

Federal Court



Cour fédérale

Date: 20250616

Docket: IMM-6940-23

Citation: 2025 FC 1083

Ottawa, Ontario, June 16, 2025

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

**JOHN DOE 1 AND JOHN DOE 2,
AND JOHN DOE**

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is a consolidated application for judicial review under s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a public policy [Policy] by which Ukrainian nationals and their immediate family members fleeing the conflict in Ukraine might apply to enter or stay in Canada on a temporary basis. The Policy is called the *Temporary Public*

Policy to Exempt Ukrainian Nationals from Various Immigration Requirements in Support of the Canada-Ukraine Authorization for Emergency Travel [CUAET].

[2] CUAET was made by the Minister of Immigration, Refugees and Citizenship Canada [IRCC] [Minister] in March 2022. CUAET expired in July 2023.

[3] The applications of John Doe 1 and John Doe 2 (IMM-6940-23) and John Doe (IMM-9574-23) were consolidated into a single application by Order dated September 12, 2023.

[4] The Policy under consideration (CUAET) was part of Canada's response to Russia's illegal full-scale invasion of Ukraine in February 2022. CUAET was established by the Minister under s 25.2 of *IRPA* to provide a rapid means by which Ukrainian nationals and their immediate family members fleeing the invasion and conflict could find temporary safe harbor in Canada.

[5] The Applicants are Canadian citizens who served in Afghanistan as Language and Cultural Advisors [LCAs] for the Department of National Defence [DND], or who while in Afghanistan served as LCAs for the Command Group of the International Security Assistance Force [ISAF] (a NATO mission). The Applicants' service took place between at various times between 2007 and 2011.

[6] To proceed with this application, the Applicants sought and obtained leave of the Federal Court pursuant to s 72 of *IRPA*. This Judgment determines if their application should be granted or dismissed.

[7] The Applicants effectively seek to bring their extended family members in Afghanistan to Canada [Extended Family Members]. To do this they ask the Court to remove references to Ukraine and Ukrainians from the CUAET. In the result, their Extended Family Members would have the same rights under the judicially amended CUAET that, prior to judicial amendments were extended only to Ukrainians.

[8] The Applicants allege the CUAET violates s 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [Charter].

[9] The challenge is brought with the argument CUAET is unlawful because and to the extent it provides a preferential immigration pathway for Ukrainians not available to other foreign nationals (such as the Afghan nationals in this case).

[10] The Applicants contrast the CUAET with the *Temporary public policy for extended families of former language and cultural advisors* [LCA Policy], also made by the Minister under s 25.2 of *IRPA*, which provided a pathway to permanent residence for family members of Afghan nationals who worked as LCAs for the Department of National Defence between 2001 and 2021. Some of the Applicants' Extended Family Members were refused permanent resident visas under the LCA Policy.

[11] The Applicants argue that had these applications been made under the CUAET, they would have been eligible.

[12] However, they do not challenge any individual immigration decision in this application.

[13] Although I expressed skepticism with their arguments, I will not say more because I find the application is moot. Having regard to well-established law on the discretion to hear cases notwithstanding they are moot, the Court decides it will not hear the Applicants' application.

II. Background

A. *Legislative and policy framework*

(1) The Minister's powers under s 25.2(1) of IRPA

[14] Subsection 25.2(1) of *IRPA* allows the Minister to grant exemptions from any applicable criteria or obligations under *IRPA* where "the Minister is of the opinion that it is justified by public policy considerations":

Public policy considerations

25.2 (1) The Minister may, in examining the circumstances concerning a foreign national who is inadmissible or who does not meet the requirements of this Act, grant that person permanent resident status or an exemption from any applicable criteria or obligations of this Act if the foreign national complies with any conditions imposed by the Minister and the Minister is of the opinion that it is justified by public policy considerations.

[Emphasis added]

Séjour dans l'intérêt public

25.2 (1) Le ministre peut étudier le cas de l'étranger qui est interdit de territoire ou qui ne se conforme pas à la présente loi et lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, si l'étranger remplit toute condition fixée par le ministre et que celui-ci estime que l'intérêt public le justifie.

[Je souligne]

[15] As mentioned, the Minister exercised this power in the context of Ukraine and Afghanistan through the CUAET and the LCA public policies. The policy challenged in this application is the CUAET, and the challenge essentially asserts it is unlawful because it differs from the LCA Policy because CUAET is available to Ukrainian nationals while the LAC Policy applied only to Afghanistan nationals.

[16] They argue nationals of any country – Afghanistan in this case – are entitled to the benefits the Minister’s policy afforded Ukrainians under the now-expired CUAET.

[17] It is noteworthy that IRCC Ministers have used their discretionary authority under s 25.2 to issue a large number and wide range of public policies in response to over a hundred (121) different and varied global events with varying domestic consequences, including geopolitical incidents, humanitarian crises and natural disasters in different countries. Several of these provided exemptions from criteria under *IRPA* for foreign nationals facing human rights abuses or fleeing conflicts other than Ukraine or Afghanistan (for example, Iran, Iraq, Syria, Hong Kong and Sudan).

(2) CUAET Public Policy

[18] The CUAET was introduced on March 17, 2022. It was renewed on March 21, 2023.

[19] The CUAET is no longer in place — it expired July 15, 2023.

[20] Before it expired, the CUAET offered Ukrainians nationals and family members free, extended temporary status and allowed them to work, study and stay in Canada until it is safe for them to return to Ukraine. Ukrainian nationals and their family members were allowed to apply for authorization through the CUAET. It provided temporary safe harbor.

[21] The CUAET outlined conditions under which, if met, delegated officers of the Minister might exempt individuals from the normal requirements of *IRPA* and the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPA Regulations*]. The Applicants summarize these exceptions as follows:

17. The CUAET offered all Ukrainians and their family members extended temporary status, allowing them to work, study, and stay in Canada, with no cap on the number of applications. They could apply from anywhere in the world, including “those who may have been outside Ukraine for years and who may not be at imminent risk” [citing Memo to the Minister, March 11, 2022].

18. This open door was provided only to Ukrainians, not to foreign nationals from other countries, including those experiencing devastating wars and other emergencies.

(3) LCA Public Policy

[22] The LCA Policy was introduced on January 30, 2023, to facilitate the reunification of former LCAs with their extended families who face increased risk in Afghanistan from the Taliban.

