent, *Eurig*, does deal with user fees. *Eurig* says, at paragraph 21 of the reasons of Justice Major for the majority, that for a user fee to be valid a nexus must exist between the quantum of the fee and the cost of providing the corresponding service. Fees and costs need not correspond exactly, as long as a reasonable connection is shown. *Eurig* contains no timing-related requirements for a user fee. If the evidence does establish a reasonable connection between the quantum of the fee and the cost of providing the services, that should be sufficient to bring the fee within FAA s.19 (2).

[52] In my view, the evidence in this case, although disputed, does demonstrate that there is at least a reasonable connection between the fee charged and the cost of the services provided. The evidence, including that of a costing specialist, Diane Platt, indicates that there are a number of variables to be taken into account in assessing whether cost recovery is achieved or not. Whether the precise amount is valid, I leave for determination on another day. But I accept the respondent's argument that there is a clear nexus between cost and fee.

[53] At first impression, I was attracted to the applicant's argument that advance payment of the fee could not be justified so long as any of the PR applications would not be processed because of the sponsor's ineligibility; whether it was the government's estimate of 2.5% or some other figure. On reflection, I do not think that the *vires* of a fee charging regulation should be determined on the basis that in some minor proportion of cases the service will never be provided because of the failure of a prerequisite event, in this case the eligibility of the sponsor. Particularly where the evidence is clear that in the vast majority of cases, the prior determination is positive.

[54] My view is strengthened by the fact that in the present context, applicants may choose to proceed with the PR application even where the sponsor is found to be ineligible and the application is, therefore, likely to be futile. They may choose to do so in order to appeal the resulting decision to the Immigration Appeal Division in order to take advantage of the examination of humanitarian and compassionate considerations in that forum. In either case, the cost of processing the application is incurred by CIC. And where the application is not processed, the fee is refunded.

[55] During the course of the hearing I asked counsel whether *Canadian Shipowners Assn. v. Canada*, [1997] F.C.J. No. 1002 (QL) (T.D.), aff'd 233 N.R. 162 (C.A.), not cited by either party, could be of assistance to the Court in deciding the issue in this case. Counsel were familiar with the decision as it relates to the questions before the Court in another matter but had not considered its application in these proceedings. I invited post-hearing submissions which the parties provided in writing. Both contend that *Canadian Shipowners* supports their positions.

[56] *Canadian Shipowners* involved fees payable for Coast Guard marine navigation aids and other services to commercial shipping, such as buoys, beacons and lighthouses. The Court held that the clear objective of FAA s.19 (2) is to recover, from users, the costs incurred by the government in providing them a benefit. The Governor-in-Council's discretion over regulations is constrained by the need to respect this purpose. It was alleged that the fees in question could not be "cost recovery" fees, since foreign and domestic ships were charged different amounts although the costs of providing services to each ship was the same. Justice Paul Rouleau disagreed, and based on the

evidence before him, held that the fee structure reflected the realities of the shipping industry. Therefore, they were valid cost recovery fees.

[57] Justice Rouleau found that it was legitimate to charge fees at different times for domestic and foreign vessels. Foreign ships were charged, depending on the region, either upon entering Canadian waters or upon unloading goods. Since Canadian ships can move freely within Canadian waters, however, the Coast Guard cannot obtain specific data on their movements and loading/unloading activities. Instead, they were charged on an annual basis. This discrepancy in the timing of fees was acceptable, because it was made in good faith based on the practical realities of the shipping industry.

[58] Based on *Canadian Shipowners*, I conclude that in considering whether a regulation lawfully imposes user fees under the enabling authority in FAA s. 19 (2) the practical realities of providing the service in question must be taken into account. In the case at bar, the timing of imposition of the permanent residence application fee appears to reflect the practical reality of processing sponsorship and permanent residence applications. I agree with the respondent that this is effectively one service and accept the evidence that imposing the fee for both applications reflects the need for efficiency in an already lengthy process, by processing two fees at once and by doing so early on so that services are not delayed later.

**CONCLUSION:**

[59] Charging fees in advance of providing a service is an ordinary and uncontroversial practice and does not render a fee imposed by a regulation *ultra vires* FAA s. 19 (2) so long as there is a clear nexus between the fee and recovery of the costs incurred by the government for services

provided or to be provided. Nor is the regulation in conflict with the enabling authority when, in some instances, the service for which the fee is paid cannot be performed because of the failure of an intervening act or event.

[60] In this instance, the government has made a policy choice to require payment of a fee in advance recognizing that in a small proportion of cases the service will not be provided and the fee must be refunded. I am not persuaded that this renders the regulation *ultra vires*, particularly in light of the evidence that only a small percentage of sponsorship applications are rejected. The vast majority are granted and proceed to the PR application. The fee is fully refundable in those cases where the sponsorship applicant is found to be ineligible and has elected not to proceed with the permanent resident application in light of that result. In my view, that brings the regulation within FAA s.19 (2). For these reasons, I find that s.295 (3) (a) is *intra vires* its enabling authority insofar as there is a clear nexus between the fee and the costs incurred in providing the service.

**CERTIFIED QUESTION:**

[61] The parties have jointly submitted the following question for certification:

> Is *Immigration and Refugee Protection Regulation* 295 (3) (a), as applied to sponsored immigrant visa applications made by parents and grandparents, *ultra vires* on the ground it is inconsistent with s.19 of the Financial Administration Act?

[62] I am satisfied that this is a serious question that lends itself to an answer of general application and would be dispositive of an appeal: *Zazai v. Canada (Minister of Citizenship and Immigration),* 2004 FCA 89; 318 N.R. 365; *Boni v. Canada (Minister of Citizenship and*

*Immigration)*, 2006 FCA 68; 357 N.R. 326. Accordingly I am prepared to certify it pursuant to paragraph 74(d) of the IRPA and Rule 18(1) of the *Federal Courts Immigration and Refugee Protection Rules*/ SOR 93-22, as am.

## JUDGMENT

**IT IS THE JUDGMENT OF THIS COURT that:**

1. the application for judicial review is dismissed, and

2. the following question is certified as a serious question of general importance;

> Is *Immigration and Refugee Protection Regulation* 295 (3) (a), as applied to sponsored immigrant visa applications made by parents and grandparents, *ultra vires* on the ground it is inconsistent with s.19 of the Financial Administration Act?

"Richard G. Mosley"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-804-09 |
| **STYLE OF CAUSE:** | TAO LI<br><br>and<br><br>THE MINISTER OF CITIZENSHIP<br>AND IMMIGRATION |
| **PLACE OF HEARING:** | Toronto, Ontario |
| **DATE OF HEARING:** | June 9, 2010 |
| **REASONS FOR JUDGMENT:** | MOSLEY J. |
| **DATED:** | August 5, 2010 |

**APPEARANCES:**

| | |
|---|---|
| Lorne Waldman | FOR THE APPLICANT |
| Marie-Louise Wcislo | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| LORNE WALDMAN<br>Waldman & Associates<br>Toronto, Ontario | FOR THE APPLICANT |
| MYLES J. KIRVAN<br>Deputy Attorney General of Canada<br>Toronto, Ontario | FOR THE RESPONDENT |