Federal Court Cour fédérale

Date: 20150317

Docket: IMM-41-14

Citation: 2015 FC 338

Ottawa, Ontario, March 17, 2015

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

ELHAM FATHY ELSAYED ISMAIL
TAMER ABDELMAKSOUD ALY MAHMOUD
RODINA TAMER ABDEL-MAKSOUD ALY MAHMOUD

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of the November 29, 2013 decision of the Immigration Appeal Division of the Immigration and Refugee Board of Canada (the IAD) dismissing the Applicants' appeal for lack of jurisdiction. The IAD found that the Applicants had not shown, on the basis of the information provided, that they had a right of appeal in the circumstances.

[2] For the reasons set out below, this application for judicial review ought to be dismissed.

I. Facts

[3] The principal Applicant, Elham Fathy Elsayed Ismail, is a citizen of Egypt who applied to come to Canada under the skilled workers program. She submitted a language testing certificate (the IELTS) and was granted a permanent resident visa, along with her dependents, the other two Applicants, her husband Tamer Abdelmaksoud Aly Mahmoud and their daughter Rodina Tamer Abdel-Maksoud Aly Mahmoud.

[4] The Applicants arrived at the Lester B. Pearson Airport on October 30, 2011. They presented their permanent resident visas and were examined by an immigration officer. When the principal Applicant was not able to answer simple questions in English, the officer checked the computer database (FOSS) and noticed that a visa officer in Cairo had determined that the IELTS results submitted were fraudulent. The visas were nonetheless issued. It is thought that this was due to the civil unrest in Egypt at the time, which resulted in an interruption in processing.

[5] The Applicants were not landed at the airport, but were permitted to enter Canada under section 23 of the *Immigration and Refugee Protection Act*, SC 2001, c 27, (the *IRPA*) for the purpose of attending an examination at a later date. Prior to the examination, on November 23, 2011, a visa officer revoked the Applicants' permanent resident visas. The Applicants then attended an examination on December 2, 2011 and exclusion orders were issued against all three,

given that they did not have valid visas. The Applicants sought to appeal the exclusion orders to the IAD, pursuant to subsection 63(2) of the *IRPA*.

[6] An IAD hearing was scheduled for July 17, 2013 and turned on the issue of whether the IAD had jurisdiction in cases of this nature, where the appellants are no longer in possession of a valid permanent resident visa before their examination. The hearing was adjourned and both parties provided written submissions on this sole issue. The decision was subsequently made on November 29, 2013.

II. The impugned decision

[7] The determinative issue in the appeal was whether the IAD had jurisdiction to hear the appeal, given that the Applicants' visas were cancelled on November 23, 2011, before the examination, resulting in exclusion orders issued on December 2, 2011. After reviewing the parties' positions, the IAD Member stated that the critical factor was not whether the Applicants were able to arrive at a Canadian port-of-entry with their visas, but rather, whether at the time of the section 44 report they were in possession of valid permanent resident visas.

[8] The IAD acknowledged that once a visa is issued, it is presumed to remain valid. Relying on *Canada (MCI) v Hundal*, [1995] 3 FC 32, [1995] FCJ No 918 [*Hundal*], the IAD nevertheless noted some exceptions to that presumption, including when a visa is revoked or cancelled by a visa officer. The IAD Member agreed with the reasoning in *Zhang v Canada (MCI)*, 2007 FC 593 [*Zhang*], which states that permitting a foreign national to appeal under subsection 63(2) when they are inadmissible because they do not have a valid visa would directly contradict the

inadmissibility finding. The IAD Member stated that the examination at the port-of-entry does not constitute a cut-off point after which the validity of the permanent resident visa cannot be assessed to see if an exception applies. Revocation of the visa by the visa officer before an admissibility hearing remains possible, such as in this case.

[9] The IAD came to the conclusion that, once there has been a finding in a report under section 44 of the *IRPA* that the permanent resident visa is invalid, that foreign national does not have a right of appeal to the IAD under subsection 63(2). The proper recourse for the Applicants in this case would have been an application for judicial review at this Court. The appeal was therefore dismissed for lack of jurisdiction.

III. <u>Issue</u>

[10] The sole issue to be determined in this application for judicial review is whether the IAD committed a reviewable error in its interpretation of subsection 63(2) of the *IRPA*. In other words, did the IAD err in finding that its jurisdiction to hear an appeal must be determined at the time of the section 44 report, and not at the moment the foreign national arrives in Canada?

IV. <u>Analysis</u>

[11] Section 18 of the *IRPA* provides that every person seeking to enter Canada must appear for an examination to determine whether they have a right to enter or may be given authorization to enter. The examination process lasts from the time the person arrives in Canada until "a determination is made that the person has a right to enter Canada, or is authorized to enter

Canada as a temporary resident or permanent resident, the person is authorized to leave the port of entry at which the examination takes place and the person leaves the port of entry”: *Immigration and Refugee Protection Regulations*, SOR/2002-227, s 37(a).

[12] Paragraph 20(1)(a) of the *IRPA* provides that a foreign national seeking to enter Canada as a permanent resident must establish “that they hold the visa or other document required under the regulations”. Section 23 of the *IRPA* permits an officer to allow a person to enter Canada for the purpose of attending a further examination or admissibility hearing at a later date.

[13] Pursuant to subsection 63(2) of the *IRPA*, a foreign national in possession of a permanent resident visa may appeal to the IAD against a decision at an examination or admissibility hearing to make a removal order against them:

Right to appeal — visa and removal order 63(2) A foreign national who holds a permanent resident visa may appeal to the Immigration Appeal Division against a decision at an examination or admissibility hearing to make a removal order against them.	Droit d’appel : mesure de renvoi 63(2) Le titulaire d’un visa de résident permanent peut interjeter appel de la mesure de renvoi prise au contrôle ou à l’enquête.

