Federal Court  Cour fédérale

Date: 20151030

Docket: IMM-3164-14

Citation: 2015 FC 1233

Ottawa, Ontario, October 30, 2015

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

PUVANESWARY SIVAGNANASUNDRAM

Applicant

And

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act], the applicant applied for judicial review of the decision of the Immigration Appeal Division of the Immigration and Refugee Board [the Board] dated April 3, 2014, wherein the Board dismissed the applicant's appeal for lack of jurisdiction because the applicant has not shown that she has a right of appeal.

[2] The applicant seeks an order setting aside the negative decision and returning the matter to a different member of the Board for redetermination.

I. Background

[3] The applicant submitted two sponsored applications for permanent residence of her husband, Muthiah Sivagnanasundaram. The first application was filed in 2000 and refused in 2004 pursuant to section 39 of the Act for financial inadmissibility. This refusal was overturned by the Board and the application was directed to the visa post for continued processing.

[4] In 2006, the application was refused on the grounds that the applicant's husband was inadmissible pursuant to subsection 34(1) of the Act due to his involvement with the Liberation Tigers of Tamil Eelam [LTTE] [the 2006 decision]. In 2007, this Court dismissed the applicant's application for leave and for judicial review of this refusal.

[5] On June 17, 2009, the applicant filed another application to sponsor her husband and this application was refused by the visa post in Colombo on May 23, 2011 [the 2011 decision]. The applicant's husband was found to be inadmissible under paragraph 36(1)(c) of the Act because he used a forged Sir Lankan passport to leave Sri Lanka. This would constitute an indictable offence in Canada punishable by a maximum term of imprisonment of at least ten years. This decision made no mention of subsection 34(1).

[6] On July 5, 2011, the applicant appealed the refusal to the Board.

[7] On January 8, 2014, the Minister filed an application arguing that the Board had no jurisdiction to hear the applicant's appeal pursuant to section 64 of the Act because the applicant's husband was found in the 2006 decision to be inadmissible pursuant to subsection 34(1) of the Act.

II. Decision Under Review

[8] First, the Board cited subsections 34(1) and (2) of the Act on security, paragraph 36(1)(c) of the Act on serious criminality and subsection 64(1) of the Act on no appeal for inadmissibility. It noted two issues at the appeal:

> 1. Is the Federal Court decision dated November 19, 2007, dismissing the application for leave from the decision of the visa officer dated October 16, 2006 a determination on the merits that would preclude a subsequent visa officer from considering the Matter?
>
> 2. Does the decision of the visa officer dated October 16, 2006 finding the applicant inadmissible for being described under IRPA s.34(1) automatically attach to the applicant and preclude another visa officer from considering the issue?

[9] The Board found the inadmissibility grounds outlined in section 34 apply to the individual, not the decision. It cited that under *Nagalingam v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1410 at paragraph 15, [2012] FCJ No 1516 [*Nagalingam*], the Board's loss of jurisdiction under subsection 64(1) of the Act is in association with the individual, not the order. The Board found the applicant's arguments distinguishing the present case from *Nagalingam* were unpersuasive.

[10] The Board found the written application before it exists solely to decide the jurisdiction of the Board at this appeal and not as an avenue for revisiting arguments that should have been put before the Federal Court at the applicant's 2006 judicial review application. Also, it found although no hearings took place before this Court, the Board is still limited in jurisdiction due to section 64 of the Act. It found the applicant cannot use the appeal from the 2011 decision to insert the section 34 inadmissibility decision back into the Board's jurisdiction. Further, the Board found it did not have the jurisdiction to determine whether the officer for the 2011 decision rightly or wrongly turned his or her mind to the issue of section 36 inadmissibility by virtue of section 64 of the Act.

[11] The Board acknowledged and agreed with the Minister's submission that the inadmissibility finding under section 34 attaches itself in perpetuity to the application, with remedy of appeal at the Federal Court, not at the Board. It also noted the applicant's husband could have sought relief by virtue of an application to the Minister under subsection 34(2) of the Act.