[23] The Respondent correctly notes the LCA Policy was one of 41 public policies created as part of the Government of Canada’s commitment and efforts to resettle at least 40,000 Afghans

in Canada as permanent residents by 2023, including individuals who assisted Canada during its military mission and their family members.

[24] As of March 7, 2025, 56,962 Afghan nationals had arrived in Canada as permanent residence under this broader initiative.

[25] The Applicants summarize the eligibility criteria for the LCA Policy as follows, which summary is not disputed:

31. The LCA Policy requires that family members must have been in Afghanistan after July 22, 2021, to qualify. Those who fled earlier are excluded. In contrast, the CUAET has no such date restriction for Ukrainians.

32. The LCA Policy also narrowly defines eligible relationships. Principal applicants must be an LCA's child, grandchild, parent, grandparent, or sibling. Only spouses and dependent children or grandchildren can accompany them. Children over twenty-two and cousins – even if informally adopted – are not eligible, even if targeted by the Taliban due to their relationship to an LCA.

[26] The Affidavit of John Doe 2, dated August 21, 2023, correctly outlines in more detail the eligibility requirements under the LCA Policy:

10. In the LCA Policy, Canada recognizes that, by assisting Canadian forces in Afghanistan, LCAs placed themselves and their families at risk of death, torture, targeted assassination, and disappearance, which are common in Afghanistan.

11. To be eligible to apply for permanent residency under the LCA Policy, the principal applicant must

- a. be an Afghan national;
- b. be outside Canada when they apply;

- c. have been in Afghanistan on or after July 22, 2021;
- d. apply using the application package posted online;
- e. be a child (no matter the age), grandchild, parent, grandparent, or sibling (may include a sibling-in-law in some cases) of a Canadian citizen or permanent resident whose employment as an LCA in Afghanistan for DND between 2001 and 2021 has been confirmed by DND;
- f. provide a statutory declaration from the former LCA to confirm their relationship;
- g. provide a statutory declaration that the LCA lives in Canada; and
- h. hold a travel or identity document (or if they do not have one, provide a statutory declaration attesting to their identity).

12. To be eligible to apply for permanent residency as a family member to a principal applicant, the person must meet the following conditions:

- a. Has been included as an accompanying family member in an application for a permanent resident visa by a principal applicant seeking exemptions under this public policy;
- b. Meets the definition of family member in subsection 1(3) of the Regulations, which is limited to a spouse or common-law partner, dependent child, and dependent child of a dependent child; to be a dependent child, the person must be less than 22 years of age or unable to be financially self-supporting due to a physical or mental condition;
- c. Holds a document enumerated at subsection 50(1) of the Regulations or if they are unable to obtain a document enumerated at subsection 50(1), provides a document described in subsection 178(1) and 178(2) of the Regulations; and
- d. A delegated officer has determined that the principal applicant meets all of the above conditions

(eligibility requirements) in Part 1 of this public policy.

13. Under the LCA Policy, applications will cease to be accepted after applications for 380 principal applicants are accepted into processing.

[27] The Applicants do not challenge the constitutionality of the LCA Policy.

[28] They challenge the CUAET policy and ask the Court to amend its text to accommodate their allegation that Afghan nationals are entitled to claim benefits CUAET offers Ukrainian nationals.

(4) Historical policy context

[29] The Applicants place this application in a broader historical context of systemic racism in the Canadian immigration system. One of their central submissions is that the CUAET is a resurfacing of what IRCC website material describes as “Keep Canada White” policies aimed at limiting and/or penalizing immigration from specific countries. These include the *Chinese Immigration Acts* of 1885 and 1923, the 1907 *Gentleman’s Agreement* (Japan), and the 1908 *Continuous Journey Stipulation* (India), and various informal measures in the early 20th century restricting African-American immigration.

[30] The Applicants specifically point to the *Immigration Act* of 1910, which authorized the government to exclude the entry of immigrants “belonging to any race deemed unsuitable to the climate and requirements of Canada,” and other immigration legislation that “distinguished between ‘preferred’ (initially British and French, and thereafter other European nationalities) and

‘non preferred’ (Asians, Africans and Caribbeans) ‘races’ [and] prevailed until the 1960s and 1970s” (Nalinie Mooten, Ph.D, *Racism, Discrimination and Migrant Workers in Canada: Evidence from the Literature*, (Ottawa: Immigration Refugees and Citizenship Canada, July 2021) at 38, 39 [IRCC Report]).

[31] In this context, the Applicants say Ukrainians belong to the historically “preferred” category of immigrants while Afghans have been historically disadvantaged by Canadian immigration policies that sought to exclude Asians (IRCC Report at 34-35, 38). The Applicants also point out that while Ukraine and Afghanistan have similar population levels, Ukrainians are predominantly white, European, and Christian, while Afghans are predominantly dark-skinned and Muslim (Affidavit of John Doe 1 at paras 32-38).

B. *The Applicants*

[32] The Applicants are three Canadian citizens with top-secret security clearance who served as LCAs for the Canadian Department of National Defence in Afghanistan, assisting Canadian and NATO military forces in 2010 and 2011. The Applicants are referred to by the pseudonyms “John Doe,” “John Doe 1,” and “John Doe 2” in this proceeding with the Court’s approval to reduce serious risk to them and their Extended Family Members of detention, mistreatment, torture, or death at the hands of the Taliban which now controls the government of Afghanistan.

[33] Each of the Applicants have Extended Family Members who either currently reside in Afghanistan or fled to other countries. These Extended Family Members were refused permanent residence visas under the LCA Policy because they do not meet its relationship requirements or

because they left Afghanistan prior to the cut-off date of July 22, 2021. Notably, this application does not challenge the refusal decisions and is not brought in the name of any of those who were refused.

[34] The Applicants say and it is not generally disputed that their Extended Family Members still residing in Afghanistan are at risk of detention, torture, and death and will likely be targeted by the Taliban due to their relationships to the Applicants. The other Extended Family Members do not have legal status in their current countries of residence, and risk deportation back to Afghanistan where they will also likely be targeted by the Taliban and face significant risk of death or injury.

[35] The Applicants say that but for the alleged discrimination (i.e. the requirement that they be Ukrainian nationals or family members of Ukrainian nationals), the Extended Family Members would have been eligible for and could have applied under the CUAET. They submit:

61. Afghans and other foreign nationals are discriminated against by the CUAET's under-inclusivity, both directly and by adverse effect. Underinclusive protection, provided to one group and not another, creates a distinction that denies equal benefit and protection of the law.

