Date: 20050502

Docket: IMM-8494-03

Citation: 2005 FC 596

OTTAWA, ONTARIO, MAY 2, 2005

PRESENT: THE HONOURABLE MR. JUSTICE MARTINEAU

BETWEEN:

DIANA THEVASAGAYAMPILLAI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] This is an application for judicial review under section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27 (the *IRPA*) of a decision of the Immigration Appeal Division (the Appeal Division) of the Immigration and Refugee Board (IRB) dated October 9, 2003, wherein the Appeal Division determined that the appeal filed by the applicant should be dismissed on a lack of jurisdiction.

[2] The applicant sponsored her husband's application for landing in Canada. The visa officer refused the application because there were grounds to believe that her husband was a member of an organisation engaged or that will be engaged in terrorism. Pursuant to paragraphs 34(1)(*c*) and (*f*) of the *IRPA* a foreign national is inadmissible on security grounds for engaging in terrorism or being a member of an organisation where there are reasonable grounds to believe he is engaged, has engaged or will engage in acts of terrorism.

[3] The applicant has appealed the refusal of the sponsored application pursuant to subsection 63(1) of the *IRPA*. The appeal was dismissed on a lack of jurisdiction. In effect, subsection 64(1) of the *IRPA* clearly establishes that no appeal may be made to the Appeal Division by a foreign national or their sponsor if the foreign national has been found to be inadmissible on grounds of security (section 34 of the *IRPA*).

[4] Subsection 64(1) reads 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.	64. (1) L'appel ne peut être interjeté par le résident permanent ou l'étranger qui est interdit de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux, grande criminalité ou criminalité organisée, ni par dans le cas de l'étranger, son répondant.

[5] The scope of the Appeal Division's jurisdiction in such a case was recently examined by this Court in *Kang v. Minister of Citizenship and Immigration*, 2005 F.C. 297; [2005] F.C.J. No. 367 (F.C.) (QL). At paragraphs 41 and 42, MacTavish J. noted:

> From a plain reading of the statute, I am satisfied that the jurisdictional question for the IAD is not whether the foreign national (or his or her sponsor) is in fact inadmissible, but rather whether the individual in question has been found to be inadmissible on one of the enumerated bases. Once that question is answered in the affirmative, the status is clear: the IAD is without jurisdiction to deal further with the matter.
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> If I were to accept Ms. Kang's submission that it was incumbent on the IAD to determine whether or not Mr. Kang was in fact inadmissible, in order to decide whether it had jurisdiction to hear the appeal, this interpretation would have the effect of rendering section 64 of IRPA largely meaningless. Requiring that the Board revisit the question of admissibility would essentially confer a right of appeal on the very individuals who have been denied such a right by virtue of the section.

[6] Despite the noble efforts made by the applicant's counsel to convince me that the approach taken in *Kang, supra*, is inconsistent with the decision rendered in 1980 by the Federal Court of Appeal in *Minister of Employment and Immigration v. Brendan Leeson Selby*, [1981] 1 F.C. 273 (F.C.A.), or is otherwise wrong in law, I find both reproaches unfounded.

[7] As was implicitly found in *Kang*, the decision in *Selby, supra*, is not determinative of the issue that this Court has to resolve in the present case (see *Kang*, *supra*, at para. 32 to 36). Indeed, in *Selby, supra*, subsection 72(1) of the former *Immigration Act*, 1976 S. C. 1976-77, c. 52 (the old Act) gave a right of appeal to a "permanent resident." While subsection 24(2) of the old Act was concerned with loss of status, it had not been incorporated by reference into the definition of "permanent resident" in subsection 2(1) of the old Act. Only subsection 24(1) of

the old Act had been incorporated by reference into the definition. Thurlow C.J. stated at paragraph 5:

> The question posed by subsection 24(1) is whether the "permanent resident" left or remained outside Canada with the intention of abandoning Canada as his place of permanent residence. That is a question of fact to be assessed in the first instance by an immigration officer faced with the question and to be resolved at a second stage by an adjudicator. But the statute, in subsection 72(1), gives to a "permanent resident" against whom a removal order has been made, a right to appeal to the Immigration Appeal Board. A person who has been granted landing and who in fact has not left or remained outside Canada with the intention of abandoning Canada as his place of permanent residence is thus entitled to appeal, notwithstanding a finding by an adjudicator that he had left or remained outside Canada with the intention of abandoning Canada as his place of permanent residence. Any other interpretation of subsections 24(1) and 72(1) would have the effect of making the adjudicator's finding on the point final and unappealable even though subsection 59(1) gives the Immigration Appeal Board "sole and exclusive jurisdiction to hear and determine all questions of law and fact; including questions of jurisdiction, that may arise in relation to the making of a removal order" and even though under subsection 76(1) the Board, on an appeal under section 72, is authorized to quash a removal order. I do not think an interpretation of subsections 24(1) and 72(1) that would negate such a person's right of appeal should be adopted. In my opinion, on an appeal by a person against whom a removal order has been made on the basis of a conclusion by the adjudicator that the person is no longer a permanent resident because he left or remained outside Canada with the intention of abandoning Canada as his place of permanent residence, the Immigration Appeal Board has jurisdiction to hear evidence and determine the fact upon which the right to appeal depends.
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> (my underlinings)

