A-558-04

2005 FCA 436

Josephine Soliven de Guzman (*Appellant*)

v.

The Minister of Citizenship and Immigration (*Respondent*)

INDEXED AS: DE GUZMAN v. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION) (F.C.A.)

Federal Court of Appeal, Desjardins, Evans, and Malone JJ.A.—Vancouver, October 24, 2005; Ottawa, December 20, 2005.

Citizenship and Immigration — Status in Canada — Permanent Residents — Sponsorship — Appeal from Federal Court decision dismissing appellant's application for judicial review to set aside decision of Immigration Appeal Division of Immigration and Refugee Board (Board) dismissing appellant's appeal from visa officer's refusal under Immigration and Refugee Protection Regulations, s. 117(9)(d) to issue visas to her sons as members of family class — Federal Court also certifying question whether Regulations, s. 117(9)(d) invalid or inoperative since depriving appellant of right to liberty, security of person contrary to Canadian Charter of Rights and Freedoms, s. 7 — Appellant, now Canadian citizen, lying about sons' existence when applying for permanent resident status — As such, pursuant to Regulations, s. 117(9)(d), appellant's sons not members of family class because had not been examined for immigration purposes when appellant applied to come to Canada — Consideration of validity of Regulations, s. 117(9)(d) must start with words of enabling Immigration and Refugee Protection Act (IRPA) provision, s. 14 — Regulations, s. 117(9)(d) falling within broad language of IRPA, s. 14 since prescribing, governing matters pertaining to family class members by excluding from class persons not examined — Nothing express or implied in IRPA, s. 14 or IRPA scheme to reduce apparent breadth of regulation-making discretion that would render s. 117(9)(d) beyond powers delegated by Parliament to Governor in Council — Certified question answered negatively.

Constitutional Law — Charter of Rights — Life, Liberty and Security — Appeal from Federal Court decision dismissing appellant's application for judicial review to set aside decision of Immigration Appeal Division of Immigration and Refugee Board (Board) dismissing appellant's appeal from visa officer's refusal to issue visas to sons as members of family class — Whether, by preventing reunification in Canada of parent and child, Immigration and Refugee Protection Regulations, s. 117(9)(d) violating Charter, s. 7 — Appellant leaving children voluntarily, s. 117(9)(d) not cause of separation from sons — No evidence provided separation causing appellant to suffer from psychological stress, hardship — Insufficient nexus between state action impugned (s. 117(9)(d)), appellant's separation from sons — Regulations, s. 117(9)(d) not

precluding other possible bases for appellant's sons application for admission to Canada (e.g. Ministerial discretion under IRPA, s. 25) — Appellant not deprived of Charter, s. 7 right.

Construction of Statutes — Appeal from Federal Court decision dismissing appellant's application for judicial review to set aside decision of Immigration Appeal Division of Immigration and Refugee Board (Board) dismissing appellant's appeal from visa officer's refusal to issue visas to sons as members of family class — Appellant arguing Immigration and Refugee Protection Regulations, s. 117(9)(d) inconsistent with international human rights instruments to which Canada signatory — International human rights instruments not prevailing over conflicting Immigration and Refugee Protection Act (IRPA) provisions — IRPA, s. 3(3)(f) not incorporating into Canadian law "international human rights instruments to which Canada is signatory" — Merely directing IRPA must be construed, applied in manner complying therewith — International instrument not legally binding on signatory State until ratification thereof unless instrument providing binding when signed — S. 3(3)(f) not requiring each provision of IRPA, Regulations comply with international human rights instruments — But IRPA to be interpreted, applied in manner complying with international human rights instruments binding on Canada — Regulations, s. 117(9)(d) not rendering IRPA inconsistent with international human rights instrument to which Canada signatory when considering context of IRPA's legislative scheme as whole.

This was an appeal from a Federal Court decision dismissing the appellant's application for judicial review to set aside a decision of the Immigration Appeal Division of the Immigration and Refugee Board (Board) dismissing the appellant's appeal from a visa officer's refusal to issue visas to her sons as members of the family class. The appellant, now a Canadian citizen, became a permanent resident in Canada after being sponsored by her mother as a unmarried daughter under the former immigration law. However, she misrepresented herself when she was landed by stating to immigration officials that she was single and had no dependants, other than her daughter who was accompanying her. In fact, the appellant had two sons whom she left in the Philippines with their father. Despite the appellant's denial that she was ever legally married, the sons' birth certificates indicate that the appellant was married to their father. When the appellant tried to sponsor her sons, her application was refused under paragraph 117(9)(*d*) of the *Immigration and Refugee Protection Regulations* on the ground that they were not members of the family class because they had not been examined for immigration purposes when the appellant applied to come to Canada. The Federal Court concluded that paragraph 117(9)(*d*) of the Regulations was valid and that the Board was correct in law to dismiss her appeal. It certified the question as to whether paragraph 117(9)(*d*) of the *Immigration and Refugee Protection Regulations* is invalid or inoperative because it is unconstitutional as it deprives the appellant of her right to liberty and/or her right to security of the person contrary to the principles of fundamental justice and to section 7 of the *Canadian Charter of Rights and Freedoms*. The issues were whether paragraph 117(9)(*d*) is authorized by section 14 of the *Immigration and Refugee Protection Act* (IRPA); whether it is invalid under section 7 of the Charter; and whether it is invalid because it renders the IRPA non-compliant with "international human rights instruments to which Canada is signatory"?

Held, the appeal should be dismissed.

The IRPA is relatively concise framework legislation, containing the core principles and policies of the statutory scheme. Section 14, which is found in Division 1 of the IRPA, is drafted in language that confers wide regulation-making powers exercisable by the Governor in Council. Compared to other kinds of administrative action, regulations have rarely been found to be invalid by courts unless there is a conflict between the express language of an enabling clause and a regulation purportedly made under it. A consideration of the validity of paragraph 117(9)(*d*) must start with the words of section 14, its enabling provision in the IRPA. Paragraph 117(9)(*d*) clearly relates to the application of Division 1, which deals with, *inter alia*, the sponsorship of members of the family class for admission to Canada. That paragraph limits sponsorship rights in certain circumstances in order to deter visa applicants from withholding or misrepresenting material facts about their dependants. The importance to the administration of the statutory scheme of full disclosure is illustrated by the fact that a foreign national is inadmissible to Canada if an accompanying or, sometimes, non-accompanying family member is inadmissible. Furthermore, paragraph 117(9)(*d*) would seem clearly to fall within the broad language of subsection 14(2) since it prescribes and governs matters pertaining to members of the family class by excluding from the class those who were not examined. The creation of divisions in the IRPA was not intended to limit the breadth of the regulation-making power contained in one division by precluding the consideration of factors more clearly falling under another. An interpretation of the Act which provides for regulatory flexibility is especially appropriate in view of the "framework" nature of the IRPA, which was arranged into divisions to provide a statutory text that is coherent and easy to follow. It would also seriously impede the effective administration of immigration to interpret the IRPA as precluding the possibility that, in addition to removal, another less onerous sanction (i.e. ineligibility to sponsor unexamined dependants as members of the family class) may be imposed on a person who misrepresented a material fact in order to gain entry to Canada. Therefore, there is nothing express or implied in either section 14 or the scheme of the IRPA to reduce the apparent breadth of the regulation-making discretion that would render paragraph 117(9)(*d*) beyond the powers delegated by Parliament to the Governor in Council.

Subsection 6(1) of the Charter provides that Canadian citizens have the right to enter and remain in Canada whereas others do not. The appellant acquired Canadian citizenship by means of a material misrepresentation and came to Canada without her sons. She is not a refugee nor a person in need of protection and provided no evidence of any special hardship or psychological stress that she is suffering as a result of the separation. She has visited her sons in the Philippines and could reunite with them on a permanent basis. Paragraph 117(9)(*d*) was thus not the cause of the appellant's 12-year separation from her two children since she left them voluntarily. Therefore, there was an insufficient nexus between the state action impugned (paragraph 117(9)(*d*)) and the appellant's separation from her sons. Paragraph 117(9)(*d*) does not preclude other possible bases on which the appellant's sons may be admitted to Canada. For example, the sons (or the appellant on their behalf) could apply to the Minister under section 25 of the IRPA for a discretionary exemption from paragraph 117(9)(*d*) or they could apply for permanent resident status in the economic class. Therefore, the appellant has not been deprived of her section 7 Charter rights to liberty and security of the person.