62. On its face, the CUAET explicitly distinguishes based on national origin, as it is only available to Ukrainians and their family members. In effect, it also creates distinctions based on race, colour, ethnic origin, and religion, since Ukrainians are predominantly White, European, and Christian, while Afghans are predominantly dark-skinned and Muslim.

63. The Respondent argues the distinction exists because Afghans require permanent residency, while Ukrainians only need temporary residency. This is a pretext. The internal memoranda show that the CUAET was always intended to create permanent residency pathways for Ukrainians, and the Minister waived the temporary intent requirement. In any case, the temporary residence

provided under the CUAET would have offered the Excluded Family Members the protection they urgently need.

[36] In this connection, the Applicants seek the following relief from this Court:

- a. A declaration that the CUAET violates s 15 of the *Charter* by failing to provide equal immigration benefits to non-Ukrainian nationals and their family members as to Ukrainian nationals and their family members, and that this violation cannot be justified in a free and democratic society;
- b. An order severing the words “Ukrainian national”, “Ukrainian”, and “national of Ukraine” wherever they appear in the CUAET, and reading in “foreign national” in each severed word’s place;
- c. An order, under s. 24(1) of the *Charter* declaring that, for the Applicants and the Excluded Family Members, the CUAET remains in effect and does not expire until 120 days after the date of the order;
- d. The costs of this application; and
- e. Such further and other relief as counsel may request and this Honourable Court may permit.

III. Matter under review

[37] The now-expired CUAET is the matter under review.

[38] The detailed exemptions to *IRPA* and the *IRPA Regulations* are outlined above. In addition, the Background section of the CUAET stated:

Background

Canada remains steadfast in its support of Ukraine's sovereignty and territorial integrity. As part of the Government of Canada's response to Russia's full-scale invasion of Ukraine, Immigration, Refugees and Citizenship Canada (IRCC) introduced the Canada-Ukraine Authorization of Emergency Travel. This temporary

measure will ensure that Ukrainian nationals and their family members who are fleeing the conflict are able to come to Canada temporarily, and able to work and study during their stay.

It is critical that those fleeing the conflict have the needed authorization and documentation so that they can remain in Canada and engage in their new community without delays. As such, under this new measure, Ukrainian nationals and their family members will be eligible for an open work permit or a study permit.

Given the urgency to provide safe haven to those fleeing the conflict, and the limited availability of IRCC designated panel physicians in the region affected by the conflict, the new measure is waiving the requirement to undergo an Immigration Medical Exam (IME) for those who may be subject to health screening before arrival in Canada. However, to protect the health and safety of Canadians, guidance will be provided to CBSA officers to consider imposing a requirement on these foreign nationals to undergo basic medical diagnostic testing for screening of reportable communicable diseases (e.g., tuberculosis) upon arrival to Canada.

Therefore, I hereby establish that, pursuant to my authority under section 25.2 of the *Immigration and Refugee Protection Act* (the Act), there are sufficient public policy considerations that justify the granting of exemptions from the requirements of the Act and the *Immigration and Refugee Protection Regulations* (the Regulations) listed below to foreign nationals who meet the conditions (eligibility requirements) set out below.

[Emphasis added]

[39] The only documents available from the Certified Tribunal Record are two memoranda to the Minister, along with the draft CUAET. The first memo, F-2022-0122700, dated March 11, 2023, states in part:

The CUAET would permit Ukraine nationals and their immediate family members to come to Canada as quickly as possible (from anywhere in the world). Clients will be eligible to receive a three-year Open Work Permit (OWP) on arrival in Canada. Minor children, and clients who opt not to receive an OWP, could stay as visitors for a similar three-year duration. Minor children will be able to study immediately upon arrival.

[40] The second memo, F-2022-01223647, states in part:

The Public Policy supporting implementation of the Canada-Ukraine Authorization for Emergency Travel (CUAET) has been revised following your direction of March 14, 2022. Via memo F-0122700, you requested a Public Policy that waives the assessment of bona fides for CUAET clients, and directed that no clients be refused for inadmissibility related to financial means.

Given the unprecedented and exceptional nature of this approach to the Temporary Resident program, it is recommended that this Public Policy not be published – aligning with the approach to some sections of the Operational Guidance.

IV. Issues

[41] The Applicants ask:

1. Is the Application moot?
2. Should the Court hear the case if the matter is moot?
3. Do the Applicants have standing?
4. Is the CUAET subject to the *Charter*?
5. Does the CUAET violate s. 15 of the *Charter*?
6. Is the CUAET saved by s. 1 of the *Charter*?
7. What is the appropriate remedy?

[42] The Respondent submits the issues are:

1. Should the Court exercise its discretion to hear this matter even though the matter is moot?
2. Do the Applicants have standing to bring the requested *Charter* challenge?
3. If the Court exercises its discretion to grant standing, does the CUAET Public Policy violate section 15 of the *Charter*?

4. If the Applicants demonstrate a *Charter* violation, have the Applicants demonstrated that the remedy sought is appropriate and within the purview of the Court?

[43] Respectfully, in this case the issues decided are whether this application is moot, and if so, should the Court exercise its discretion to hear the application. In my view the application is moot, and in the exercise of its discretion, the Court will not hear the application. Therefore, the application will be dismissed.

A. *Mootness*

[44] It is well-established that “mootness is a preliminary matter going to whether the Court will hear the application for judicial review, and not to the merits or procedure of the underlying decision, no administrative law standard of review applies” (*Dinan v Canada (Transport)*, 2022 FC 106 para 8, citing *Ulloa Mejia v Canada (Citizenship and Immigration)*, 2012 FC 980 at para 22 and *Budlakoti v Canada (Citizenship and Immigration)*, 2015 FCA 139 at paras 28(1), 37).

B. *Charter challenge*

[45] While I make no finding in this respect (nor in relation to the preliminary issues of standing) I note that in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 55-56 [*Vavilov*], the Supreme Court of Canada instructs that applicable standard of review for constitutional questions is correctness:

[53] In our view, respect for the rule of law requires courts to apply the standard of correctness for certain types of legal questions: constitutional questions, general questions of law of central importance to the legal system as a whole and questions regarding the jurisdictional boundaries between two or more

administrative bodies. The application of the correctness standard for such questions respects the unique role of the judiciary in interpreting the Constitution and ensures that courts are able to provide the last word on questions for which the rule of law requires consistency and for which a final and determinate answer is necessary: *Dunsmuir*, at para. 58.