[12] Therefore, the Board found it does not have jurisdiction over the appeal because the applicant is an individual who is barred from access to the Board by virtue of section 64 of the Act.

III. Issues

[13] The applicant raises the following issues:

1. What is the appropriate standard of review in the within matter?

2. Did the Board err in relying upon *Nagalingam* to find that the Board had no jurisdiction under the Act's subsection 64(1) to hear the applicant's appeal?

3. In the applicant's husband's subsequent application for landing, does the decision of the visa officer dated October 16, 2006 finding him inadmissible for being described under the Act's subsection 34(1) automatically attach to him and preclude another visa officer from considering the issue?

4. Is the Federal Court decision dated November 19, 2007 dismissing the application for leave from the decision of the visa officer dated October 16, 2006 a determination on the merits that would preclude a subsequent visa officer from considering the matter?

[14] The respondent raises one issue: whether the Board correctly determined that it lacked jurisdiction under subsection 64(1) of the Act to hear the applicant's appeal.

[15] I would rephrase the issues as follows:

A. What is the standard of review?

B. Did the Board correctly determine its jurisdiction of the applicant's appeal?

IV. Applicant's Written Submissions

[16] First, the applicant submits the standard of review for the question of jurisdiction is that of correctness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraphs 50 and 59, [2008] 1 SCR 190) [*Dunsmuir*].

[17] Second, the applicant submits the Board erred in relying on *Nagalingam* because the inadmissibility finding in *Nagalingam* was made by the Immigration Division, a quasi-judicial tribunal, not by a visa officer as in the present case, which was an administrative decision. The applicant argues this distinction is critical in the jurisprudence because pursuant to *Kurukkal v Canada (Minister of Citizenship and Immigration)*, 2010 FCA 230 at paragraph 3, [2010] FCJ No 1159, the same or another administrative decision maker is entitled to reconsider an administrative decision. Further, if a right of appeal does lie with the Board, then recourse to this Court would be barred by virtue of paragraph 72(2)(a) of the Act.

[18] Third, the applicant submits that the visa officer for the 2011 decision was entitled to conduct a new and fresh assessment of admissibility. Pursuant to subsection 11(1) of the Act, it is the current visa officer with carriage of the file that makes decisions on admissibility. Since the latest visa officer did not cite the applicant's husband for inadmissibility under subsection 34(1), this demonstrates that it was the officer's intention to conclude differently on the issue of subsection 34(1) inadmissibility. Further, the applicant argues the visa officer in the within matter reversed his or her own finding of admissibility (see certified tribunal record pages 94 and

95). She argues the officer sent a letter to the applicant asking her to come and collect her visa but the new information led to the refusal for inadmissibility.

[19] In *Lo v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1155, 229 FTR 145 [*Lo*], a visa officer reversed a finding made by a previous visa officer that Mr. Lo was admissible. The applicant argues this indicates the opposite would also apply where a subsequent visa officer can reverse a finding made by a previous visa officer that an applicant was inadmissible.

[20] Also, the *Immigration and Refugee Protection Regulations*, SOR/2002-227, at Regulation 14, sets out situations where determinations of admissibility are considered as conclusive findings. The situation in the present case does not fall under Regulation 14; therefore, this supports the discretion that a visa officer has in revisiting previously made administrative decisions. The applicant argues the facts in the within matter would support the decision of the latest visa officer to not uphold the earlier 2006 finding of inadmissibility. Here, the officer who made the 2011 decision had all the material in front of him or her, including the UK decision notes that the applicant was detained by the LTTE after refusing to pay a monetary demand. It argues the officer was persuaded that the applicant was not found inadmissible under subsection 34(1), but only under paragraph 36(1)(c) which would allow the applicant's access to the Board.

