Federal Court  Cour fédérale

Date: 20230809

Docket: IMM-3825-22

Citation: 2023 FC 1090

Ottawa, Ontario, August 9, 2023

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

DEMAINE ATHOL ASPHALL

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review brought by the Minister of Citizenship and Immigration (the Minister) concerning an Immigration Appeal Division [IAD] decision dated April 12, 2022 (the Decision) in which the IAD allowed an appeal by the Respondent and quashed the removal order against him.

[2] For the reasons that follow, I will allow the application.

II. **Background**

[3] The Respondent is a citizen of Jamaica who has held permanent resident status in Canada since November 1993.

[4] On March 11, 2015, he pled guilty to possession of a restricted firearm with ammunition, carrying a concealed weapon, and a breach of weapons prohibition. He was convicted and sentenced to two years less a day for the possession charge, 90 days consecutive for carrying a concealed weapon, and 60 days consecutive for breach of the weapons prohibition, resulting in a global sentence of more than two years imprisonment.

[5] In October 2020, the Respondent learned that the Canada Border Services Agency was referring a report under subsection 44(1) of the *Immigration and Refugee Protection Act* [*IRPA*] alleging that, given his March 2015 conviction for possession of a restricted firearm with ammunition, he was inadmissible to Canada.

[6] The Respondent subsequently retained counsel to appeal his criminal convictions and sentences at the Ontario Court of Appeal (ONCA) on the basis that his trial counsel did not inform him of the potential collateral immigration consequences of his guilty plea and the range of sentences the judge might impose.

[7] The Respondent requested that his admissibility hearing be postponed pending the outcome of his criminal appeal. The Immigration Division ("ID") refused the Respondent's request and proceeded with the Applicant's admissibility hearing on February 1, 2021.

[8] At the conclusion of his hearing, the ID issued a deportation order after finding the Respondent was inadmissible for serious criminality pursuant to paragraph 36(1)(a) of the *IRPA*.

[9] In December 2021, the Crown conceded the Respondent's criminal appeal and on January 7, 2022, the ONCA issued an order and reasons allowing his appeal and setting aside the Respondent's convictions: *R v Asphall*, 2022 ONCA 1.

[10] On January 10, 2022, the Respondent filed an application with the Immigration Appeal Division (IAD) requesting an extension of time to appeal his removal order. The Respondent also requested, if the extension of time was granted, that the appeal be allowed in chambers given that his reportable convictions were set aside.

[11] The Minister opposed the Respondent's application and argued that the Respondent did not have a right of appeal under subsection 64(1) of the *IRPA*.

[12] On March 1, 2022, the IAD granted the Respondent's application for an extension of time to file his appeal, finding that the interests of justice supported an extension in the circumstances.

[13] Both the Applicant and the Respondent made submissions to the IAD addressing the legal validity of the Respondent's removal order in light of the extension of time being granted to allow filing of the appeal.

[14] On April 12, 2022, the IAD allowed the Respondent's appeal, finding that the removal order was no longer legally valid at the time of the IAD appeal based on the ONCA order setting aside the reportable conviction.

[15] The IAD rendered two separate decisions in this matter, dated March 1, 2022 and April 12, 2022 respectively. The March 1 decision dealt with the Respondent's request for an extension of time as well as the IAD's jurisdiction to hear the appeal.

[16] Acknowledging that an extension of time request is an interlocutory decision not generally subject to judicial review, the Applicant has requested that both decisions be considered together as part of the record on judicial review. The Respondent does not object.

III. **Decisions under Review**

A. *The Request for an Extension of Time*

[17] The IAD found that it had jurisdiction to hear the appeal and consider the extension of time application. It considered several previous IAD decisions in arriving at its conclusion.

[18] The IAD cited *Singh v Canada (Public Safety and Emergency Preparedness)*, 2018 CanLII 30626 (CA IRB) [*Singh*] and *Campbell v Canada (Public Safety and Emergency*

Preparedness), 2019 CanLII 145896 (CA IRB) as support for finding that it had jurisdiction to hear the appeal, relying on jurisprudence from this Court in *Nabiloo v Canada (Citizenship and Immigration)*, 2008 FC 125 [*Nabiloo*]. It noted, however, that there were examples where the opposite approach was taken, citing *Luis Carlos Rebelo v Minister of Public Safety and Emergency Preparedness*, TC1-19697 [*Rebelo*]. However, the IAD preferred the reasoning in *Singh* and *Campbell* to that of *Rebelo*.