International human rights instruments do not prevail over conflicting IRPA provisions. The direction in paragraph 3(3)(*f*) that the IRPA must be "construed and applied in a manner that . . . that complies with international human rights instruments to which Canada is signatory" must not be interpreted as giving priority over the IRPA to "international human rights instruments" which are not specifically identified in the IRPA, may not have been subject to parliamentary scrutiny and may not even have existed when the IRPA was enacted. However, in reaching its decision, the Federal Court adopted an unduly limited view of the effect of the burgeoning common law when holding that it was required to consider the international human rights instruments merely as "context" when interpreting ambiguous provisions of the immigration law. This view did not take proper account of the expanding role that the common law has given to international law in the interpretation of domestic law. This aspect of the evolution of the common law is an important part of the context against which paragraph 3(3)(*f*) must be interpreted. Paragraph 3(3)(*f*) does not incorporate into Canadian law "international human rights instruments to which Canada is signatory" but merely directs that the IRPA must be construed and applied in a manner that complies with them. The words "shall be construed and applied in a manner that complies with" are mandatory and appear to direct courts to give the international human rights instruments in question more than persuasive or contextual significance in the interpretation of the IRPA. The international law sources described comprise some that are binding on Canada in international law and some that are non-binding. Paragraph 3(3)(*f*) only applies to instruments to which Canada is signatory. An international instrument is not legally binding on a signatory State until it has also ratified it unless the instrument provides that it is binding when signed. Moreover, paragraph 3(3)(*f*) of the IRPA does not require that each and every provision of the IRPA and the Regulations comply with international human rights instruments. Rather, the question is whether an impugned statutory provision, when considered together with others, renders the IRPA non-compliant with an international human rights instrument to which Canada is signatory. The IRPA must be interpreted and applied in a manner that complies with the international human rights instruments that are binding on Canada. It was not necessary in the case at bar to decide the effect of paragraph 3(3)(*f*) with respect to non-binding international instruments to which Canada is signatory because only the binding instruments were relevant to this case. However, the Court (with the exception of Malone J.A.) was inclined to think that Parliament intended them to be used as persuasive and contextual factors in the interpretation and application of the IRPA, and not as determinative.

A reviewing court should consider an impugned provision in the context of the entire legislative scheme. Determining the effect of paragraph 117(9)(*d*) on Canada's international obligations requires the Court to consider whether other provisions in the IRPA mitigate its impact on a right guaranteed by an international human rights instrument to which Canada is signatory. If the statutory provision in question is a regulation and is held to render the IRPA non-compliant, the Court must then determine whether the relevant enabling section of the IRPA authorizes the Governor in Council to enact a regulation which renders the IRPA non-compliant with a binding international human rights instrument to which Canada is signatory. In view of paragraph 3(3)(*f*), only a clear legislative intention to the contrary will warrant a conclusion that the regulation-making power could lawfully be exercised in this manner.

Because the international human rights instruments relied on by the appellant create legal obligations that are binding on Canada, paragraph 3(3)(*f*) makes them determinative of the meaning of the IRPA in the absence of a clearly expressed legislative intention to the contrary. However, when considered in the context of the legislative scheme as a whole, particularly section 25, paragraph 117(9)(*d*) does not render the IRPA inconsistent with an international human rights instrument to which Canada is signatory. Therefore, it was not necessary to conduct the second step and decide if section 14 of the IRPA should be interpreted as not authorizing the making of a regulation that renders the IRPA non-compliant with an instrument within the scope of paragraph 3(3)(*f*). The certified question was answered negatively.

statutes and regulations judicially considered

American Convention on Human Rights, adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969, O.A.S.T.S. No. 36; 1144 U.N.T.S. 123, Art. 17(1).

Canadian Bill of Rights, R.S.C., 1985, Appendix III, s. 2.

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], ss. 1, 6(1), 7.

Citizenship Act, R.S.C., 1985, c. C-29, ss. 10, 18.

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, December 10, 1984, [1987] Can. T.S. No. 36.

Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, 213 U.N.T.S. 221, Art. 8.

Convention on the Rights of the Child, November 20, 1989, [1992] Can. T.S. No. 3, Arts. 3(1), 10, 16.

Immigration and Refugee Protection Act, S.C. 2001, c. 27, ss. 2(2), 3(1)(*d*), (3)(*f*), 5(1), 12(1), 13(1), 14, 16(1), 24, 25, 40, 42, 43, 63(1), 65, 74(*d*), 97(1)(*a*) .

Immigration and Refugee Protection Regulations, SOR/2002-227, s. 117(9)(*d*) (as am. by SOR/2004-167, s. 41), (10) (as enacted *idem*).

Immigration Regulations, 1978, SOR/78-172, ss. 2(1) “unmarried”, 4(1)(*b*) (as am. by SOR/88-286, s. 2), 9(1)(*a*).

International Covenant on Civil and Political Rights, December 19, 1966, [1976] Can. T.S. No. 47, Art. 17.

International Covenant on Economic, Social and Cultural Rights, December 16, 1966, [1976] Can. T.S. No. 46, Art. 10.

Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, May 25, 2000, UN GA Res. 54/263, Annex II.

Vienna Convention on the Law of Treaties, May 23, 1969, [1980] Can. T.S. No. 37, Art. 18.

cases judicially considered

applied:

Munar v. Canada (Minister of Citizenship and Immigration) (2005), 261 D.L.R. (4th) 157; 49 Imm. L.R. (3d) 84; 2005 FC 1180; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76; (2004), 234 D.L.R. (4th) 257; 180 C.C.C. (3d) 353; 16 C.R. (6th) 203; 315 N.R. 201; 183 O.A.C. 1; 46 R.F.L. (5th) 1; 2004 SCC 4.

distinguished:

Al-Nashif v. Bulgaria (2003), 36 E.H.R.R. 37, 655; *Sen v. Netherlands* (2003), 36 E.H.R.R. 7, 81.

considered:

Ontario Federation of Anglers & Hunters v. Ontario (Ministry of Natural Resources) (2000), 211 D.L.R. (4th) 741; 93 C.R.R. (2d) 1; 158 O.A.C. 255 (Ont. C.A.); *Canadian Assn. of Regulated Importers v. Canada (Attorney General)*, [1994] 2 F.C. 247; (1994), 17 Admin. L.R. (2d) 121; 164 N.R. 342 (C.A.); *R. v. Drybones*, [1970] S.C.R. 282; (1969), 9 D.L.R. (3d) 473; 71 W.W.R. 161; 10 C.R.N.S. 334; *Capital Cities Communications Inc. et al. v. Canadian Radio-Television Commn.*, [1978] 2 S.C.R. 141; (1977), 81 D.L.R. (3d) 609; 36 C.P.R. (2d) 1; 18 N.R. 181; *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324; (1990), 74 D.L.R. (4th) 449; 45 Admin. L.R. 161; 114 N.R. 81; *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; (1987), 78 A.R. 1; 38 D.L.R. (4th) 161; [1987] 3 W.W.R. 577; 51 Alta. L.R. (2d) 97; 28 C.R.R. 305; 74 N.R. 99; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; (1989), 59 D.L.R. (4th) 416; 26 C.C.E.L. 85; 89 CLLC 14,031; 93 N.R. 183; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; (1999), 174 D.L.R. (4th) 193; 14 Admin. L.R. (3d) 173; 1 Imm. L.R. (3d) 1; 243 N.R. 22; *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241; (2001), 200 D.L.R. (4th) 419; 40 C.E.L.R. (N.S.) 1; 19 M.P.L.R. (3d) 1; 271 N.R. 201; 2001 SCC 40; *Martinez v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1341; [2003] F.C.J. No. 1695 (QL).

referred to:

Chiarelli v. Canada (Minister of Employment and Immigration), [1992] 1 S.C.R. 711; (1992), 90 D.L.R. (4th) 289; 2 Admin. L.R. (2d) 125; 72 C.C.C. (3d) 214; 8 C.R.R. (2d) 234; 16 Imm. L.R. (2d) 1; 135 N.R. 161; *Medovarski v. Canada (Minister of Citizenship and Immigration); Esteban v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 539; (2005) 258 D.L.R. (4th) 193; 339 N.R. 1; 2005 SCC 51; *R. v. Morgentaler*, [1988] 1 S.C.R. 30; (1988), 44 D.L.R. (4th) 385; 37 C.C.C. (3d) 449; 62 C.R. (3d) 1; 31 C.R.R. 1; 82 N.R. 1; 26 O.A.C. 1.

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APPEAL from a Federal Court decision ([2005] 2 F.C.R. 162; (2004), 245 D.L.R. (4th) 341; 19 Admin. L.R. (4th) 291; 124 C.R.R. (2d) 189; 257 F.T.R. 290; 40 Imm. L.R. (3d) 256; 2004 FC 1276) dismissing the appellant’s application for judicial review to set aside a decision of the Immigration Appeal Division of the Immigration and Refugee Board and certifying the question as to whether paragraph 117(9)(*d*) of the *Immigration and Refugee Protection Regulations* is invalid or inoperative because it violates section 7 of the *Canadian Charter of Rights and Freedoms*. Appeal dismissed.

appearances:

Lorne Waldman, William J. Macintosh and *Peter D. Larlee* for appellant.