[54] When applying the correctness standard, the reviewing court may choose either to uphold the administrative decision maker's determination or to substitute its own view: *Dunsmuir*, at para. 50. While it should take the administrative decision maker's reasoning into account — and indeed, it may find that reasoning persuasive and adopt it — the reviewing court is ultimately empowered to come to its own conclusions on the question.

(1) Constitutional Questions

[55] Questions regarding the division of powers between Parliament and the provinces, the relationship between the legislature and the other branches of the state, the scope of Aboriginal and treaty rights under s. 35 of the *Constitution Act, 1982*, and other constitutional matters require a final and determinate answer from the courts. Therefore, the standard of correctness must continue to be applied in reviewing such questions: *Dunsmuir*, at para. 58; *Westcoast Energy Inc. v. Canada (National Energy Board)*, 1998 CanLII 813 (SCC), [1998] 1 S.C.R. 322.

[Emphasis added]

[46] As later confirmed by the Supreme Court in *York Region District School Board v Elementary Teachers' Federation of Ontario*, 2024 SCC 22, the Vavilov presumption of reasonableness is rebutted for determinations of constitutionality:

[64] The determination of constitutionality calls on the court to exercise its unique role as the interpreter and guardian of the Constitution. Courts must provide the last word on the issue because the delimitation of the scope of constitutional guarantees that Canadians enjoy cannot vary “depending on how the state has chosen to delegate and wield its power” (*Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, [2018] 2 S.C.R. 293, at para. 116, per McLachlin C.J.). The presumptive

standard of reasonableness is, thus, rebutted and correctness applies.

[65] *Vavilov* does not restrict the scope of “constitutional questions” to only issues of federalism and the constitutional delegation of state power to administrative decision-makers (A.F., at para. 57; see also I.F., Attorney General of Canada, at para. 17). Notably, *Vavilov* used non-exhaustive language in articulating the constitutional questions category, including within it “other constitutional matters” (para. 55 (emphasis added)). This category should not be unduly narrowed.

[66] Post-Vavilov, there is a developing line of jurisprudence to support the application of correctness review in this context (*Canadian Broadcasting Corp. v. Ferrier*, 2019 ONCA 1025, 148 O.R. (3d) 705, at para. 35; *Société des casinos du Québec inc. v. Association des cadres de la Société des casinos du Québec*, 2024 SCC 13, at para. 92; and *Canadian Broadcasting Corporation v. Canada (Parole Board)*, 2023 FCA 166, 429 C.C.C. (3d) 69, at paras. 32-33). Academics have similarly interpreted that the scope of constitutional rights “demand[s] a uniform answer” and is therefore reviewable on the correctness standard (P. Daly, “Big Bang Theory: Vavilov’s New Framework for Substantive Review”, in C. M. Flood and P. Daly, eds., *Administrative Law in Context* (4th ed. 2022), 327, at p. 347; P. Daly, *A Culture of Justification: Vavilov and the Future of Administrative Law* (2023), at pp. 141 and 161-62; M. Mancini, “The Conceptual Gap Between *Doré* and *Vavilov*” (2020), 43 *Dal. L.J.* 793, at pp. 824-26).

[Emphasis added]

V. Relevant Charter provisions

[47] Section 15 of the *Charter* concerns equality rights. It states:

Equality before and under law and equal protection and benefit of law

15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of

Égalité devant la loi, égalité de bénéfice et protection égale de la loi

15 (1) La loi ne fait acception de personne et s’applique également à tous, et tous ont droit à la même protection et

the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability

au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

Affirmative action programs

Programmes de promotion sociale

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Le paragraphe (1) n'a pas pour effet d'interdire les lois, programmes ou activités destinés à améliorer la situation d'individus ou de groupes défavorisés, notamment du fait de leur race, de leur origine nationale ou ethnique, de leur couleur, de leur religion, de leur sexe, de leur âge ou de leurs déficiences mentales ou physiques.

[48] Section 1 of the *Charter* states that *Charter* rights and freedoms are subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society:

Rights and freedoms in Canada

Droits et libertés au Canada

1 The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

1 La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une

société libre et démocratique.

[49] Subsection 24(1) of the *Charter* provides that courts of competent jurisdiction (such as the Federal Court) may grant remedies where *Charter* rights or freedoms have been infringed or denied:

Enforcement of guaranteed rights and freedoms

24 (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Recours en cas d'atteinte aux droits et libertés

24 (1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

[50] Section 52(1) of the *Charter* further states that laws inconsistent with the provisions of the Constitution are, to the extent of the inconsistency, of no force or effect:

Primacy of Constitution of Canada

52 (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Primauté de la Constitution du Canada

52 (1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.

VI. Submissions of the parties and analysis

A. *Is this application moot?*

[51] The Applicants' two applications for leave were brought on June 2, 2023 (John Doe 1 and John Doe 2) and July 27, 2023 (John Doe). They are now consolidated.

[52] The CUAET expired on July 15, 2023, that is, shortly after the first application was filed.

[53] Applications are no longer being accepted under the CUAET. Therefore, without judicial intervention, neither the Applicants nor their Extended Family Members may apply for relief under it, even if the Court revived it.

[54] While the Applicants accept the policy is no longer in effect, they argue their issues are not moot. In the alternative, if this case is moot, the Applicants submit the Court should exercise its discretion and hear this case notwithstanding mootness.

[55] The Respondent submits this application is moot because there is no practical utility in the Court granting the relief sought. The Respondent submits this is not a case that the Court should exercise its discretion to hear notwithstanding mootness.

[56] For the reasons that follow, I agree with the Respondent.

(1) Test for mootness

[57] The test for mootness is set out by the Supreme Court of Canada in *Borowski v Canada (Attorney General)*, 1989 CanLII 123 (SCC), [1989] 1 SCR 342 at 353 [*Borowski*]. First, a court must determine whether the matter is moot. If it finds the matter is moot, the court must then determine if it should exercise its discretion to hear the case:

The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.

The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term “moot” applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the “live controversy” test. A court may nonetheless elect to address a moot issue if the circumstances warrant.