[19] The IAD addressed the Appellant's reliance on *Nabiloo*, notably Madam Justice Snider's comments that, should Ms. Nabiloo's criminal appeal succeed, she would be able to apply for an extension of time to bring her appeal before the IAD.

[20] The IAD noted that the effect of the conviction being set aside was that the sentence too was set aside. A sentence set aside is a sentence that never existed, it has been annulled or vacated: *Grenon v Canada (National Revenue)*, 2017 FCA 167 [*Grenon*] citing *Singer and Belzberg v J.H. Ashdown Hardware Co. Ltd.*, [1953] 1 SCR 252, [1953] 2 DLR 625 [*Singer*]

[21] The IAD set out the four factors for exercising discretion to extend the time for filing an appeal as set out in *Canada (Attorney General) v Hennelly*, 1999 CanLII 8190 (FCA) [*Hennelly*]. Finding the test had been met, it granted the extension of time.

B. *The Validity of the Removal Order*

[22] The IAD found the Minister's reliance on case law and manuals from Immigration, Refugees and Citizenship Canada ("IRCC") was not on point. The manual concerned pardons

and acquittals of criminal charges, which were not relevant to the appeal. Further, the manual was not binding on the IAD.

[23] The IAD also found that the case of *Canada (Citizenship and Immigration) v Smith*, 2012 FC 582 [*Smith*] did not help the Minister. *Smith* dealt with overturning an IAD decision to put Mr. Smith back on a stay after a previous IAD had cancelled a stay of removal order when he had been convicted of assault with a weapon. The Federal Court found the IAD admitted there had been no breach of natural justice and it therefore had no jurisdiction to reinstate Mr. Smith's stay. Further, the Federal Court found the IAD was wrong to state that the underlying decision was null and void.

[24] The Minister also relied on *Almrei v Canada (Citizenship and Immigration)*, 2011 FC 554 [*Almrei*] which concerned denial of a permanent resident application given that the underlying evidence justifying the denial no longer existed. The Federal Court found that removal was unenforceable.

[25] In cancelling the stay of removal, the IAD found *Smith* distinguishable because the IAD in *Smith* agreed that it did not have jurisdiction to reopen Mr. Smith's appeal given there was no breach of natural justice. Unlike *Smith*, the IAD found that it possessed the jurisdiction to hear the appeal. The IAD found *Almrei* distinguishable because it concerned the decision of an Immigration Officer, not the ID.

[26] The IAD stressed that the Applicant had a right of appeal to the IAD, which holds *de novo* hearings. Further, it found the legal validity of the removal order at the time of the appeal was pertinent to the appeal under subsection 67(1) of the *IRPA*.

[27] The IAD again cited *Singer* for the proposition that a decision set aside is a decision that never existed and *Grenon* for the further clarification that to set aside is "to annul or vacate".

[28] The effect of setting aside the criminal decision, according to the IAD, was that it never existed. Since removal orders under paragraph 36(1)(a) of the *IRPA* are based on criminal convictions, not charges, and persons charged benefit from a presumption of innocence, allowing the removal order to remain valid would deprive the Applicant of the presumption of innocence.

[29] The IAD noted that it had taken this approach in the past. In *Tshibola v Minister of Public Safety and Emergency Preparedness*, TC0-07537, a deportation order was quashed by the IAD at the request of the Minister because a retrial was ordered of a conviction against the subject of the order. In *Campbell*, a removal order was quashed by the IAD where criminal convictions were quashed and a new trial ordered. In that case, the reason for quashing the order was that the basis for it no longer existed.

[30] Therefore, as the basis for the removal order against the Respondent no longer existed, it was quashed by the IAD.

IV. **Issues and Standard of Review**

[31] As the IAD pointed out, it cannot entertain interlocutory applications where it has no jurisdiction to hear an appeal. I agree with the Minister that the sole issue is whether the IAD has the jurisdiction to entertain the Respondent's appeal.

[32] The Minister submits the Respondent had no statutory right of appeal and the IAD erred in exercising jurisdiction over the matter.

[33] This issue concerns the IAD interpreting its home statute. The parties submit, and I agree, that this warrants reasonableness review: C*anada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 25. On reasonableness review, the Court "must develop an understanding of the decision maker's reasoning process in order to determine whether the decision as a whole is reasonable. To make this determination, the reviewing court asks whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision": *Vavilov* at para 99.