R. Keith Reimer and *Sandra E. Weafer* for respondent.

solicitors of record:

Waldman & Associates, Toronto, *William J. Macintosh & Associates*, Surrey, and *Larlee & Associates*, Vancouver, for appellant.

Deputy Attorney General of Canada for respondent.

The following are the reasons for judgment rendered in English by

EVANS J.A.:

A. INTRODUCTION

[1] In 1993, Josephine Soliven de Guzman, a citizen of the Philippines, came to live in Canada. When she applied to the Canadian embassy in Manila for her permanent resident visa, and when she was landed in Canada, she told immigration officials that she was single and had no dependants, other than her daughter, Shara Mae, who was accompanying her. This was not true: she also had two sons, Jay and Jayson, whom she left in the Philippines with their father.

[2] Eight years later, after establishing herself in this country and becoming a Canadian citizen, Ms. de Guzman applied to sponsor the admission to Canada of Jay and Jayson as members of the family class. They were then 17 and 16 years old respectively. However, they were refused visas under paragraph 117(9)(*d*) [as am. by SOR/2004-167, s. 41] of the *Immigration and Refugee Protection Regulations* [SOR/2002-227] (Regulations), on the ground that they were not members of the family class because they had not been examined for immigration purposes when Ms. de Guzman applied to come to Canada. Accordingly, Ms. de Guzman's application to sponsor her sons was denied.

[3] Ms. de Guzman says that paragraph 117(9)(*d*) is invalid on three grounds. First, it is not authorized by the relevant enabling section of the *Immigration and Refugee Protection Act* [S.C. 2001, c. 27] (IRPA). Second, by preventing the reunification in Canada of parent and child, the regulation violates the parent's rights under section 7 of the *Canadian Charter of Rights and Freedoms* [being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]]. Third, paragraph 117(9)(*d*) is inconsistent with international human rights instruments to which Canada is signatory, and which protect the right of families to live together and the best interests of children.

[4] The practical significance of paragraph 117(9)(*d*) is that it deprives those to whom it applies of the benefit of the favourable immigration treatment afforded to members of the family class. Family reunification is an objective of the IRPA: paragraph 3(1)(*d*).

[5] Sponsorship as a member of the family class provides the best opportunity for starting a new life in Canada for those who may not qualify for admission under other selection criteria. The outcome of this appeal is of importance to a significant number of people, in addition to the parties.

[6] The broad sweep of paragraph 117(9)(*d*) has been narrowed somewhat by an amendment which brought back into the family class non-accompanying family members who were not examined because an officer decided that no examination was necessary: subsection 117(10), added by SOR/2004-167, subsection 41(4). However, this does not assist Ms. de Guzman.

B. HISTORY OF THE PROCEEDING

[7] Ms. de Guzman appeals to this Court from the decision of a Judge of the Federal Court dismissing her application for judicial review to set aside a decision of the Immigration Appeal

Division of the Immigration and Refugee Board. The Judge's decision is reported as *de Guzman v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 F.C.R. 162.

[8] In a decision dated September 26, 2003, the Board dismissed Ms. de Guzman's appeal from a visa officer's refusal to issue visas to her sons as members of the family class. Relying on paragraph 117(9)(*d*), the Board held that, since they were not members of the family class, they were not eligible to be sponsored by their mother and, under section 65 of the IRPA, it had no discretionary jurisdiction to consider humanitarian and compassionate circumstances.

[9] The applications Judge concluded that paragraph 117(9)(*d*) was valid and that the Board was correct in law to dismiss Ms. de Guzman's appeal. Pursuant to paragraph 74(*d*) of the IRPA, the Judge [at paragraph 74] certified for appeal the following as a serious question of general importance:

Is paragraph 117(9)(*d*) of the *Immigration and Refugee Protection Regulations* invalid or inoperative because it is unconstitutional as it deprives the applicant of her right to liberty and/or her right to security of [the] person, in a manner not in accordance with the principles of fundamental justice, contrary to section 7 of the Charter?

C. FACTUAL BACKGROUND

[10] In 1990, Josephine de Guzman's mother applied to sponsor her admission to Canada as a member of the family class. Under the law then in force, Ms. de Guzman, who was 32 years old, was eligible to be admitted as a member of the family class as her sponsor's unmarried daughter: *Immigration Regulations, 1978*, SOR/78-172, paragraph 4(1)(*b*), as amended by SOR/88-286, subsection 2(1). "Unmarried" was stated in the 1978 Regulations, subsection 2(1), to mean that "the person is not married and has never been married."

[11] Ms. de Guzman stated on her visa application form that she was single and had no children. However, on being examined by a doctor for immigration purposes, she admitted that she had a daughter, Shara Mae, born in 1986. Ms. de Guzman amended her application form accordingly. However, she did not disclose to immigration officials the existence of either Jay, born in 1983, or Jayson, born in 1985. As a result, they were not examined.

[12] The boys' birth certificates give their surname as Montiadora, their father's name as Manuel C. Montiadora, and their mother's name as Josephine S. de Guzman. Their parents are stated to have married in 1982. Jay's birth certificate was signed by his mother and Jayson's by his father.

[13] Under the law as it was when Ms. de Guzman applied for admission to Canada, she would not have been eligible to be sponsored by her mother if she and Mr. Montiadora were or had been married.

[14] In 1993, Ms. de Guzman was issued a visa and entered Canada, along with Shara Mae, leaving her sons with their father in the Philippines, where they have remained. When Ms. de

Guzman was landed in Canada, she again certified that she was single and had no dependants, apart from Shara Mae.

[15] Ms. de Guzman applied in July 2001 to sponsor her sons, and in November 2001 was informed that her application to sponsor them had been accepted.

[16] However, in April 2003, Jay received a letter from a visa officer at the Canadian embassy in Manila advising him that his visa application had been denied. The officer stated that, by virtue of paragraph 117(9)(*d*) of the Regulations, Jay was not a member of the family class, since he had not been examined when his sponsor, his mother, had applied for a visa for herself. Although the only refusal letter seems to have been sent to Jay, it was clearly intended to apply also to Jayson. At the same time, Ms. de Guzman was informed that Jay's visa application had been denied.

D. LEGISLATIVE FRAMEWORK

[17] The following statutory provisions are relevant to this appeal:

*Immigration and Refugee Protection Regulations***,** SOR/2002-227

117. . . .

(9) A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if

. . .

(*d*) subject to subsection (10), the sponsor previously made an application for permanent residence and became a permanent resident and, at the time of that application, the foreign national was a non-accompanying family member of the sponsor and was not examined.

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

3. (1) The objectives of this Act with respect to immigration are

. . .

(*d*) to see that families are reunited in Canada;

. . .

(3) This Act is to be construed and applied in a manner that

. . .

(*f*) complies with international human rights instruments to which Canada is signatory.

. . .

5. (1) Except as otherwise provided, the Governor in Council may make any regulation that is referred to in this Act or that prescribes any matter whose prescription is referred to in this Act.

. . .

12. (1) A foreign national may be selected as a member of the family class on the basis of their relationship as the spouse, common-law partner, child, parent or other prescribed family member of a Canadian citizen or permanent resident.

. . .

13. (1) A Canadian citizen or permanent resident may, subject to the regulations, sponsor a foreign national who is a member of the family class.

. . .

14. (1) The regulations may provide for any matter relating to the application of this Division, and may define, for the purposes of this Act, the terms used in this Division.

(2) The regulations may prescribe, and govern any matter relating to, classes of permanent residents or foreign nationals, including the classes referred to in section 12, and may include provisions respecting

(*a*) selection criteria, the weight, if any, to be given to all or some of those criteria, the procedures to be followed in evaluating all or some of those criteria and the circumstances in which an officer may substitute for those criteria their evaluation of the likelihood of a foreign national's ability to become economically established in Canada;

(*b*) applications for visas and other documents and their issuance or refusal, with respect to foreign nationals and their family members;

(*c*) the number of applications that may be processed or approved in a year, the number of visas and other documents that may be issued in a year, and the measures to be taken when that number is exceeded;

(*d*) conditions that may or must be imposed, varied or cancelled, individually or by class, on permanent residents and foreign nationals;

(*e*) sponsorships, undertakings, and penalties for failure to comply with undertakings;

(*f*) deposits or guarantees of the performance of obligations under this Act that are to be given by any person to the Minister; and
(*g*) any matter for which a recommendation to the Minister or a decision may or must be made by a designated person, institution or organization with respect to a foreign national or sponsor.

