Federal Court  Cour fédérale

Date: 20240110

Docket: IMM-8413-21

Citation: 2024 FC 43

Edmonton, Alberta, January 10, 2024

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

NAVINDER SINGH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Immigration Appeal Division [IAD] of the Immigration and Refugee Board [IRB] found that Mr. Singh did not have a right to appeal his removal order because, as a result of that order, his permanent resident visa was invalidated. I am allowing Mr. Singh's application for judicial review of this decision, because the IAD's decision is contrary to the logic of the legislation and to this Court's case law.

I. Background

[2] Mr. Singh is a foreign national who, after spending some time in Canada as a temporary foreign worker, obtained a permanent resident visa valid from February 28, 2018 to October 15, 2018. On March 1, 2018, he presented himself at a port of entry and asked to be landed. However, he was referred to secondary examination, because child pornography was found on his cell phone. He was eventually convicted and, on March 23, 2021, he was sentenced to six months less a day in jail and three years' probation.

[3] As a result of his conviction, he was referred to the Immigration Division [ID] of the IRB. The ID issued a removal order against Mr. Singh, because he was inadmissible for serious criminality, pursuant to section 36(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act].

[4] Mr. Singh sought to appeal the removal order to the IAD. The IAD, however, found that Mr. Singh did not have a right of appeal. The IAD based its decision on subsection 63(2) of the Act, which reads as follows:

63 . . .	**63** […]
(2) A foreign national who holds a permanent resident visa may appeal to the Immigration Appeal Division against a decision to make a removal order against them made under subsection 44(2) or made at an admissibility hearing.	**(2)** Le titulaire d'un visa de résident permanent peut interjeter appel de la mesure de renvoi prise en vertu du paragraphe 44(2) ou prise à l'enquête.

[5] The IAD's analysis begins with the following paragraph:

> When he filed his Notice of Appeal to the IAD, the Appellant's permanent resident visa was expired so he is not a person who holds a permanent resident visa and the IAD does not have jurisdiction to hear his appeal. Although there may be some circumstances where an expired visa does not prevent the IAD from hearing an appeal under subsection 63(2), this is not such a case.

[6] To find that this was not a case in which a right of appeal would persist despite an examination that lasts beyond the visa's expiry date, the IAD reviewed the relevant jurisprudence, which it summarized as follows:

> The more nuanced but also relevant feature in the jurisprudence is a distinction between these two situations: 1) where the basis for the visa is invalidated as a result of a deferred examination, leaving no appeal right, and 2) where the visa is not invalidated by a deferred examination and an appeal right is retained.

[7] The IAD then reasoned as follows:

> This is the critical finding on which this appeal turns: the criminal conviction against the Appellant was based on circumstances that existed at the time the Appellant presented himself for examination at the port of entry. Even though the police investigation and conviction happened during a deferred examination after presenting a valid visa, the foundation for the conviction and resulting inadmissibility existed when the Appellant asked to be landed. The effect of the investigation, conviction, and inadmissibility for serious criminality, is to invalidate the visa. The basis for issuing the visa was undermined by the subsequent conviction and that basis cannot be fairly characterized as having no effect on the issuance of the visa.

[8] Mr. Singh now seeks judicial review of the IAD's decision that he does not have a right of appeal.

II. Analysis

[9] I am allowing Mr. Singh's application, because the IAD's finding that Mr. Singh's conviction retroactively invalidated his visa is unreasonable.

[10] I wish to emphasize what is not in dispute in this application. Mr. Singh does not challenge his conviction. He recognizes that he committed a serious offence. He does not challenge the fact that his conviction renders him inadmissible to Canada pursuant to section 36 of the Act. The real stake, as I understand it, is that he wishes to ask the IAD to exercise its power, provided by section 68 of the Act, to stay a removal order based on humanitarian and compassionate considerations. I express no opinion as to whether the IAD should do so.