V. **Was the IAD's Interpretation of its Jurisdiction to hear the Appeal Reasonable?**

A. *The Applicant's Submissions*

[34] The availability of appeal to the IAD of a removal is limited by section 64 of the *IRPA*, which is as follows:

64 (1) No appeal may be made to the Immigration Appeal Division by a foreign national or their sponsor or by a permanent resident if the foreign national or permanent resident has been found to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality. Serious criminality	64 (1) L'appel ne peut être interjeté par le résident permanent ou l'étranger qui est interdit de territoire pour raison de sécurité, pour atteinte aux droits humains ou internationaux, pour sanctions ou pour grande criminalité ou criminalité organisée, ni, dans le cas de l'étranger, par son répondant.
(2) For the purpose of subsection (1), serious criminality must be with respect to a crime that was punished in Canada by a term of imprisonment of at least six months or that is described in paragraph 36(1)(b) or (c).	(2) L'interdiction de territoire pour grande criminalité vise, d'une part, l'infraction punie au Canada par un emprisonnement d'au moins six mois et, d'autre part, les faits visés aux alinéas 36(1)b) et c).

[35] The Applicant Minister argues that in enacting the *IRPA* Parliament intended, among other things, to give more importance to national security and the expeditious removal of persons ordered deported due to serious criminality. This marked a change from the previous statute, which placed greater priority on the successful integration of applicants. The Minister further stresses that a finding of inadmissibility does not preclude other applications under the *IRPA*, such as for relief on humanitarian and compassionate grounds under section 25.

[36] The Minister also submits that the Federal Court of Appeal has recently clarified that statutory decision makers have no power to overturn inadmissibility findings: *Tapambwa v Canada (Citizenship and Immigration)*, 2019 FCA 34 at paras 47-49 and *Subramaniam v*

Canada (Citizenship and Immigration), 2020 FCA 202 at paras 23-25. Parliament gave the responsibility of overturning inadmissibility findings to the Federal Court. Therefore, according to the Minister, the Respondent's status as inadmissible must remain.

[37] The Minister also points to the relevant Enforcement Manual which states, *inter alia*, that:

> . . . although the person may no longer be inadmissible, it does not change the fact that they were inadmissible at the time the removal order was issued. Therefore, their permanent residence status was lost.
> (ENF 10 Removals, subsection 8.6)

[38] The IAD is a creation of statute. Therefore, the right to appeal to it must be laid out in its enabling statue. The Minister argues that the IAD focussed on the *de novo* nature of its appeal and not whether the appeal was properly constituted in the first place. This, he submits, is unreasonable. The Minister analogizes the situation to that of the Federal Court of Appeal, where review of a certified question is *de novo*, but can only be triggered by the presence of a valid certified question: *Kunkel v Canada (Citizenship and Immigration)*, 2009 FCA 347 at para 12.

[39] The Minister stresses the Respondent has been found inadmissible and subsection 64(1) of the *IRPA* precludes an appeal to the IAD under this very circumstance. The overturning of his criminal convictions did not retroactively change the fact that he had, to use the language of subsection 64(1), "been found to be inadmissible".

[40] Justice Snider explained in paragraph 46 of *Almrei* that:

> . . . a decision taken before a fundamental change in evidence is not a nullity or void *ab initio*. However, on a going-forward basis, any such decision could not be enforced or otherwise acted or relied on. In this case, the Officer's decision is not a nullity. What I believe, however, is that, based on decisions such as *Kalicharan*, the Minister could not rely on that particular decision to take further steps to remove the Applicant from Canada.

[41] The Minister stresses that *Almrei* was decided after *Nabiloo*, on whose *obiter* comments the IAD relied. Further, *Almrei* has been cited with approval, for example, in *Smith* at paragraph 28.

[42] Applying *Almrei*, the Minister argues that the inadmissibility finding is simply unenforceable. It is not a nullity, and therefore there is no right of appeal to the IAD.

[43] The Minister also criticizes the IAD's reliance on *Singer*, which was a civil case involving the joint and several liability of various defendants and does not appear to have ever been cited in criminal or immigration contexts. Similarly, *Grenon* was decided within the statutory context of a "jeopardy order" under the *Income Tax Act*.