. . .

25. (1) The Minister shall, upon request of a foreign national who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.

. . .

40. (1) A permanent resident or a foreign national is inadmissible for misrepresentation

(*a*) for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of this Act;

. . .

(2) The following provisions govern subsection (1):

(*a*) the permanent resident or the foreign national continues to be inadmissible for misrepresentation for a period of two years following, in the case of a determination outside Canada, a final determination of inadmissibility under subsection (1) or, in the case of a determination in Canada, the date the removal order is enforced; and

. . .

63. (1) A person who has filed in the prescribed manner an application to sponsor a foreign national as a member of the family class may appeal to the Immigration Appeal Division against a decision not to issue the foreign national a permanent resident visa.

. . .

65. In an appeal under subsection 63(1) or (2) respecting an application based on membership in the family class, the Immigration Appeal Division may not consider humanitarian and compassionate considerations unless it has decided that the foreign national is a member of the family class and that their sponsor is a sponsor within the meaning of the regulations.

E. ISSUES AND ANALYSIS

Issue 1: Is paragraph 117(9)(*d*) authorized by section 14 of the IRPA?

(i) Preliminary observations: the facts

[18] First, it is not disputed that, if paragraph 117(9)(*d*) is valid, Jay and Jayson are not members of the "family class". Consequently, even though Ms. de Guzman is their mother and they are her "children" for the purpose of the IRPA, she has no right to sponsor their admission as permanent residents in the family class.

[19] Second, if Ms. de Guzman had disclosed her sons' existence when she applied in the family class as the unmarried daughter of a Canadian citizen, her visa application would probably have been refused. This is because their birth certificates, unlike Shara Mae's, state that their mother and father were married, even though Ms. de Guzman denies that she and Mr. Montiadora were ever legally married. Those in common law relationships were "unmarried" for the purpose of the 1978 Regulations. Ms. de Guzman's misrepresentation was thus highly material to the success of her application for a visa in the family class as an unmarried daughter.

[20] Third, it is not now seriously argued that Ms. de Guzman's misrepresentations were innocent. The evidence indicates that she probably both knew that she was obliged to disclose the existence of her sons and understood that, if she did, her application would likely be refused. It may be significant that when, as a result of the medical examination, she admitted that she had had a child, she disclosed Shara Mae, whose birth certificate shows her surname as "de Guzman," father as "unknown," and "place and date of marriage of parents" as "illegitimate."

(ii) Preliminary observations: the law

[21] For ease of reference, I set out again the provision of the IRPA under which paragraph 117(9)(*d*) was enacted.

14. (1) The regulations may provide for any matter relating to the application of this Division, and may define, for the purposes of this Act, the terms used in this Division.

(2) The regulations may prescribe, and govern any matter relating to, classes of permanent residents or foreign nationals, including the classes referred to in section 12, and may include provisions respecting

[22] Three points should be made at the outset that are relevant to the interpretation of this provision and to the Court's power to review the legal validity of paragraph 117(9)(*d*).

[23] First, the IRPA is "framework legislation": see *Issue Paper 1: Framework Legislation* (Ottawa: Citizenship and Immigration Canada, 2001), online: Citizenship and Immigration Canada <http://www.cic. gc.ca/english/irpa/c11-issues.html>. That is to say, the Act contains the core principles and policies of the statutory scheme and, in view of the complexity and breadth of the subject-matter, is relatively concise. The creation of secondary policies and principles, the

implementation of core policy and principles, including exemptions, and the elaboration of crucial operational detail, are left to regulations, which can be amended comparatively quickly in response to new problems and other developments. Framework legislation thus contemplates broad delegations of legislative power.

[24] Second, section 14 is drafted in language which, on its face, confers wide regulation-making powers, exercisable by the Governor in Council by virtue of subsection 5(1).

[25] Third, compared to other kinds of administrative action, regulations have rarely been found to be invalid by courts, partly, no doubt, because of the broad grants of delegated power under which they are often made: see Michael Taggart, "From 'Parliamentary Powers' to Privatization: The Chequered History of Delegated Legislation in the Twentieth Century" (2005), 55 *U.T.L.J.* 575, at pages 621-623.

[26] If there is a conflict between the express language of an enabling clause and a regulation purportedly made under it, the regulation may be found to be invalid. Otherwise, courts approach with great caution the review of regulations promulgated by the Governor (or Lieutenant Governor) in Council. This was well described by Abella J.A. (as she then was) in *Ontario Federation of Anglers & Hunters v. Ontario (Ministry of Natural Resources*) (2002), 211 D.L.R. (4th) 741 (Ont. C.A.), at paragraphs 36-41, where she quoted with approval (at paragraph 37) the following passage from the reasons of Linden J.A. in *Canadian Assn. of Regulated Importers v. Canada (Attorney General)*, [1994] 2 F.C. 247 (C.A.), at page 260:

It is not fatal to a policy decision that some irrelevant factors be taken into account; it is only when such a decision is based entirely or predominantly on irrelevant factors that it is impeachable. It is not up to the Court to pass judgment on whether a decision is "wise or unwise". (See *Cantwell v. Canada (Minister of the Environment)* (1991), 6 C.E.L.R. (N.S.) 16 (F.C.T.D.), at page 46 *per* MacKay J.) This Court, because these matters involve "value judgments", is not to "sit as an appellate body determining whether the initiating department made the correct decision."

As this Court stated in *National Anti-Poverty Organization v. Canada (Attorney General)*, [1989] 3 F.C. 684, at page 707, "Even if one were to assume that the Governor in Council acted with a dual purpose in mind (one falling within his mandate . . . and the other falling outside his mandate . . .) I doubt that this could advance the respondents' case." For, as the Supreme Court of Canada has explained, "Governments do not publish reasons for their decisions; governments may be moved by any number of political, economic, social or partisan considerations." (See *Thorne's Hardware Ltd.* [*v. The Queen*, [1983] 1 S.C.R. 106], at pages 112-113.)

(iii) Irrelevant considerations: how deep are the IRPA's Divisions?

[27] At the hearing of the appeal, counsel for Ms. de Guzman conceded the breadth of the powers delegated by section 14. His principal argument was that paragraph 117(9)(*d*) was invalid because the Governor in Council had taken irrelevant considerations into account when enacting it. He submitted that, since each division of the IRPA has its own regulation-making provision,

Parliament should be taken to have intended that the regulation-making power in a Division may only be used to make regulations for the purposes of that division.

[28] Section 14 is in Division 1, which is headed “Requirements Before Entering Canada and Selection”. However, counsel for Ms. de Guzman argued, in enacting paragraph 117(9)*(d)*, the Governor in Council took into consideration the need to deter visa applicants from making misrepresentations to immigration officials and thus to promote the orderly administration of the scheme. These considerations, he said, are irrelevant to the subject-matter of Division 1 and belong elsewhere in the IRPA.

[29] Counsel pointed, in particular, to “Division 4 – Inadmissibility”, which expressly deals with misrepresentations and their consequences. Thus, for example, subsection 40(1) in Division 4 provides that persons who misrepresent or withhold material facts are inadmissible, as are those whose admission is sponsored by a person who has been determined to be inadmissible for misrepresentation. Counsel also notes that subsection 40(2) provides that a person is only inadmissible for misrepresentation under subsection 40(1) for two years from the date of either a determination of inadmissibility made outside Canada or the person’s removal, when the determination of inadmissibility was made in Canada. In addition, section 43 enables the Governor in Council to make regulations to “provide for any matter relating to the application of this Division”, that is, Division 4.

[30] In brief, the appellant’s argument is that considerations which may be taken into account in the exercise of regulation-making powers in the various divisions of the IRPA are mutually exclusive. Despite counsel’s ingenuity, I am unable to agree.

[31] First, a consideration of the validity of paragraph 117(9)(*d*) must start with the words of its enabling provision in the IRPA, section 14. Subsection 14(1) contains words also found in the regulation-making provisions in other divisions of the IRPA, including section 43 in Division 4, namely, “[t]he regulations may provide for any matter relating to the application of this Division” [emphasis added].

[32] Paragraph 117(9)(*d*) clearly relates to the application of Division 1, which deals with, among other things, the sponsorship of members of the family class for admission to Canada. Paragraph 117(9)(*d*) limits sponsorship rights in certain circumstances in order to deter visa applicants from withholding or misrepresen-ting material facts about their dependants. It thus encourages truthful answers to questions, as required by subsection 16(1), without which immigration officials cannot properly assess an application by obtaining a complete picture of, among other things, an applicant’s family circumstances.