[Emphasis added]

[58] As further explained by the Federal Court of Appeal in *Public Service Alliance of Canada v Canada (Attorney General)*, 2021 FCA 90 at paragraph 6:

[6] An issue is moot if the tangible and concrete dispute between the parties has disappeared and the issue has become academic: *Borowski v. Canada (Attorney General)*, 1989 CanLII 123 (SCC), [1989] 1 S.C.R. 342, 57 D.L.R. (4th) 231 at 353 S.C.R. Mootness in judicial reviews has assumed new prominence in light of the recent encouragement given to reviewing courts to avoid needless hearings: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 at paras. 139-142; see *Canadian Union of Public Employees (Air Canada Component) v. Air Canada*, 2021 FCA 67 at para. 14.

(2) Does the doctrine of mootness apply?

[59] The Applicants maintain the application is not moot because a live controversy between the parties still exists as to whether the CUAET is discriminatory and whether the Applicants are entitled to a remedy under s. 24(1) of the *Charter*. The Applicants submit the requested Order would allow the Applicants' family members to find safety in Canada. Further, their request for a s 24(1) remedy is not a concession that the matter is moot, pointing to several cases where the Supreme Court of Canada discusses the possibility of a s 24(1) remedy in conjunction with a s 52(1) declaration: *Ontario (Attorney General) v G*, 2020 SCC 38 at paragraphs 141-152, 451 DLR (4th) 541; *R v Albashir*, 2021 SCC 48 at paragraph 67; *Schachter v Canada*, [1992] 2 SCR 679 at 720; *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44.

[60] The Respondent submits the matter is moot because there is no practical utility in granting the declaration sought because the impugned CUAET policy is expired:

28. There is no practical utility in granting the declaration sought in the Application because the impugned policy has expired, and foreign nationals can no longer apply for facilitation under the

policy. This is highlighted by the Applicants' request that the expired CUAET Public Policy be reinstated solely for their Extended Family Members "for such time as is needed to apply." This requested remedy is wholly inappropriate, disregards the statutory scheme, and is inconsistent with settled jurisprudence that holds that the Court cannot direct the Minister to use his s.25.2 authority.

[61] The Respondent further submits "[t]he Applicants' assertion that the matter is not moot because their challenge to the Public Policy is still alive is tantamount to saying that no matter would ever be moot if it is before the Courts. This position cannot succeed."

[62] As mentioned above, the first step of the test is to determine whether this case is moot. In this respect, the Supreme Court in *Borowski* provides guidance at pages 354-55:

The first stage in the analysis requires a consideration of whether there remains a live controversy. The controversy may disappear rendering an issue moot due to a variety of reasons, some of which are discussed below.

In *The King ex rel. Tolfree v. Clark*, [1944] S.C.R. 69, this Court refused to grant leave to appeal to applicants seeking a judgment excluding the respondents from sitting and exercising their functions as Members of the Ontario Legislative Assembly. However, the Legislative Assembly had been dissolved prior to the hearing before this Court. As a result, Duff C.J., on behalf of the Court, held at p. 72:

It is one of those cases where, the state of facts to which the proceedings in the lower Courts related and upon which they were founded having ceased to exist, the sub-stratum of the litigation has disappeared. In accordance with well-settled principle, therefore, the appeal could not properly be entertained. [Emphasis added.]

A challenged municipal by-law was repealed prior to a hearing in *Moir v. The Corporation of the Village of Huntingdon* (1891), 19 S.C.R. 363, leading to a conclusion that the appealing party had no actual interest and that a decision could have no effect on the

parties except as to costs. Similarly, in a fact situation analogous to this appeal, the Privy Council refused to address the constitutionality of challenged legislation where two statutes in question were repealed prior to the hearing: *Attorney-General for Alberta v. Attorney-General for Canada*, [1939] A.C. 117 (P.C.)

...

As well, the inapplicability of a statute to the party challenging the legislation renders a dispute moot: *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357. This is similar to those situations in which an appeal from a criminal conviction is seen as moot where the accused has fulfilled his sentence prior to an appeal: *Re Maltby v. Attorney-General of Saskatchewan* (1984), 10 D.L.R. (4th) 745 (Sask. C.A.)

[Emphasis added except where noted in original]

[63] The doctrine of mootness has been applied to expired or revoked policies in the context of challenges to COVID-19 measures: see e.g. *Wojdan v Canada (Attorney General)*, 2022 FCA 120; *Kakuev v Canada*, 2022 FC 1465 at paragraph 21; *Ben Naoum v Canada (Attorney General)*, 2022 FC 1463 at paragraphs 18-33 [*Ben Naoum*].

[64] Notably, *Ben Naoum* states:

[28] Generally speaking, the Applicants seek declarations of invalidity, on various grounds, in respect of the repealed air and rail passenger vaccine mandates. Yet, it is well known that Courts should refrain from expressing opinions on questions of law in a vacuum or where it is unnecessary to dispose of a case. Any legal or constitutional pronouncement could prejudice future cases and should be avoided (*Phillips v Nova Scotia Commissioner of Inquiry into the Westray Mine Tragedy*, 1995 CanLII 86 (SCC), [1995] 2 SCR 97, at para 12).

...

[32] Finally, I agree with the Respondent that requests for declaratory relief cannot sustain a moot case in and of itself and that the declaratory remedies the Applicants seek fail to provide

live issues for judicial resolution. Mootness “cannot be avoided” on the basis that declaratory relief is sought (*Rebel News Network Ltd v Canada (Leaders’ Debates Commission)*, 2020 FC 1181, at para 42). Courts will grant declaratory reliefs only when they have the potential of providing practical utility, that is, if when they settle a “live controversy” between the parties. The Court sees no practical utility in the declaratory reliefs sought by the Applicants.

[Emphasis added]

[65] Further, in *Right to Life Association of Toronto v Canada (Attorney General)*, 2022 FCA 220 at paragraphs 12-14, the Federal Court of Appeal held:

[12] The appellants say the appeal is not moot because they seek a declaration of a Charter breach and that constitutes a live controversy, citing *Trang v. Alberta (Edmonton Remand Centre)*, 2005 ABCA 66, 363 A.R. 167 at para. 5 [*Trang 2005*]. TRTL concedes that “in the case at bar ... the core remedy sought is a declaration that the Respondent breached the Appellants’ Charter rights in 2018”. I acknowledge that the Court may make a binding declaration and that such a declaration can be an adequate remedy, but whether the Court will make a declaration depends on the circumstances.