[44] In *Therrien (Re)*, 2001 SCC 35, the Supreme Court explained that the meaning of "vacate" in the pardons context under the *Criminal Records Act* does not necessarily involve retroactive effects, specifying that "it is possible to make something void, deprive it of any effect or authority or annul it for the future only": paras 117, 121. Moreover, where Parliament intends to treat a criminal proceeding as void *ab initio*, it will say so: see, for example, subsection 579(2) of the *Criminal Code*, RSC 1985, c C-46.

[45] Though the matter is not free from doubt, the Minister points to a number of cases where this Court has found that setting aside a conviction on appeal does not invalidate a finding of inadmissibility under the *IRPA*: *Johnson v Canada (Citizenship and Immigration)*, 2008 FC 2 at paras 19-29; *Pascale v Canada (Citizenship and Immigration)*, 2011 FC 881 at para 46; *Chen v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 13 at para 91; *Strungmann v Canada (Citizenship and Immigration)*, 2011 FC 1229 at paras 17-25.

B. *The Respondent's Submissions*

[46] The Respondent claims the Minister conflated the two IAD decisions in his submissions.

[47] The Respondent argues the Minister relies on subsection 64(1) of the *IRPA* without the relevant limitation present in subsection 64(2), *viz*. that "serious criminality must be with respect to a crime that was punished in Canada by a term of imprisonment of at least six months or that is described in paragraph 36(1)(b) or (c)" [Respondent's emphasis]. The Minister's submissions do not engage with this provision. The Respondent's inadmissibility for serious criminality was no longer "with respect to a crime that was punished".

[48] The Respondent also points to *Cartwright v Canada Minister of Citizenship and Immigration)*, 2003 FCT 792 at paragraph 65 (*Cartwright*), which defined "a crime that was punished" as "pronounc[ing] a sentence relative to the crime for which a conviction has been entered", and which was recently cited approvingly by this Court in *Bouali v Canada (Citizenship and Immigration)*, 2019 FC 152 at paragraph 35. With the Respondent's conviction set aside, any sentence in connection therewith is a nullity.

[49] The Respondent claims, contrary to the Minister, that he never suggested or argued that the ONCA's overturning of his conviction rendered it void *ab initio*. It is because the ONCA order did not immediately invalidate the removal order that the Respondent applied to the IAD for an extension of time, following the procedure and logic of *Nabiloo*.

[50] Further, the Respondent claims that the Minister is wrong to rely on *Almrei*, since it concerns the refusal of a permanent residence application on grounds of inadmissibility, not an IAD appeal. The core issue of the IAD's jurisdiction over a removal order for serious criminal inadmissibility is absent from *Almrei*.

[51] The Respondent argues that *Nabiloo*, not *Almrei*, is on point. *Nabiloo* holds that the IAD may hear an application for an extension of time where an appeal of a criminal conviction has resulted in a decreased sentence. This same logic holds where the conviction has been set aside. The ID too followed *Nabiloo* in issuing the removal order, since *Nabiloo* meant that the Respondent would not suffer prejudice by proceeding since he could apply to the IAD for an extension of time should his criminal appeal succeed.

[52] The Respondent states the Minister originally agreed with the reasoning in *Nabiloo*, and therefore likely only originally opposed the application for an extension of time due to a misapprehension about the legal impact of the ONCA order. This misapprehension is the reason the Respondent only cited *Singer* and *Grenon* against the Minister. The Respondent never argued that the ONCA order annulled or vacated the removal order. Rather the ONCA order gave the IAD jurisdiction to consider the Respondent's removal order appeal.

[53] The Respondent maintains that the Applicant has not cited any case, save the outlier of *Rebelo*, which suggests that the IAD would lack jurisdiction in these circumstances.

[54] The Respondent claims that the fact that the IAD can conduct a *de novo* appeal of the removal order distinguishes his case from *Almrei*, *Tapambwa*, and *Subramaniam*. The applicants in *Tapambwa* and *Subramanian* had no statutory right of appeal to the IAD. *Johnson*, *Pascale*, and *Strungmann* too are cases where the applicant lacked a *de novo* appeal mechanism. In *Smith*, the IAD found that it had no jurisdiction to reopen an appeal, but this is different from granting an extension of time. *Chen* concerned a judicial review of a deportation order where the ONCA dismissed the applicant's criminal appeal. Further, the claim that only the Federal Court can overturn inadmissibility findings is plainly wrong in light of Division 7 of the *IRPA*.

[55] The IAD was right, according to the Respondent, to stress that it must assess the legal and factual validity of a removal order *at the time of the appeal*. This is consistent with its *de novo* jurisdiction.