[11] In my view, the IAD's overall logic is reasonable and consistent with the case law. As the IAD stated, the starting point is to ask whether the visa has expired when the exclusion report is filed or the notice of appeal is filed. If the visa has already expired, then one inquires into whether there are any special circumstances that warrant preserving the right of appeal in spite of the lapse of time. See *Ismail v Canada (Citizenship and Immigration)*, 2015 FC 338 at paragraph 18, [2015] 4 FCR 426 [*Ismail*]; *Pepa v Canada (Citizenship and Immigration)*, 2023 FCA 102 at paragraph 18 [*Pepa*].

[12] The second step of the IAD's reasoning is also reasonable and consistent with the case law. In the passage quoted above, the IAD noted that the issue is whether the information uncovered by the examination affects the validity of the visa. This is exactly what Justice Yves

de Montigny, then a member of this Court, wrote in *Ismail* at paragraph 19. In that case, for example, it was discovered that the applicant had provided false results of an English language test in support of his visa application.

[13] The third step, however, is problematic. The IAD concluded that the validity of the visa was affected because the facts leading to Mr. Singh's conviction took place before he sought to enter Canada. The IAD reasoned that the validity of the visa was thereby affected.

[14] In my view, this reasoning is illogical and, therefore, unreasonable. One must keep in mind that the removal order against Mr. Singh is based on section 36(1)(a) of the Act, regarding criminal offences committed in Canada. Under that provision, inadmissibility only arises upon a conviction. It is an exception to the general rule found in section 33, that reasonable grounds to believe that a fact occurred are a sufficient basis for inadmissibility. Given this specificity, it cannot be said that the basis for inadmissibility existed before Mr. Singh entered Canada.

[15] The IAD also overlooks the fact that cases from this Court have suggested that a subsequent criminal conviction is a circumstance that does not affect the validity of a visa. In *Zhang v Canada (Minister of Citizenship and Immigration)*, 2007 FC 593 at paragraph 13, [2008] 1 FCR 716, Justice de Montigny wrote:

> Turning to subsection 63(2), Parliament intended to give foreign nationals with legitimate permanent resident visas the chance to appeal removal orders that would have denied them entry despite having the visas. A removal order based on criminality is one example.

[16] In *Ismail*, at paragraph 19, he wrote:

> I agree, therefore, with the IAD that foreign nationals who are found to be inadmissible at the port of entry or at a deferred examination will have a right of appeal to that tribunal only when their inadmissibility does not relate to the absence of a permanent resident visa. Such will be the case where there has been a change in circumstances since the visa was issued, for example, as a result of a criminal conviction or of a new medical condition.

[17] While the IAD considered these cases, it failed to acknowledge that they addressed the precise circumstance at issue, a criminal conviction. Instead, it relied on cases in which the facts uncovered by the examination more directly affected the validity of the visa and a criminal conviction was not necessary. *Pepa*, for example, dealt with an applicant who failed to disclose her recent marriage, which undercut the validity of her visa obtained as a dependent of her father.

[18] I am also concerned that the IAD's interpretation leaves little scope for the application of subsection 63(2). Under the IAD's logic, it is difficult to see what kind of removal order resulting from an examination would not retroactively affect the validity of a visa. If a removal order is made after the conclusion of the examination, i.e., after an applicant is landed, the applicant would already be a permanent resident and their right of appeal would flow from subsection 63(3), not 63(2). The latter would therefore have virtually no role to play.

[19] At the hearing, the Minister argued that the IAD's decision could be sustained on the sole basis that Mr. Singh's visa was expired when he sought to appeal his removal order. In my view, however, the IAD reasonably considered that this was only the first step of the analysis and that it also had to consider whether the circumstances warranted preserving the right of appeal in spite of the passage of time. I do not read *Pepa* as setting these principles aside.

III. Disposition

[20] For these reasons, I will grant Mr. Singh's application for judicial review, set aside the IAD's decision and remit the matter to a different member of the IAD for redetermination.

JUDGMENT in IMM-8413-21

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted.
2. The decision of the Immigration Appeal Division dated November 10, 2021 is set aside.
3. The matter is remitted to a different member of the Immigration Appeal Division for reconsideration.
4. No question is certified.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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