[33] The importance to the administration of the statutory scheme of full disclosure is illustrated by the fact that a foreign national is inadmissible to Canada if an accompanying or, in some circumstances, a non- accompanying family member is inadmissible: IRPA, section 42. A similar provision was in effect when Ms. de Guzman applied for a visa: *Immigration Regulations, 1978*, paragraph 9(1)(*a*).

[34] In addition, subsection 14(2) of the IRPA states that regulations made under it "may prescribe, and govern any matter relating to, classes of permanent residents or foreign nationals, including" members of the family class. Regulations made under subsection 14(2) may also include "(*e*) sponsorships". Again, paragraph 117(9)(*d*) would seem clearly to fall within this broad language. It prescribes and governs matters pertaining to members of the family class by excluding from the class those who were not examined.
[35] Second, I do not accept that Parliament attached the same significance to the arrangement of the IRPA into divisions as counsel for Ms. de Guzman suggests. He was unaware of any evidence in the legislative history of the IRPA to indicate that the creation of divisions was intended to limit the apparent breadth of the regulation-making power contained in one division by precluding the consideration of factors more clearly falling under another.

[36] In my view, the link between a regulation and the subject-matter of the division to which it relates is found in provisions of the IRPA to the effect that regulations may provide for any matter relating to the application of the division in which the enabling clause is contained. There is no basis to imply into the IRPA an additional requirement that regulations made to provide for a matter relating to the application of one division may not take into account factors also relevant to the subject-matter of another division.

[37] Thus, the Minister may decide that, since Ms. de Guzman has been in Canada for more than 10 years, it would be unduly harsh, and expensive, to institute proceedings under section 10 of the *Citizenship Act*, R.S.C., 1985, c. C-29, to revoke her citizenship, with a view to making a removal order against her on the ground that she is inadmissible under subsection 40(1) because of her misrepresentations. However, it is hardly surprising to conclude that Parliament has also authorized another less onerous sanction for misrepre-sentation, namely, ineligibility to sponsor unexamined dependants as members of the family class.

[38] In my view, it would seriously impede the effective administration of immigration to interpret the IRPA as precluding the possibility that, in addition to removal, another sanction may be imposed on a person who misrepresented a material fact in order to gain entry to Canada. It would result in undue administrative rigidity to conclude that misrepresentations by visa applicants which undermine the integrity of the statutory scheme may not be taken into account when regulations are made under section 14, on the ground that misrepresentations are expressly dealt with in Division 4.

[39] An interpretation of the Act which provides for regulatory flexibility is especially appropriate in view of the "framework" nature of the IRPA. The hypothesis that the IRPA was arranged into divisions in order to provide a statutory text that is coherent and relatively easy to follow is more plausible than counsel's suggestion that its purpose is to divide the Act into water-tight compartments: see *Issue Paper 1: Framework Legislation*, cited previously at paragraph 23 of these reasons.

[40] Counsel points out that paragraph 117(9)(*d*) prevents a person from ever sponsoring a foreign national as a member of the family class, whereas paragraph 40(2)(*a*) provides that a person removed under section 40 for misrepresentation is only inadmissi-ble for two years. The

argument would seem to be that, having expressly imposed only a two-year period of inadmissibility for misrepresentation, Parliament should not be taken to have authorized implicitly a regulation made under another division, which, for the same conduct, results in a lifetime ban on sponsorship.

[41] For reasons already given, I do not regard removal as the only sanction for misrepresentation that is consistent with the scheme created by the IRPA. Further, removal is generally a more serious sanction than an inability to sponsor a person as a member of the family class, especially since sponsorship may not be a foreign national's only avenue of access to Canada. And, while the period of inadmissibility for misrepresentation lasts for only two years, persons who wish to return to Canada at the end of that time must apply for a visa and demonstrate that they meet selection criteria. There is no automatic right to return after two years.

(iv) A statutory right to sponsor children

[42] Counsel argued that the IRPA, subsection 13(1) creates a "substantive" right in Canadian citizens, such as Ms. de Guzman, to sponsor their children as members of the family class, a right which is removed by paragraph 117(9)(*d*). The argument is that, in the absence of explicit language, section 14 should not be interpreted as authorizing a regulation which removes rights conferred by the IRPA.

[43] I disagree. First, in view of the breadth of the legislative power delegated by section 14, and the framework nature of the IRPA, it cannot be argued that regulations may only be made with respect to "non-substantive" matters. Hence, I see no reason why regulations may not be enacted to create exceptions to policies in the Act. Second, the right to sponsor members of the family class created by subsection 13(1) is expressly made "subject to the regulations." Third, the notion that paragraph 117(9)(*d*) deprives Ms. de Guzman of a statutory right is further weakened by the fact that the IRPA does not define "family class" and subsection 14(2) authorizes the making of regulations that "prescribe, and govern any matter relating to" the family class and sponsorship.

(v) Conclusion

[44] To summarize, I can find nothing express or implied in either section 14, or the scheme of the IRPA, to reduce the apparent breadth of the regulation-making discretion that would render paragraph 117(9)(*d*) beyond the powers delegated by Parliament to the Governor in Council.

Issue 2: Is paragraph 117(9)(*d*) invalid under section 7 of the Charter as a deprivation of the right to liberty or security of the person other than in accordance with the principles of fundamental justice?

[45] Subsection 6(1) of the Charter provides that Canadian citizens have the right to enter and remain in Canada. Others do not: *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711, at page 733. The Supreme Court of Canada has recently

affirmed that deportation does not, in itself, deprive a non-citizen of the constitutional right to liberty or security of the person: *Medovarski v. Canada (Minister of Citizenship and Immigration; Esteban v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 539, at paragraph 46.

[46] Nonetheless, counsel argues, by preventing Ms. de Guzman from sponsoring her sons, and keeping her apart from them, paragraph 117(9)(*d*) deprives her of the right to liberty because it restricts her right to make fundamental personal choices. It also deprives her of the right to security of the person by subjecting her to the psychological stress of being separated from close family members. In response to the objection that this argument, in effect, gives Ms. de Guzman's sons a constitutional right to enter Canada, counsel submits that their right is merely incidental to their mother's, in the sense that it is granted merely to give effect to her constitutional right to be reunited with her sons in Canada.

[47] I cannot accept this argument. If, as counsel argues, whether section 7 [of the Charter] is engaged depends on the impact of paragraph 117(9)(*d*) on the individual concerned, the facts of this case are hardly propitious. Ms. de Guzman established permanent residence in Canada, and subsequently acquired Canadian citizenship, on the basis of a material misrepresentation. Having come to Canada without her sons to seek a better life for herself and her daughter, she applied to sponsor them some eight years after leaving them in the Philippines with their father. She provided no evidence of any special hardship or psychological stress that she is suffering as a result of the separation. She has visited her sons from time to time in the Philippines, where she could reunite with them on a permanent basis. She is not a refugee, nor a person in need of protection.

[48] The legal context of her claim is no stronger. In addition to the basic propositions of constitutional law described above in paragraph 45, it should be noted that paragraph 117(9)(*d*) is not the cause of the now 12 years' separation of Ms. de Guzman from two of her children. She left them voluntarily, albeit to move to a country where she thought that her life prospects were better than in the Philippines. There is thus no sufficient nexus between the state action impugned (paragraph 117(9)(*d*)) and the separation of Ms. de Guzman from her sons. In sum, Ms. de Guzman has not established that she is the victim of the "serious state-imposed psychological stress" (*R. v. Morgentaler*, [1988] 1 S.C.R. 30, at page 56, *per* Dickson C.J.) to which section 7 applies.

[49] Nor does paragraph 117(9)(*d*) preclude other possible bases on which Ms. de Guzman's sons may be admitted to Canada. In particular, they could apply to the Minister under section 25 of the IRPA for a discretionary exemption from paragraph 117(9)(*d*) or for permanent resident status. Discretion may be exercised positively when the Minister is of the opinion that it is justified by humanitarian and compassionate circumstan-ces relating to the applicant, taking into account the best interests of a directly affected child or by public policy considerations. Subsection 24(1) also confers a wide discretion on the Minister to grant temporary permits when circumstances so warrant. In addition, the sons, who are now young adults, may always apply for visas to come to Canada in the "economic class."

[50] Counsel notes that an application under section 25 may be made by the sons, not by Ms. de Guzman, and that it focuses on the humanitarian and compassionate circumstances relating to them, not their mother. On the basis of this, he argues that the Minister's discretion under section 25 cannot be relied on to establish that her interest in family reunification is adequately protected.

[51] I do not agree. Ms. de Guzman could have made a section 25 application on behalf of her sons. The application could rely on the hardship to them of being separated from their mother. It is not realistic in this context to distinguish too sharply between the distress of the mother and that of her sons resulting from the separation, especially since "public policy considerations" may also be taken into account.