[56] The Minister's leaning on the prioritization of security in interpretation of the *IRPA* misses the point and is an immaterial consideration where a criminal conviction has been set aside. Other important objectives of the *IRPA* include family reunification and the successful integration of permanent residents in Canada. The IAD's interpretation aligns with these objectives.

[57] The Respondent submitted several further authorities which he claims endorse the IAD's approach in this case: *Kalicharan v Canada (Minister of Manpower and Immigration)*, [1976] 2 FC 123; *Chammam v Canada (MPSEP)*, 2015 CanLII 92800 (CA IRB); *Tshibola*; *Nabiloo* at paras 19-20. The IAD's approach is in keeping with its past practice, the guidance of this Court, and its statutory authority under sections 64 and 67 of the *IRPA*.

C. *Analysis*

(1) The IAD's Jurisdiction

[58] The parties place emphasis on different aspects of the law in support of their positions. A central tension that appears to me is the focus by the Applicant Minister on when a person found to be inadmissible has a right of appeal to the IAD, contrasted with the Respondent's highlighting of the *de novo* nature of IAD appeals, which would allow such proceedings to fix decisions where a rational basis no longer exists. Between these two approaches, the Minister's is more consistent with the *IRPA* and the jurisprudence from this Court.

[59] The focus on the *de novo* nature of appeals to the IAD is mistaken because it presupposes jurisdiction to hear appeals. The question of jurisdiction is logically prior to its exercise.

[60] According to subsection 64(1) of the *IRPA*, no appeal to the IAD of a removal order exists where inadmissibility was due to serious criminality. Subsection 64(2) further states that "serious criminality must be with respect to a crime that was punished in Canada by a term of at least six months or that is described in paragraph 36(1)(b) or (c)".

[61] Looking closely at the text of subsection 64(1), there is no right of appeal where a permanent resident "has been found to be inadmissible" [my emphasis]. As the Federal Court of Appeal found in *Tapambwa*, this "refers to the fact that once determined to be inadmissible, an applicant remains inadmissible": para 46. Inadmissibility is not synonymous with serious criminality; it is a status and a determination, the result of an inquiry in light of the relevant facts and law made by, in this case, the ID. In *Kalicharan*, a deportation order was made February 5, 1976, and Justice Mahoney of this Court stated that, "[t]he applicant was, on February 5, 1976, a person described in subparagraph 18(1)(e)(ii) and, thus, subject to deportation" [emphasis added]: *Kalicharan* at page 125.

[62] As Justice Heneghan of this Court aptly stated in *Cartwright* at paragraph 67, "[t]o 'punish' a person for a crime is to impose judicial sanction; it is to pronounce a sentence relative to the crime for which a conviction has been entered" (cited approvingly in *Martin v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 347 at para 5). Further, she stated that, "section 64(2) must be interpreted as referring to the term of imprisonment for which an offender was sentenced, that is the punishment imposed, rather than the actual amount of time served" (*Cartwright* at para 71). In *Cartwright*, this meant that the applicant's release on parole after 10 months did not change the fact that he had been sentenced to 4 years, and that it was the 4 years that were relevant under s. 64(2). Here too, what is relevant is the sentence imposed for the conviction at the time that the determination of inadmissibility was made by the ID.

[63] As the Respondent rightly points out, the IAD holds *de novo* hearings and must analyze questions of fact and law as they stand at the time of the IAD hearing. However, first, it must

have the statutory authority to hear an appeal. The Respondent's emphasis on the fact that his conviction and concomitant punishment no longer exist after they were overturned by the ONCA ignores the question of the jurisdiction to hear appeals. Of course, were the Respondent to have a right of appeal to the IAD, it would be of paramount cogency and relevance that he no longer had a conviction and sentence. But, he does not have such a right. I find the Minister's analogy to certified questions is on point. Like the Federal Court of Appeal under the *IRPA*, the IAD holds *de novo* hearings only after it has been appealed via a statutorily established mechanism.

[64] The Respondent argues that *Kalicharan* supports his view.

[65] I disagree. In *Kalicharan*, this Court granted the writ of prohibition against the applicant's deportation order when the ONCA overturned his criminal conviction. *Kalicharan* "seems to stand for the proposition that a deportation order or other instrument seeking to remove the Applicant from Canada could not be enforced – nothing more": *Almrei* at para 38; *Smith* at para 29.