[13] A declaration that the Charter was breached may, but does not always, constitute a live controversy. A declaration may be granted only if it will have practical utility, that is, if it will settle a “live controversy” between the parties: *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 S.C.R. 99 at para. 11; *Solosky v. The Queen*, 1979 CanLII 9 (SCC), [1980] 1 S.C.R. 821, 105 D.L.R. (3d) 745; *Income Security Advocacy Centre v. Mette*, 2016 FCA 167, [2016] F.C.J. No. 587 (Q.L.) at para. 6.

[14] Here, were the appellants successful on appeal, a declaration that Charter rights were violated by the inclusion of the attestation in the application form for a program that is spent, would serve no practical utility and would not resolve any live controversy. If, in the future, a funding program contains a similar attestation requirement, it can be challenged at that time. And, of course, the challenge necessarily would depend on the type of attestation requirement and the reasons behind it. There is a good chance that a decision in this case on these particular facts would be of no use in that later case.

[66] *Phillips v Nova Scotia Commissioner of Inquiry into the Westray Mine Tragedy*, 1995 CanLII 86 (SCC), [1995] 2 SCR 97 [*Phillips*] is also relevant. There the Supreme Court of Canada held the policy dictates restraint in constitutional cases “when the substratum on which the case was based ceases to exist. The court is then required to opine on a hypothetical situation and not a real controversy” (at para 12).

[67] With respect, I find this challenge to the CUAET policy is moot. The Policy came into existence in 2022 and expired in 2023. Neither the Applicants nor their Extended Family Members have any present ability to claim any entitlement or benefit under it. In my respectful view, any tangible and concrete dispute between the parties has disappeared and the issue has become academic. As a rule, academic issues are considered in law to be moot per *Borowski*.

(3) Should the Court exercise its discretion to hear the application?

[68] *Borowski* sets out three factors to guide the Court’s use of its discretion to hear a moot application. The Federal Court of Appeal succinctly summarizes these *Amgen Canada Inc v Apotex Inc*, 2016 FCA 196:

[15] Although there is no longer a live matter before the Court, the Court may nevertheless exercise its discretion to hear and decide it: *Borowski v. Canada (Attorney General)*, 1989 CanLII 123 (SCC), [1989] 1 S.C.R. 342 at pages 358-62.

[16] To guide that discretion, the Supreme Court in *Borowski* offered three considerations:

1. *The absence of adversarial parties.* If there are no longer parties on opposing sides that are keen to advocate their positions, the Court will be less willing to hear the matter.

2. *Lack of practicality; wasteful use of resources.* If a proceeding will not have any practical effect upon the rights of the parties, it has lost its primary purpose. The parties and the Court should no longer devote scarce resources to it. Here, the concern is judicial economy. However, in exceptionally rare cases, the need to settle uncertain jurisprudence can assume such great practical importance that a court may nevertheless exercise its discretion to hear a moot appeal: *M. v. H.*, 1999 CanLII 686 (SCC), [1999] 2 S.C.R. 3, 171 D.L.R. (4th) 577 at paragraphs 43-44.

3. *The court exceeding its proper role.* In some cases, pronouncing law in a moot appeal in the absence of a real dispute is tantamount to making law in the abstract, a task reserved for the legislative branch of government not the judicial branch.

[69] The Supreme Court of Canada instructs that these factors are to be applied holistically rather than mechanically (*Borowski* at 363(d)):

In exercising its discretion in an appeal which is moot, the Court should consider the extent to which each of the three basic *rationalia* for enforcement of the mootness doctrine is present. This is not to suggest that it is a mechanical process. The principles identified above may not all support the same conclusion. The presence of one or two of the factors may be overborne by the absence of the third, and vice versa.

[70] In the case at bar, the Applicants submit each of the three *Borowski* factors weigh in favour of the Court hearing this application.

(a) *Absence of adversarial parties*

[71] First, the Applicants submit the parties are still adverse in interest, as the Applicants have a strong interest in the case due to the CUAET's practical effects on them and their families, while the Respondent has a correspondingly strong interest in opposing the application.

[72] The Respondent makes no submissions on this factor.

[73] In my respectful view, while the Applicants submit the parties are still adverse in interest because the Applicants have a strong interest in the case due to the CUAET's practical effects on them and their families, that is not enough. Indeed, that submission if given effect would result in many, if not most, moot cases being heard. At the hearing the Applicants emphasized that counsel are still available on both sides, but that also is likely the case in numerous instances of moot cases. The Applicant's submission that the Respondent has a correspondingly strong interest in opposing the application is equally unpersuasive.

[74] The existence of an adversarial context in this case does not outweigh the other *Borowski* factors, i.e., a proceeding having no practical effect upon the rights of the parties, the principle of judicial economy, or issues of the Court exceeding its proper role (see e.g. *Mekuria v Canada (Citizenship and Immigration)*, 2010 FC 304 at para 13).

(b) *Lack of practicality, wasteful use of resources*

[75] Second, the Applicants submit it is in the interests of judicial economy to hear the case because an ongoing dispute between the parties is likely. They point out the Respondent claims the right to implement immigration policies specifically targeting persons from certain countries, and so suggest similar allegations of discrimination are likely to arise in the future.

[76] The Respondent submits:

There is minimal, if any, jurisprudential value to proceeding with the Application. The Applicants do not challenge the validity or *Charter* compliance of any provision of IRPA but only take issue with the specific application of Ministerial discretion in the issuance of the CUAET Public Policy. The Public Policy was a temporary policy, tailored to a specific situation to respond to a humanitarian crisis in Ukraine. It cannot be assumed that the policy will be replicated or reinstated in the same fashion in the future, and in fact, it has not been.