[21] Fourth, the applicant submits the decision on the 2007 leave application is not determinative of the merits (*MacDonald v Montreal (City)*, [1986] 1 SCR 460, 27 DLR (4th)

321). She further submits the failure of her husband to avail himself of the subsection 34(2) Ministerial relief is of no relevance as to whether the applicant had access to the Board.

V. Respondent's Written Submissions

[22] The respondent is in agreement with the applicant that the standard of review for a question of jurisdiction is the standard of correctness (*Nagalingam* at paragraph 12).

[23] The respondent submits the Board correctly determined that it had no jurisdiction to hear the applicant's appeal under subsection 64(1) of the Act. The Board correctly determined that the inadmissibility referred to is attached to the individual and not to the type of decision or decision maker (*Nagalingam* at paragraph 15).

[24] Further, the respondent submits there is no jurisprudential support that subsection 64(1) does not apply to inadmissibility determinations made by administrative decision makers because the principle of *functus officio* does not strictly apply to them.

VI. Analysis and Decision

A. *Issue 1 - What is the standard of review?*

[25] The present case raises a question of true jurisdiction (*Nagalingam* at paragraph 12). I agree with the parties' submissions that the standard of review for such a question is that of correctness (*Dunsmuir* at paragraphs 50 and 59).

B. *Issue 2 - Did the Board correctly determine its jurisdiction of the applicant's appeal?*

[26] I agree with the Board's finding on the question of jurisdiction.

[27] Subsection 64(1) of the Act indicates certain types of finding of inadmissibility extinguish a foreign national and a permanent resident's right of appeal to the Board.

[28] In *Nagalingam*, Mr. Justice Richard Boivin ruled that a finding of inadmissibility operates to preclude an appeal. After reviewing the objectives of the Act as outlined by the Supreme Court of Canada in *Medovarski v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51 at paragraph 10, [2005] 2 SCR 539, Justice Boivin concluded this finding is associated with the individual, not the order. I agree.

> 14 From the outset, the Court recalls the objectives of the Act as outlined by the Supreme Court of Canada in *Medovarski v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51 at para 10, [2005] 2 SCR 539:
>
> > [10] The objectives as expressed in the *IRPA* indicate an intent to prioritize security. This objective is given effect by preventing the entry of applicants with criminal records, by removing applicants with such records from Canada, and by emphasizing the obligation of permanent residents to behave lawfully while in Canada. This marks a change from the focus in the predecessor statute, which emphasized the successful integration of applicants more than security: .... Viewed collectively, the objectives of the *IRPA* and its provisions concerning permanent residents, communicate a strong desire to treat criminals and security threats less leniently than under the former Act.
> >
> > [Emphasis added in original]

> 15 More particularly, subsection 64(1) of the Act is not formulated as to prohibit the appeals of deportation orders pertaining to security, human or international rights violations, or serious or organized criminality - it prohibits the individual who is inadmissible on one of these grounds from requesting an appeal at the IAD. The wording is clear, unambiguous and consistent in both official languages. If Parliament had intended the lack of jurisdiction to apply to orders instead of individuals, it could easily have achieved this goal with different language. As it now stands, the prohibition under subsection 64(1) is associated with the individual, not the order:
>
> > No appeal for inadmissibility
> >
> > 64. (1) No appeal may be made to the Immigration Appeal Division by a foreign national ... 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.
> >
> > ***
> >
> > Restriction du droit d'appel
> >
> > 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 [...].
> >
> > [Emphasis added in original]

[29] Here, I agree with the respondent's view that the Board lacked jurisdiction to hear the appeal as a result of the inadmissibility finding made earlier against the applicant's husband, Muthaiah Sivagnanasundram, as that finding attaches to the individual not to the type of decision or decision maker. There is no support in statutes or case law that subsection 64(1) does not apply to inadmissibility determinations made by administrative decision makers because the principle of *functus officio* does not strictly apply to them.