[66] For several reasons, I am not persuaded that Madam Justice Snider's *obiter* comments in *Nabiloo* represent the current state of the law. First, because, as discussed above, they are contrary to a plain reading of subsections 64(1) and (2) of the *IRPA* which prohibit an appeal to the IAD where the ID has made a finding of inadmissibility on grounds of serious criminality. Second, because it was also Madam Justice Snider who decided *Almrei*, which contradicts *Nabiloo*. Third, the IAD does not appear to have a settled interpretation of *Nabiloo*—for example, the IAD agreed with Justice Snider's *obiter* comments in *Xu v Canada (Public Safety*

and Emergency Preparedness), 2018 CanLII 142843 (CA IRB) but not in *Kidd v Canada (Public Safety and Emergency Preparedness)*, 2018 CanLII 61870 (CA IRB). Fourth, this Court does not appear to have ever cited *Nabiloo* approvingly for the proposition set out in Justice Snider's *obiter* comments at paragraph 20 of that decision. Fifth, Madam Justice Snider's *obiter* comments in *Nabiloo* only cite *Rumpler v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1485; but *Rumpler* deals with inadmissibility due to criminality, where there is a right of appeal to the IAD, and not serious criminality.

[67] What, then, is the significance of the ONCA's overturning of the Respondent's conviction? The answer lies in both *Almrei* and the older case of *Kalicharan*. The overturning is clearly a fundamental change in evidence, and it is to be dealt with as Madam Justice Snider indicated at paragraph 46 of *Almrei*:

> . . . a decision taken before a fundamental change in evidence is not a nullity or void *ab initio*. However, on a going-forward basis, any such decision could not be enforced or otherwise acted or relied on. In this case, the Officer's decision is not a nullity. What I believe, however, is that, based on decisions such as *Kalicharan*, the Minister could not rely on that particular decision to take further steps to remove the Applicant from Canada.
>
> [my emphasis]

[68] Therefore, as the Applicant Minister argues, the case law establishes that a finding of inadmissibility based on an overturned conviction with no right of appeal to the IAD is unenforceable.

[69] The Respondent argues that *Almrei*, *Tapambwa*, *Subramaniam*, *Johnson*, *Pascale*, and *Strungmann* are not on point because none of these cases involved a subject of a removal order

with a right of appeal. However, as I have stressed above, this puts the cart before the horse or, rather, the jurisdiction before its valid exercise.

[70] As far as appeals to the IAD are concerned, a person ordered removed by the ID for inadmissibility due to serious criminality is no different from a person ordered removed by an Officer — neither have a statutory right of appeal.

[71] The parties further dispute the meaning of the ONCA decision setting aside the Respondent's conviction and ordering a new trial. Following Justice Snider in *Almrei*, discussing the effects of a pardon versus an acquittal as set out by Mr. Justice MacKay in *Smith*, it is my view that, "whether dealing with an acquittal or a pardon, the effect on the immigration determination would have been no different. The issue […] is not whether the pardon had the effect of removing a criminal conviction *ab initio*; rather the question is whether, as a matter of administrative law, the decision can be quashed": *Almrei* at para 44.

[72] For these reasons, I find that the IAD was unreasonable in determining that it had the jurisdiction to hear the Respondent's appeal. Subsections 64(1) and (2) of the *IRPA* preclude appeals for inadmissibility due to serious criminality. Serious criminality is determined by the ID and, once determined, the ID is the final decision-maker unless leave is granted for judicial review of its decision. However, where a conviction on which serious criminality is based is overturned, any removal order made based on that conviction is unenforceable.

[73] Reasonableness review recognizes that deference is owed to administrative decision-makers interpreting their home statutes. Nevertheless, it is unreasonable for a decision-maker operating within a statutorily defined jurisdiction to take to itself extra-statutory powers.

(2) The Extension of Time

[74] As the Respondent admits, an extension of time to file an appeal cannot be granted where there is no right of appeal. Therefore, the IAD was unreasonable in granting such an extension to the Respondent.

VI. **Conclusion**

[75] I am allowing this application for the reasons set out above.

[76] The IAD unreasonably interpreted the *IRPA* as giving it a power to hear appeals that were explicitly proscribed.

[77] The IAD's decision quashing the removal order is set aside.

JUDGMENT IN IMM-3825-22

THIS COURT'S JUDGMENT is that:

1. This application is allowed.

2. The IAD's decision quashing the removal order is set aside.

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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