[77] While not cited by either party, in this connection I note similar arguments were recently rejected by the Federal Court of Appeal in *Hakizimana v Canada (Public Safety and Emergency Preparedness)*, 2022 FCA 33 at paragraphs 2122, citing *NO v Canada (Citizenship and Immigration)*, 2016 FCA 214 and *Abel c Canada (Citoyenneté et Immigration)*, 2021 CAF 131:

[21] Again, in both *N.O.* and *Abel*, the Court held that the factors that would justify hearing the appeal despite its mootness were absent. Despite this, the appellants submit, based on the fact that they came very close to being removed from Canada without any risk assessment, in spite of raising a fear of persecution, that “it is in the interest of justice for this appeal to be decided considering the fundamentally important nature of the legal issue and the high cost of leaving the issue undecided” (Appellants’ Arguments Regarding Mootness at para. 13). They claim that the confusion they experienced regarding the interpretation of paragraph 101(1)(d) “will continue to wreak havoc upon future refugee

claimants” and calls out for a decision on the merits from this Court (Appellants’ Arguments Regarding Mootness, at paras. 17-18). Deciding this case on the merits, they say, would preserve precious judicial resources, as the appeal has already been heard and the issue it raises will certainly arise again if the matter is left unresolved.

[22] Similar arguments were considered, but dismissed, in *Abel*, where, as here, the matter was heard on the merits before being dismissed as moot. As the Court stated, vague references to the possibility of cases raising the same question at some point in the future are insufficient to justify the Court’s intervention (*Abel* at para. 19). The Court noted that it has, on many occasions, declined to decide moot issues notwithstanding the importance these issues may have had (*Abel* at para. 22). Furthermore, as was the case in *Abel*, the issue raised in the present appeal is not one which is elusive of appellate review (*Abel* at para. 19; see also *N.O.* at para. 5). In sum, the considerations advanced by the appellants in favour of deciding this appeal despite its mootness are outweighed by the need for the sound use of judicial resources.

[Emphasis added]

[78] I find no merit in the Applicants’ argument it is in the interests of judicial economy to hear the case because an ongoing dispute between the parties is likely. They point out the Respondent claims the right to implement immigration policies specifically targeting persons from certain countries, and so suggest similar allegations of discrimination are likely to arise in the future. Frankly, these are speculative submissions.

[79] The Applicants further submit that “[t]hese temporary policies are elusive of review because they are temporary. If the Court declines to hear this matter because the policy has expired, it will immunize these policies from *Charter* scrutiny. The Respondent would then be free to implement discriminatory policies so long as they expire before a hearing is held.”

[80] The Respondent maintains it would be a wasteful use of resources to proceed with the judicial review. The Respondent points out the primary declaration sought is a revision of an expired Public Policy and submits this will not have any practical effect upon the rights of the parties because the Applicants' Extended Family Members could not apply under an expired Public Policy. I agree.

[81] Moreover, unnecessary constitutional pronouncements may prejudice future cases involving actual in force policies with a full and proper record. In this connection, I note *Phillips*, cited above, states at paragraphs 9, 12-13:

9 The policy which dictates restraint in constitutional cases is sound. It is based on the realization that unnecessary constitutional pronouncements may prejudice future cases, the implications of which have not been foreseen. Early in this century, Viscount Haldane in *John Deere Plow Co. v. Wharton*, [1915] A.C. 330, at p. 339, stated that the abstract logical definition of the scope of constitutional provisions is not only "impracticable, but is certain, if attempted, to cause embarrassment and possible injustice in future cases".

...

12 This practice applies, *a fortiori*, when the substratum on which the case was based ceases to exist. The court is then required to opine on a hypothetical situation and not a real controversy. This engages the doctrine of mootness pursuant to which the court will decline to exercise its discretion to rule on moot questions unless, *inter alia*, there is a pressing issue which will be evasive of review. See *Borowski v. Canada (Attorney General)*, 1989 CanLII 123 (SCC), [1989] 1 S.C.R. 342. The practice applies notwithstanding that the appeal has been argued on the basis which has disappeared. Accordingly, in *Tremblay v. Daigle*, 1989 CanLII 33 (SCC), [1989] 2 S.C.R. 530, the Court was advised, in the middle of argument, that the appellant, who was appealing an order enjoining her from having an abortion, had proceeded with an abortion. The Court felt constrained to deal with legal issues with respect to the propriety of granting an injunction in the circumstances. It did so because the nature of the issue was such that it would be difficult or impossible for another

woman in the same predicament to obtain a decision of this Court in time. The Court, however, declined to deal with the issue of fetal rights under s. 7 of the *Charter* and stated, at pp. 571-72:

As we have indicated, the Court decided in its discretion to continue the hearing of this appeal although it was moot, in order to resolve the important legal issue raised so that the situation of women in the position in which Ms. Daigle found herself could be clarified. It would, however, be quite a different matter to explore further legal issues which need not be examined in order to achieve that objective. The jurisprudence of this Court indicates that unnecessary constitutional pronouncement should be avoided: *Morgentaler* (No. 2), [[1988] 1 S.C.R. 30], at p. 51; *Borowski*, [[1989] 1 S.C.R. 342]; *John Deere Plow Co. v. Wharton*, [1915] A.C. 330 (P.C.), at p. 339; *Winner v. S.M.T. (Eastern) Ltd.*, [1951] S.C.R. 887, at p. 915. [Emphasis added.]

13 In *Borowski*, although the appeal was fully argued on the merits in the Court of Appeal and in this Court, it was dismissed on the ground of mootness. I cannot, therefore, agree with my colleague that the fact that the case was fully argued in the Nova Scotia Court of Appeal and in this Court is sufficient to warrant deciding difficult *Charter* issues and laying down guidelines with respect to future public inquiries simply because to do so might be “helpful”.

[Emphasis in original]

[82] In my view these factors militate against hearing this application notwithstanding it is moot. In my view it would be better to deal with a real issue at a later time than deal with a moot issue now and make findings that might more properly be made in a live case with an actual *lis*.

(c) *Court exceeding its proper role*

[83] Third, the Applicants submit this application would not intrude on the legislature’s role because “[i]t is firmly within the role of the Court to make declarations as to the constitutional validity of a policy and to provide remedies under s. 24(1) of the *Charter*.”

[84] The Applicants’ submissions on this factor are not persuasive. No one seriously denies declarations are useful, ancient and important judicial tools to ensure justice between parties — having the advantage of being made either before or after rights are infringed or violated. But again, and with respect, this argument could be advanced in many if not all moot cases. The fact a moot issue was amenable to declaratory relief at one time does not assist.

[85] Having considered the *Borowski* factors, I am not persuaded to exercise my discretion to hear this case notwithstanding it is moot.

VII. Conclusion

[86] This application for judicial review is dismissed for mootness.

VIII. Certified questions

[87] The Applicants proposed the following questions of general importance to be certified:

1. Are policies issued under s 25.2 of the *Immigration and Refugee Protection Act*, SC 2001, c 27, subject to the *Charter*?