[8] Addy J. who also provided reasons in *Selby, supra*, remarked at paragraphs 21, 22 and 23:

> Subsections (1) and (2) of section 72 provide for cases where a removal order has been made and subsection (3), where a deportation order has been made. Removal order, by section 2(1) includes an exclusion order as well as a deportation order. Subsection (1) of section 72 provides for an appeal by a permanent resident or by a person lawfully in possession of a valid returning permit. A permanent resident is entitled to be issued a valid returning permit before leaving. However, a permanent resident with respect to whom security or criminal intelligence reports have been made does not possess a right of appeal under this subsection. No such impediment seems to be imposed in the case of a person with a valid resident returning permit, presumably because the permit would most likely be cancelled should the intelligence activities appear to warrant it.

> Subsection (2) provides for appeals available to a Convention refugee or to a person in possession of a valid visa seeking admission and against whom a report has been made by an immigration officer who feels that he is not legally admissible. Finally, subsection (3) applies to persons falling in the same categories as those mentioned in subsection (2) but who are the object of a deportation order rather than an exclusion order and in respect of whom a certificate of the Minister and the Solicitor General has been filed based on security or criminal intelligence reports or who has been determined by an adjudicator to be in an inadmissible class as a spy, or subversive agent or a person likely to engage in acts of violence, etc.
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> Specific and different grounds of appeal are provided for in relation to the three main categories of appellants mentioned in each of these subsections of section 72. It must necessarily follow that the class or category under which a particular appellant falls must be determined by the Immigration Appeal Board before it can decide the extent and nature of its jurisdiction in any particular case. For an appeal to be considered under section 72(1), the Board must satisfy itself that the appellant falls within one of the two categories mentioned therein, otherwise his appeal could not be considered under that provision. The question in such a case of determining whether a person is or is not a permanent resident is therefore fundamental to the exercise of the Board's jurisdiction.
>
> (my underlinings)

[9] Sections 63 to 67 of the *IRPA* which regulate appeals to the Appeal Division now use a different language and are not equivalent to sections 59 and 72 of the old Act. Moreover, it is clear that subsection 64(1) of the *IRPA*, which has to be read in conjunction with subsection 64(2) of the *IRPA* in cases of serious criminality (section 36 of the *IRPA*), does not invite the Appeal Division to make a determination on the status of the individual. The question of status is already addressed at section 63 of the *IRPA*. Subsection 64(1) of the *IRPA* is strictly concerned with the issue of determining whether the individual "has been found to be inadmissible" on one of the enumerated grounds. Therefore, in order to exercise its jurisdiction, it is not necessary that the Appeal Division look into the facts which have led to the finding that the individual in question has been found inadmissible on one of the enumerated grounds.

[10] In the case at bar, the Appeal Division had no jurisdiction to reconsider the inadmissibility finding made by the visa officer. In my opinion, the clear wording of subsection 64(1), together with the object of the *IRPA* and its scheme, preclude the Appeal Division from reconsidering the finding of inadmissibility made by an authorized decision-maker, in this case, a visa officer. If Parliament had intended in the first place to grant a right of appeal *de novo* with respect to the existence of one of the enumerated grounds mentioned in subsection 64(1) of the *IRPA*, clearer language would have been used. This is not the case here.

[11] I have also considered the other arguments made by the applicant's counsel, as well as his proposed question for certification. They do not constitute valid reasons for deviating from *Kang, supra*, and they do not, in my opinion, raise a question of general importance. In both cases, I accept the respondent's submissions.

ORDER

THIS COURT ORDERS that the present application for judicial review be dismissed. No question of general importance shall be certified.

"Luc Martineau"
Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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STYLE OF CAUSE: Diana Thevasagayampillai v. M.C.I.

PLACE OF HEARING: Toronto, Ontario

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REASONS FOR ORDER AND ORDER: **THE HONOURABLE MR. JUSTICE MARTINEAU**

DATED: May 2, 2005

APPEARANCES:

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