[52] In these circumstances, I am not persuaded that Ms. de Guzman has been deprived of the constitutional rights to liberty and security of the person guaranteed by section 7 of the Charter. Accordingly, it is not necessary to consider whether paragraph 117(9)(*d*) is either in accordance with the principles of fundamental justice, or saved by section 1.

Issue 3: Is paragraph 117(9)(*d*) invalid because it renders the IRPA non-compliant with "international human rights instruments to which Canada is signatory"?

[53] The applications Judge held (at paragraph 53) that paragraph 3(3)(*f*) of the IRPA merely codifies the common law canon of statutory construction that legislation is presumed to reflect the values contained in international human rights instruments. He concluded that the content of the instruments described in paragraph 3(3)(*f*) was not incorporated into domestic law, did not "override plain words in a statute", and could be used simply as "context" to resolve ambiguities in the IRPA. Further, he said, since paragraph 117(9)(*d*) was "plain, clear, and unambiguous", there was no room for international law in this case, even as an interpretative aid.

(i) The legal status under the IRPA of "international human rights instruments"

(a) Do they prevail over conflicting IRPA provisions?

[54] Counsel for Ms. de Guzman argued that the Judge erred in holding that the direction in paragraph 3(3)(*f*) that the IRPA must be "construed and applied in a manner that . . . complies with international human rights instruments to which Canada is signatory" [emphasis added] merely codifies the common law. Rather, he said, paragraph 3(3)(*f*) gives priority to these international instruments, which consequently prevail over any inconsistent provision in either the IRPA or the Regulations.

[55] To support his interpretation of the words, "construed and applied in a manner that complies", counsel relied on the *Canadian Bill of Rights*, R.S.C., 1985, Appendix III, section 2, which states:

2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and

applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to. . . . [Emphasis added]

In *R. v. Drybones*, [1970] S.C.R. 282, at pages 293-294, Ritchie J. rejected the view that section 2 was merely a rule of construction and that laws which were plainly inconsistent with one of the rights set out in the *Canadian Bill of Rights* were nonetheless operative.

[56] In my opinion, paragraph 3(3)(*f*) does not have this far reaching effect. If Parliament had intended to give priority to these international instruments over the IRPA, it could be expected to have said so explicitly.

[57] Contrast paragraph 3(3)(*f*) with, for example, the specificity of paragraph 97(1)(*a*),which defines a person in need of protection as one who, if removed, would be subjected to a danger of torture "within the meaning of Article 1 of the Convention Against Torture." This kind of statutory provision eliminates the possibility of a conflict between a particular provision of the IRPA and the Convention [*Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, December 10, 1984, [1987] Can. T.S. No. 36] by directing that a phrase in the IRPA has the same meaning as the identical phrase in the Convention, which Canada has both signed and ratified. Paragraph 97(1)(*a*) would also have been unnecessary if, as counsel argued, the effect of paragraph 3(3)(*f*) is to give priority to the Convention if the IRPA does not comply with an international human rights instrument signed by Canada.

[58] To conclude on the basis of paragraph 3(3)(*f*) that the terms of the IRPA, which had been debated and approved by Parliament, are overridden by a conflicting international legal instrument does not respect the legislative process in this country. The IRPA does not list, let alone set out the text of, the measures to which paragraph 3(3)(*f*) applies. The phrase, "international human rights instruments to which Canada is signatory", is far from self-defining. Nor did counsel shrink from asserting that paragraph 3(3)(*f*) is sufficiently open- ended so as to apply to "international human rights instruments" signed by Canada after the IRPA came into force.

[59] In my opinion, *Drybones* provides no support for counsel's argument. The Court's interpretation in that case of the phrase "shall . . . be so construed and applied" was influenced by the following words in section 2: "unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*." These words would have been unnecessary, the Court said, if section 2 did not otherwise have the effect of ensuring that the *Canadian Bill of Rights* prevailed over inconsistent legislation.

[60] Moreover, it is one thing to conclude that Parliament intended a statute embodying essential civil rights prevail over legislation derogating from those rights. It is quite another, however, to interpret the "construe and apply" provision in paragraph 3(3)(*f*) as giving priority over the IRPA to "international human rights instruments" which are not specifically identified in the IRPA, may not have been subject to parliamentary scrutiny, and, indeed, may not even have existed when the IRPA was enacted.

(b) "International human rights instruments to which Canada is signatory" as interpretative norms

1. Common law, the Charter and international human rights law

[61] As I have just indicated, counsel for Ms. de Guzman went too far in arguing that paragraph 3(3)(*f*) gives priority to international human rights instruments over inconsistent IRPA provisions. However, in my respectful opinion, the applications Judge adopted an unduly limited view of the effect of the burgeoning common law when he said (at paragraph 53) that paragraph 3(3)(*f*) merely requires the Court to consider the international human rights instruments relevant in this case as "'context' when interpreting ambiguous provisions of the immigration law."

[62] The view taken by the Judge does not take proper account of the expanding role that the common law has given to international law in the interpretation of domestic law, which has been one of the signal legal developments of the last 15 years: see generally, Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworths, 2002), Chapter 16. In my opinion, this aspect of the evolution of the common law is an important part of the context against which paragraph 3(3)(*f*) must be interpreted.

[63] The older view of the relationship between international legal obligations and statutes was expressed in *Capital Cities Communications Inc. et al. v. Canadian Radio-Television Commn*, [1978] 2 S.C.R. 141, at page 173. In that case, the Supreme Court of Canada held that an international convention to which Canada was party did not give rise to rights and duties enforceable in Canadian courts, because it had not been implemented by Parliament. If implemented, the Court said, the convention would be relevant to the interpretation of the implementing legislation, but only to resolve an ambiguity evident in it.

[64] In *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, the Court went a little further in giving domestic effect to international law by rejecting the view that, when a treaty has been implemented by legislation, a court may only resort to the treaty to resolve an ambiguity patent in the text of the legislation. Thus, Gonthier J. said (at page 1371):

. . . It is reasonable to make reference to an international agreement at the very outset of the inquiry to determine if there is any ambiguity, even latent, in the domestic legislation. The Court of Appeal's suggestion that recourse to an international treaty is only available where the provision of the domestic legislation is ambiguous on its face is to be rejected.

[65] Dickson C.J. opened the door to a much more expansive use of international law in the domestic law of Canada when he urged that the emerging body of international human rights law should be used in the interpretation of the Charter, even though it had not been implemented by Parliament.

[66] Thus, speaking of international human rights conventions by which Canada was legally bound, he stated in dissenting reasons in *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at page 349:

. . . the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.

In addition (at page 348), he regarded the amalgam of "[t]he various sources of international human rights law—declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms" as "relevant and persuasive sources" for interpreting the Charter. In *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at page 1056, the passage quoted above was cited with approval by the majority.

[67] More recently, in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paragraphs 69-71, L'Heureux-Dubé J., writing for a majority of the Court on this point, endorsed the use of international law to interpret a statutory provision as requiring immigration officers to give great weight to the best interests of any affected children when exercising a discretion to grant an in-country application for landing on humanitarian and compassionate grounds.

[68] Thus, she said (at paragraph 70), even if not implemented by Parliament, "the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review." Similarly, in *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241, at paragraph 30, the Court noted that, to interpret a statutory empowering provision as authorizing the municipality to enact an impugned by-law, was "consistent with the principles of international law and policy."

[69] These tentative judicial steps in increasing the engagement of domestic law and international law are analysed in Jutta Brunnées and Stephen J. Toope, "A Hesitant Embrace: *Baker* and the Application of International Law by Canadian Courts" in David Dyzenhaus, ed., *The Unity of Public Law* (Portland, Oregon: Hart Publishing, 2004) (Brunnée and Toope), at page 357. The authors argue that courts have not always made it clear how influential international law should be in the interpretation of domestic legislation. Sometimes, it is treated as merely persuasive, or as part of the context, while at other times it is presumed to be determinative, unless the statutory text is irremediably inconsistent with international law.

[70] In an attempt to bring greater clarity to the analysis in the evolving domestic jurisprudence, the authors suggest (at page 367) that Parliament should be presumed not to legislate in derogation of international legal norms that are binding on Canada. In contrast, non-binding international legal norms should not be given the same interpretative weight, but should be regarded as no more than persuasive and contextual: Brunnée and Toope, at pages 383-384.

2. Scope of paragraph 3(3)(*f*)

[71] The interpretation of paragraph 3(3)(*f*) has been considered in other cases decided in the Federal Court. Two are of particular interest. In *Martinez v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1341, at paragraph 13, Simpson J, said:

Section 3(3)(*f*) of the IRPA has incorporated the Convention [on the Rights of the Child] into our domestic law to the extent that the IRPA must be construed and applied in a manner that is consistent with the Convention.