[30] Further, I find the applicant's interpretation of *Lo* is flawed. In that case, a visa officer reversed a finding made by a previous visa officer that Mr. Lo was admissible. This does not mean the opposite applies where a subsequent visa officer is allowed to reverse a finding made by a previous visa officer that an applicant was inadmissible. The operation of subsection 64(1) attaches to findings of inadmissibility, not to their opposite.

[31] Therefore, I find the Board correctly determined its lack of jurisdiction to hear the applicant's appeal.

[32] For the reasons above, I would deny this application.

[33] The applicant submitted the following proposed serious question of general importance for my consideration for certification:

> Where a visa officer's decision is silent on a previous inadmissibility, does that previous admissibility still stand?

[34] I am not prepared to certify this proposed serious question of general importance as I do not consider it to raise a serious question.

JUDGMENT

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

"John A. O'Keefe"

Judge

ANNEX

Relevant Statutory Provisions

***Immigration and Refugee Protection Act*, SC 2001, c 27**

11. (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.	11. (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.
…	…
34. (1) A permanent resident or a foreign national is inadmissible on security grounds for	34. (1) Emportent interdiction de territoire pour raison de sécurité les faits suivants :
(a) engaging in an act of espionage that is against Canada or that is contrary to Canada's interests;	a) être l'auteur de tout acte d'espionnage dirigé contre le Canada ou contraire aux intérêts du Canada;
(b) engaging in or instigating the subversion by force of any government;	b) être l'instigateur ou l'auteur d'actes visant au renversement d'un gouvernement par la force;
(b.1) engaging in an act of subversion against a democratic government, institution or process as they are understood in Canada;	b.1) se livrer à la subversion contre toute institution démocratique, au sens où cette expression s'entend au Canada;
(c) engaging in terrorism;	c) se livrer au terrorisme;
(d) being a danger to the security of Canada;	d) constituer un danger pour la sécurité du Canada;

(e) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or	e) être l'auteur de tout acte de violence susceptible de mettre en danger la vie ou la sécurité d'autrui au Canada;
(f) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (a), (b), (b.1) or (c).	f) être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle est, a été ou sera l'auteur d'un acte visé aux alinéas a), b), b.1) ou c).
…	…
36. (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for	36. (1) Emportent interdiction de territoire pour grande criminalité les faits suivants :
(a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;	a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;
(b) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or	b) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;
(c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of	c) commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans.

imprisonment of at least 10 years.	
…	…
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.
…	…
72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.
(2) The following provisions govern an application under subsection (1):	(2) Les dispositions suivantes s'appliquent à la demande d'autorisation :
(a) the application may not be made until any right of appeal that may be provided by this Act is exhausted;	a) elle ne peut être présentée tant que les voies d'appel ne sont pas épuisées;

***Immigration and Refugee Protection Regulations*, SOR/2002-227**

14. For the purpose of determining whether a foreign national or permanent resident is inadmissible under paragraph 34(1)(c) of the Act, if either the following determination or decision has	14. Les décisions ci-après ont, quant aux faits, force de chose jugée pour le constat de l'interdiction de territoire d'un étranger ou d'un résident permanent au titre de l'alinéa

been rendered, the findings of fact set out in that determination or decision shall be considered as conclusive findings of fact:	34(1)c) de la Loi :
(a) a determination by the Board, based on findings that the foreign national or permanent resident has engaged in terrorism, that the foreign national or permanent resident is a person referred to in section F of Article 1 of the Refugee Convention; or	a) toute décision de la Commission, fondée sur les conclusions que l'intéressé a participé à des actes terroristes, qu'il est visé par la section F de l'article premier de la Convention sur les réfugiés;
(b) a decision by a Canadian court under the Criminal Code concerning the foreign national or permanent resident and the commission of a terrorism offence.	b) toute décision rendue en vertu du Code criminel par un tribunal canadien à l'égard de l'intéressé concernant une infraction de terrorisme.

FEDERAL COURT

SOLICITORS OF RECORD

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