2. Can a group be considered disadvantaged under s 15(2) of the *Charter* if the group's disadvantage is unrelated to discrimination?
3. Can a policy that benefits only one nationality be protected by s. 15(2) of the *Charter* if it excludes other more-disadvantaged nationalities?
4. Can the meaning of "every individual" under s. 15(1) of the *Charter* include individuals other than those who are physically present in Canada, subject to a criminal trial in Canada, or Canadian citizens?
5. If a policy that benefits only one nationality prima facie violates s 15(1) of the *Charter*, is the pressing and substantial objective that is relevant for the s. 1 *Charter* analysis the objective of the policy as a whole or the objective of its limitation to only one nationality?
6. Under s 24(1) of the *Charter*, does the Court have the power to remedy a *Charter* violation by extending for specific individuals the application of a temporary policy that has expired?

[88] The Respondent proposed the following questions of general importance to be certified, but only if the case is not moot:

1. Can a group be considered disadvantaged under s. 15(2) of the *Charter* if the group's disadvantage is unrelated to historic discrimination in Canada?
2. Under s 24(1) of the *Charter*, is it appropriate for the Court to order a remedy that overrides a Minister's discretionary policy under s. 25.2 of the *IRPA*?

[89] The Respondent also submitted at the hearing that it opposes the questions proposed by the Applicants because they do not meet the test for certification. The Respondent does not make any further submissions on this issue.

[90] In *Mahjoub (Re)*, 2017 FC 334, I summarized the test for certifying a question under

IRPA:

[9] The Federal Court of Appeal in *Canada (Minister of Citizenship and Immigration) v Liyanagamage*, (1994), 176 NR 4 at paras 4-6, set out the principles governing the certification of a question under section 82.3. These principles may be summarized as follows:

(i) The question must be one that transcends the interests of the parties to the litigation and contemplates issues of broad significance or general application.

(ii) The question must be dispositive of the appeal. The certification process is not to be used as a tool to obtain from the Court of Appeal declaratory judgments on fine questions which need not be decided in order to dispose of the case.

(iii) The certification process is not to be equated with the reference process established by the *Federal Courts Act*.

[10] In *Zhang v Canada (Citizenship and Immigration)*, 2013 FCA 168, the Federal Court of Appeal described the threshold for certification as follows:

[7] Paragraph 74(d) of the Act contains an important “gatekeeper” provision: an appeal to this Court may only be made if, in an application for judicial review brought under the Act, a Judge of the Federal Court certifies that a serious question of general importance is raised and states the question.

[...]

[9] It is trite law that to be certified, a question must (i) be dispositive of the appeal and (ii) transcend the interests of the immediate parties to the litigation, as well as contemplate issues of broad significance or general importance. As a corollary, the question must also have been raised and dealt with by the court below and it must arise from the case, not from the Judge’s reasons (*Canada (Minister of Citizenship and Immigration) v.*

Liyanagamage, 176 N.R. 4, 51 A.C.W.S. (3d) 910 (F.C.A.) at paragraph 4; *Zazai v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89, [2004] F.C.J. No. 368 (C.A.) at paragraphs 11-12; *Varela v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 145, [2010] 1 F.C.R. 129 at paragraphs 28, 29 and 32).

[10] In *Varela*, this Court stated that it is a mistake to reason that because all issues on appeal may be considered once a question is certified, therefore any question that could be raised on appeal may be certified. The statutory requirement set out in paragraph 74(d) of the Act is a precondition to the right of appeal. If a question does not meet the test for certification, so that the necessary precondition is not met, the appeal must be dismissed.

[11] In addition, as Pelletier JA confirmed in *Zazai v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89 at paras 11-12, certification may only take place where there is “a serious question of general importance which would be dispositive of an appeal.” As a corollary, that Court added that the question must have been raised and dealt with in the decision below: “if it does not arise, or if the judge decides that it need not be dealt with, it is not an appropriate question for certification.”

[12] The Supreme Court of Canada in *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 778 (SCC), [1998] 1 SCR 982 at paragraph 25, added that “[t]he certification of a ‘question of general importance’ is the trigger by which an appeal is justified. The object of the appeal is still the judgment itself, not merely the certified question.”

[Emphasis added]

[91] To the same effect, see this Court’s recent judgments in *Tesfaye v Canada (Public Safety and Emergency Preparedness)*, 2024 FC 2040 at para 76 [per Gascon J], citing *Mason v Canada*

(*Citizenship and Immigration*), 2023 SCC 21 at para 37, *Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22 at para 46, *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at para 36, *Mudrak v Canada (Citizenship and Immigration)*, 2016 FCA 178 at paras 15–16, 36, *Zhang v Canada (Citizenship and Immigration)*, 2013 FCA 168 at para 9, *Obazughanmwun v Canada (Public Safety and Emergency Preparedness)*, 2023 FCA 151 at para 28, *Varela v Canada (Citizenship and Immigration)*, 2009 FCA 145 at para 29, *Rrotaj v Canada (Citizenship and Immigration)* 2016 FCA 292 at para 6, *Krishan v Canada (Citizenship and Immigration)* 2018 FC 1203 at para 98, and *Halilaj v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 1062 at para 37).

[92] In my view neither set of questions should be certified because they are not dispositive of this application. They are not dealt with because this application is dismissed on the grounds it is moot.

IX. Costs

[93] The Applicants seek costs of the application. The Respondent points to Rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, which states no costs are available unless the Court so orders. In my respectful view, and in the exercise of my discretion, this is not a case for costs.

JUDGMENT in IMM-6940-23

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed as moot.
2. No question of general importance is certified.
3. There is no order as to costs.

"Henry S. Brown"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-6940-23

STYLE OF CAUSE: JOHN DOE 1 AND JOHN DOE 2, AND JOHN DOE v
ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: MAY 21, 2025

JUDGMENT AND REASONS: BROWN J.

DATED: JUNE 16, 2025

APPEARANCES:

Nicholas Pope	FOR THE APPLICANTS
Helene Robertson	FOR THE RESPONDENT
Emily Keilty	

SOLICITORS OF RECORD:

Hameed Law	FOR THE APPLICANTS
Barristers and Solicitors	
Ottawa, Ontario	
Attorney General of Canada	FOR THE RESPONDENT
Ottawa, Ontario	