[72] However, in *Munar v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1180, at paragraph 28, de Montigny J. stated that, "despite the confusion that may have been created by her use of the word 'incorporate'", Simpson J. should not be understood to have held in *Martinez* that paragraph 3(3)(*f*) has the same effect as legislation implementing an international law instrument by transforming it into Canadian law. He noted that Simpson J. had said that "incorporation" was only to the extent that paragraph 3(3)(*f*) directed that IRPA must be interpreted and applied in a manner that complies with the relevant international instruments.

[73] I agree with de Montigny J. that paragraph 3(3)(*f*) does not incorporate into Canadian law "international human rights instruments to which Canada is signatory", but merely directs that IRPA must be construed and applied in a manner that complies with them.

[74] Against the background of comparatively recent developments in the common law and in constitutional law, respecting the interpretative use of international human rights law, I now consider the scope of paragraph 3(3)(*f*).

[75] First, the words "shall be construed and applied in a manner that complies with" are mandatory and appear to direct courts to give the international human rights instruments in question more than persuasive or contextual significance in the interpretation of the IRPA. By providing that the IRPA "is to be" interpreted and applied in a manner that complies with the prescribed instruments, paragraph 3(3)(*f*), if interpreted literally, makes them determinative of the meaning of the IRPA, in the absence of a clear legislative intent to the contrary.

[76] Second, the sources of international law described in paragraph 3(3)(*f*) comprise some that are binding on Canada in international law, and some that are not. The paragraph applies to instruments to which Canada is signatory. An international instrument is not legally binding on a signatory State until it has also ratified it, unless the instrument provides that it is binding when signed. Signature normally evinces an intention to be bound in the future, although it may also impose an immediate obligation on the signatory not to take measures to undermine the agreement. See Ian Brownlie, *Principles of Public International Law*, 6th ed. (Oxford: Oxford University Press, 2003), at pages 582-583; Hugh M. Kindred *et al.*, *International Law: Chiefly as Interpreted and Applied in Canada*, 6th ed. (Toronto: Emond Montgomery, 2000), at pages 102-103; *Vienna Convention on the Law of Treaties*, May 23, 1969, [1980] Can. T.S. No. 37, Article 18.

[77] For example, on November 10, 2001, Canada signed the *Optional Protocol to the Convention on the Rights of the Child, on the sale of children, child prostitution and child*

pornography, May 25, 2000, UN GA Res. 54/263, annex II. However, Canada did not ratify it until September 14, 2005. Nonetheless, paragraph 3(3)(*f*) applied as soon as Canada signed the Protocol, and mandated that the IRPA was to be interpreted and applied in a manner that complied with it, even before it was legally binding on Canada.

[78] Third, the term "international human rights instrument" is not defined in the IRPA and arguably could apply to a wide range of sources of international human rights norms of varying degrees of authoritativeness and specificity. However, its scope is limited by the fact that paragraph 3(3)(*f*) only applies to those instruments of which it can be said that "Canada is signatory."

[79] Some idea of the possible range of instruments included within paragraph 3(3)(*f*) may be gleaned from those listed on the Web site of the Office of the United Nations High Commissioner for Human Rights (UNHCHR), http://www.ohchr.org/english/law/. Seven treaties are listed under the heading "The Core International Human Rights Instruments and their monitoring bodies." Canada is signatory and party to six of them; one it has not signed.

[80] The Web site also contains a longer, but non-exhaustive and more varied, list of other "Universal Human Rights Instruments." Of these, it states that declarations, principles, guidelines, standard rules and recommendations are not legally binding. In any event, instruments only fall within paragraph 3(3)(*f*) if "Canada is signatory" to them. Regional multilateral human rights instruments, such as the *American Convention on Human Rights* [adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969, O.A.S.T.S. No. 36; 1144 U.N.T.S. 123], are not listed on the UNHCHR Web site, but may fall within paragraph 3(3)(*f*).

[81] Fourth, paragraph 3(3)(*f*) applies to the interpretation and application of "this Act", which is defined in subsection 2(2) as including regulations made under the authority of the IRPA. In my view, paragraph 3(3)(*f*) does not require that each and every provision of the IRPA and the Regulations, considered in isolation, must comply with international human rights instruments. Rather, the question is whether an impugned statutory provision, when considered together with others, renders the IRPA non-compliant with an international human rights instrument to which Canada is signatory.

3. Conclusions

[82] On the basis of the above analysis, it is my view that paragraph 3(3)(*f*) attaches more than mere ambiguity-resolving, contextual significance to "interna-tional human rights instruments to which Canada is signatory". If only available to resolve an ambiguity in the IRPA, an international human rights instrument might not be able to be used to expose a latent ambiguity in a statute (see *National Corn Growers*), or to bring specificity to a vague statutory provision: for the distinction between ambiguous and vague, see Randal N. Graham, *Statutory Interpretation: Theory and Practice* (Toronto: Emond Montgomery, 2001), Chapter 4.

[83] On its face, the directive contained in paragraph 3(3)(*f*) that the IRPA "is to be construed and applied in a manner that complies with international human rights instruments to which Canada is signatory", is quite clear: the IRPA must be interpreted and applied consistently with an instrument to which paragraph 3(3)(*f*) applies, unless, on the modern approach to statutory interpretation, this is impossible.

[84] However, a consideration of the range of instruments potentially falling within paragraph 3(3)(*f*) may suggest that Parliament did not intend them all to be determinative of either the meaning of the IRPA or the validity of administrative action taken under its authority, absent clear legislative intent to the contrary.

[85] First, paragraph 3(3)(*f*) identifies the international human rights instruments to which it applies by a phrase ("to which Canada is signatory") which does not necessarily connote that they are binding on Canada in international law. It is true that Canada has ratified all of the international human rights instruments identified by the UNHCHR as "core" which it has signed. One it has not signed. Nonetheless, I do not think that this warrants interpreting paragraph 3(3)(*f*) as limited to instruments which are legally binding on Canada. If this is what Parliament meant, it would have limited the scope of paragraph 3(3)(*f*) to instruments to which Canada is a party.

[86] Second, the range of instruments falling within paragraph 3(3)(*f*) is uncertain. Moreover, because legislation is presumed to be "always speaking," the paragraph may well also include international human rights instruments that were either not signed by Canada, or not even in existence, when the IRPA was enacted. To make the meaning of the IRPA subject to such an amorphous and open-ended body of international instruments transfers very considerable power from Parliament, the supreme legislator, to the Executive as the branch of government responsible for foreign affairs: compare the dissenting view of Iacobucci and Cory JJ. in *Baker*, at paragraph 80.

[87] Paragraph 3(3)(*f*) should be interpreted in light of the modern developments in the courts' use of international human rights law as interpretative aids. Thus, like other statutes, the IRPA must be interpreted and applied in a manner that complies with "interna-tional human rights instruments to which Canada is signatory" that are binding because they do not require ratification or because Canada has signed and ratified them. These include the two instruments on which counsel for Ms. de Guzman relied heavily in this appeal, namely, the *International Covenant on Civil and Political Rights*, and the *Convention on the Rights of the Child*. Thus, a legally binding international human rights instrument to which Canada is signatory is determinative of how the IRPA must be interpreted and applied, in the absence of a contrary legislative intention.

[88] However, paragraph 3(3)(*f*) also applies to non-binding instruments to which Canada is signatory. Because the only international instruments relevant to this case are legally binding on Canada, it is not necessary to decide here the effect of paragraph 3(3)(*f*) with respect to non-binding international human rights instruments.

[89] However, in view of the considerations outlined above regarding such instruments, I am inclined to think that Parliament intended them to be used as persuasive and contextual factors in the interpretation and application of the IRPA, and not as determinative. Moreover, of these non-binding instruments, not all will necessarily be equally persuasive. This view of paragraph 3(3)(*f*) also derives support from the Supreme Court of Canada's jurisprudence, to the extent that in the *Public Service Employee Relations*; *Slaight Communications*; *Baker* and *Spraytech* cases, the Court indicated that it was prepared to give a persuasive and contextual role to non-binding international human rights law in the interpretation of domestic law. In view of Parliament's directive in paragraph 3(3)(*f*), the concerns expressed by Cory and Iacobucci JJ. in *Baker* are of less significance in the present context.

(ii) Subordinate legislation and paragraph 3(3)(*f*)

[90] In my respectful opinion, the applications Judge erred when he said that international law has no role in this case because the meaning of paragraph 117(9)(*d*) is clear. When a statutory provision, including a regulation, is impugned as not complying with a binding international human rights instrument to which Canada is signatory, it must first be determined whether the provision renders the IRPA non-compliant.