[14] There is no doubt that a visa can be revoked at any time after having been issued. This is indeed one of the exceptions to the presumption that a visa once issued is presumed to be valid. As Justice Rothstein stated in *Hundal*, above, at paragraph 19:

> A fourth exception to a visa remaining valid will be where it is revoked by a visa officer. While the *Immigration Act* makes no express provisions for revocation of a visa, I think the authority to

> revoke arises by necessary implication. In *Minister of Employment and Immigration v Gudino*, [1982] 2 F.C. 40 (C.A.), it was argued that once a visa is issued the visa officer became functus and could not cancel or invalidate the visa. Heald J.A. stated at page 43:
>
> > In my view, it is a necessary implication from the use of the words "valid and subsisting" that a visa can be revoked or become invalid by reason of a change in circumstance.
>
> While Heald J.A. was dealing with the phrase "valid and subsisting", I think the same necessary implication flows from the word "valid" alone since "subsisting" is used in the Act to mean that the visa must not have expired. Thus, where a visa officer cancels a visa, it is no longer valid. According to Gudino, no specified manner of cancellation is prescribed by the Act (see page 45). However, such cancellation or invalidation of the visa requires some decision by the visa officer. As long as a decision to cancel has been made, the visa is no longer valid.

[15] The parties agree that the decision should be reviewed on the correctness standard, given that the issue is a pure question of law. I am inclined, however, to give more deference to the IAD in light of recent jurisprudence from the Supreme Court and the Federal Court of Appeal. In *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, the majority held that decisions of administrative tribunals interpreting their home statute should be subject to deference and be reviewed on a standard of reasonableness. See also: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36; *Atkinson v C Canada (Attorney General)*, 2014 FCA 187; *Fort McKay First Nation v Orr*, 2012 FCA 269. Be that as it may, I find that the decision of the IAD is both reasonable and correct.

[16] There is no dispute between the parties that, had the permanent resident visa been revoked prior to the Applicants' arrival in Canada, the IAD would clearly not have had jurisdiction to hear their appeal pursuant to this Court's decision in *Zhang*. The only issue to be

decided here is whether it makes any difference that at the time the Applicants presented themselves to the port-of-entry, they were in possession of valid visas. Counsel for the Applicants, relying on another decision of the IAD (*Khan v Canada (Public Safety and Emergency Preparedness)*, 2009 CanLII 28046 (CA IRB)), argues that once a person presents herself at the port-of-entry with a valid visa, anything which occurs following that time is irrelevant with respect to her right to appeal. Counsel submitted that if it were otherwise, immigration officers and visa officers could "run a back door admissions policy" denying an individual a right of appeal to the IAD as a result of a "retroactive revocation" by a visa officer, after that person has arrived in Canada. With all due respect, this argument is without merit.

[17] First of all, I fail to see why the examination at the port-of-entry would constitute a cut-off point after which the validity of the permanent visa cannot be assessed to ascertain whether one of the four exceptions set out in *Hundal* might apply. The examination process is not completed until a determination is made that a person has a right or is entitled to enter Canada as a temporary or permanent resident, and the visa can be revoked until that determination is made. The fact that a person has entered Canada and triggered the examination process has no bearing on the power to revoke the visa.

[18] It is clear from a textual, contextual and purposive analysis of both section 63(2) and the *IRPA* as a whole that a right of appeal is granted only to a person who "holds" a valid permanent resident visa at the time the exclusion report is issued. Parliament could have drafted that section differently, to include for example, persons who hold "or have held" a valid permanent resident visa. Parliament chose otherwise, and courts must enforce clear legislative intention. As stated by

this Court in *Zhang*, a finding that the appeal right in subsection 63(2) of the *IRPA* would apply to an invalid or revoked visa would lead to the absurd consequence of granting persons with no right to be in Canada the right to appeal a removal order denying their ability to be in Canada. In the absence of clear words to the contrary, Parliament cannot be taken to have had that intention.

[19] 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. In those circumstances, an exclusion order will be appealable before the IAD, and humanitarian and compassionate factors may then be taken into consideration. When the inadmissibility relates to the absence of a permanent resident visa (whether a permanent resident visa has never been issued or has been revoked), however, the only recourse will be an application for judicial review in this Court.

[20] It goes without saying that visa and immigration officers are presumed to act in good faith. In the unlikely event that a visa was revoked to thwart Parliament's intention and to preclude the possibility of a legitimate appeal pursuant to subsection 63(2), this Court could be called upon to intervene on judicial review and could quash the decision to revoke a visa for improper or impermissible motives.

[21] Counsel for the Applicants asked the Court to certify the following question: "Does section 63(2) apply at the time the foreign national enters Canada and before examination is completed?" The test to certify a question has been set out by the Federal Court of Appeal in *Liyanagamage v Canada (Secretary of State)* (1994), 176 NR 4 (at para 4), where it was held that a certified question must be one which, in the Court's opinion, contemplates issues of broad significance and general application, transcends the interests of the immediate parties to the litigation, and is determinative of the appeal. I believe the proposed question meets that test. I would only rephrase it slightly to read thus:

> For the purposes of determining its jurisdiction to hear an appeal pursuant to subsection 63(2) of the *IRPA*, shall the validity of the permanent resident visa be assessed by the IAD at the time of arrival in Canada or at the time the exclusion order is made?

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

The following question is certified:

> For the purposes of determining its jurisdiction to hear an appeal pursuant to subsection 63(2) of the *IRPA*, shall the validity of the permanent resident visa be assessed by the IAD at the time of arrival in Canada or at the time the exclusion order is made?

"Yves de Montigny"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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