[91] A reviewing court should consider an impugned provision in the context of the entire legislative scheme. Thus, determining the effect of paragraph 117(9)(*d*) on Canada's international obligations requires the Court to consider whether other provisions in the IRPA mitigate its impact on a right guaranteed by an international human rights instrument to which Canada is signatory.

[92] If the IRPA is found to be compliant, that ends the inquiry. But if the statutory provision in question is a regulation, and it is held to render the IRPA non-compliant, there is a second step in the analysis. At this stage, the Court must determine whether, properly construed, the relevant enabling section of the IRPA authorizes the Governor in Council to enact a regulation which renders the IRPA non-compliant with a binding international human rights instrument to which Canada is signatory. In view of paragraph 3(3)(*f*), only a clear legislative intention to the contrary will warrant a conclusion that the regulation-making power could lawfully be exercised in this manner.

(iii) Does paragraph 117(9)(*d*) conflict with an international human rights instrument to which Canada is signatory?

[93] On the basis of this two-step analysis, the first question is whether paragraph 117(9)(*d*), when considered in the context of the legislative scheme as a whole, renders the IRPA inconsistent with an international human rights instrument to which Canada is signatory. I shall discuss the provisions of the instruments on which counsel relied in two broad groups: those protecting the integrity of family life and those protecting the best interests of children.

(a) Right to family life

[94] Counsel for Ms. de Guzman relied on Article 17 of the *International Covenant on Civil and Political Rights*, December 19, 1966, [1976] Can. T.S. No. 47 (ICCPR), which provides, among other things, that no one is to be subjected to arbitrary or unlawful interference with their privacy, family, or home. Article 16 of the *Convention on the Rights of the Child*, November 20, 1989, [1992] Can. T.S. No. 3 (CRC), contains similar protections for children. Both instruments have been signed and ratified by Canada so that non-compliance would constitute a breach of Canada's international legal obligations.

[95] Counsel then referred to jurisprudence from the European Court of Human Rights applying Article 8, paragraph 1 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, November 4, 1950, 213 U.N.T.S. 221, which is broadly analogous to Article 17 of the ICCPR.

[96] However, with one exception, the cases cited concern deportation, not a refusal to admit a child whose parent was a citizen of the country in which it was sought to reunite the family. All are very fact specific and provide little general guidance. Deportation of a person from the country in which he or she has been residing with other family members is a direct attack by the state on family life, which, on the facts of this case, paragraph 117(9)(*d*) is not. The separation of Ms. de Guzman from her children has been in large part attributable to her leaving her sons in the Philippines with their father when she came to Canada and failing to disclose their existence.

[97] Moreover, it is striking that, in one of the European Convention cases cited by counsel, *Al-Nashif v. Bulgaria* (2003), 36 E.H.R.R. 37, 655, the European Court of Human Rights recognized (at page 657) that the Convention was not intended to displace the general right of states to regulate non-citizens' entry into and residence in their territory:

As a matter of international law and subject to treaty obligations, a State has the right to control the entry of non-nationals into its territory. . . . Where immigration is concerned, Art. 8 cannot be considered to impose on a State a general obligation to respect the choice by married couples of the country of their matrimonial residence to authorise family reunion in its territory.

Nonetheless, in the particular circumstances of that case, the Court found that the deportation of Mr. Al-Nashif, a stateless person who had lived in Bulgaria with his family for the previous seven years, violated his rights under Article 8.

[98] In paragraph 96 of these reasons, I noted considerations which distinguish the present case from deportation cases. It is also very relevant that, although paragraph 117(9)(*d*) prevents Ms. de Guzman from sponsoring her sons as members of the family class, they may be admitted to be reunited with their mother under other provisions of the IRPA, in particular, subsection 24(1) and section 25, or as independent applicants in the economic class.

[99] *Sen v. Netherlands* (2003), 36 E.H.R.R. 7, 81, is somewhat similar to the present case, in that it concerned the refusal by Dutch authorities to admit a child who had been left behind in Turkey when his mother joined her husband in the Netherlands. The European Court of Human Rights held that the refusal was in breach of Article 8 because the Netherlands had failed to

strike an appropriate balance between the parents' interest in reuniting their family in their country of residence and the public interest in the control of immigration.

[100] However, *Sen*, too, is distinguishable, since, if Ms. de Guzman's sons make an application for an exemption on humanitarian and compassionate grounds, an officer will make an individual assessment of their circumstances under section 25 of the IRPA. The fact that her sons, who are now both in their early 20s, must formally initiate these applications, rather than Ms. de Guzman, is not sufficient, in my view, to conclude, when all the relevant facts are considered, that paragraph 117(9)(*d*) renders the IRPA in breach of Article 17 of the ICCPR.

[101] For the above reasons, I would also reject the arguments based on other international human rights instruments to which Canada is signatory which recognize, in general terms, the social importance of the family, especially for the care and education of children: see *International Covenant on Economic, Social and Cultural Rights*, December 16, 1966, [1976] Can. T.S. No. 46, Article 10; *American Convention on Human Rights*, November 22, 1969, 1144 U.N.T.S. 123, Article 17(1).

(b) Best interests of the child and children's right to family reunification

[102] In arguing that paragraph 117(9)(*d*) violates the protection afforded to children by international human rights instruments to which Canada is signatory, counsel relied particularly on Article 3, paragraph 1 and article 10 of the CRC.

[103] Article 3, paragraph 1 provides that the best interests of the child shall be a primary consideration "[I]n all actions concerning children . . . by . . . courts of law, administrative authorities or legislative bodies." Counsel submits that the best interests of children whose parents cannot sponsor them could not have been "a primary consideration" in the enactment of paragraph 117(9)(*d*). Accordingly, he argues, the legislation does not comply with an international human rights instrument to which Canada is signatory.

[104] I do not agree. First, as McLachlin C. J. noted in *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, at paragraph 10: "Article 3(1) of the *Convention on the Rights of the Child* describes [best interest of the child] as 'a primary consideration' rather than 'the primary consideration' (emphasis added)." Accordingly, she concluded: "the legal principle of the 'best interests of the child' may be subordinated to other concerns in appropriate contexts."

[105] Second, and more specifically, not every statutory provision must be able to pass the "best interests of the child" test, if another provision requires their careful consideration. In my opinion, section 25 [of the IRPA] is such a provision, because it obliges the Minister to consider the best interests of a child when deciding whether, in his opinion, humanitarian and compassionate circumstances justify exempting an applicant from the normal selection criteria and granting permanent residence status.

[106] Article 10 of the CRC provides that "applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner." Counsel says that paragraph 117(9)(*d*) does not comply with Article 10.

[107] Again, my answer is that the discretion conferred on the Minister by section 25 enables the IRPA to be administered in a compliant manner. Until Ms. de Guzman's sons have applied under section 25, and their applications have been rejected, any complaint on their behalf based on Article 10 is premature. Moreover, when and if they apply under section 24 or 25, the decision is subject to the duty of fairness and is reviewable in the Federal Court.

(iv) Summary

[108] Because the international human rights instruments on which the appellant relies create legal obligations that are binding on Canada, paragraph 3(3)(*f*) makes them determinative of the meaning of the IRPA, in the absence of a clearly expressed legislative intention to the contrary. However, when considered with other provisions in the IRPA, particularly section 25, paragraph 117(9)(*d*) does not make the IRPA non-compliant with "an international human rights instrument to which Canada is signatory."

[109] Hence, it is not necessary to decide if section 14 of the IRPA should be interpreted as not authorizing the making of a regulation that renders the IRPA non-compliant with an instrument within the scope of paragraph 3(3)(*f*).

F. CONCLUSIONS

[110] For all of these reasons, I would dismiss the appeal without costs, and would answer in the negative the question certified by the applications Judge:

Is paragraph 117(9)(*d*) of the *Immigration and Refugee Protection Regulations* invalid or inoperative because it is unconstitutional as it deprives the applicant of her right to liberty and/or her right to security of person, in a manner not in accordance with the principles of fundamental justice, contrary to section 7 of the Charter?

DESJARDINS J.A.: I agree.

The following are the reasons for judgment rendered in English by

[111] MALONE J.A.: I concur with the detailed reasons of Evans J.A. but wish to add a particular note of caution in connection with paragraphs 88-89 as they relate to non-binding, international, human rights instruments.

[112] I am not prepared to speculate that they are to be used as persuasive and contextual factors in the interpretation and application of the IRPA. By agreeing with that position, counsel in future cases will, without fail, seize on the above paragraphs and argue that they are *de facto*

binding. In this developing area, I would prefer to leave this issue to another panel and another day in a case specifically dealing with a non-binding international human rights instrument.