Federal Court  Cour fédérale

Date: 20121203

Docket: IMM-2411-12

Citation: 2012 FC 1410

Ottawa, Ontario, December 3, 2012

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

PANCHALINGAM NAGALINGAM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] of a decision rendered by the Immigration and Refugee Board's Immigration Appeal Division (the IAD) on February 21, 2012, in which it held that it did not have jurisdiction to hear Mr. Nagalingam's appeal because the applicant has been found inadmissible on grounds of organized criminality.

Factual Background

[2] Mr. Panchalingam Nagalingam (the applicant) is a citizen of Sri Lanka and a Tamil. He arrived in Canada in August 1994. He was found to be a Convention Refugee on March 2, 1995 and became a permanent resident on March 13, 1997.

[3] Between 1999 and 2001, the applicant was convicted of assault, failure to comply with a recognizance and mischief. Subsequently, the applicant was found to be inadmissible for organized criminality under paragraph 37(1)(*a*) of the Act because of his membership to the A.K. Kannan Tamil gang. A deportation order was issued against him on May 28, 2003, by virtue of which he also lost his permanent resident status. The Federal Court dismissed his application for judicial review of the decision on inadmissibility (*Nagalingam v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1397, 134 ACWS (3d) 489).

[4] Because the applicant had been found to be a Convention refugee, the Minister issued a danger opinion under paragraph 115(2)(*b*) of the Act on October 4, 2005. The applicant was removed from Canada on December 5, 2005. On April 24, 2008, the Federal Court of Appeal allowed the judicial review of the danger opinion and it was remitted back for re-determination (*Nagalingam v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 153, [2009] 2 FCR 52). The applicant made a request to the Minister to allow him to return to Canada. The applicant was returned to Canada on February 24, 2009 on a Temporary Resident Permit. Upon his return, he was initially detained but eventually released on strict terms and conditions.

[5] The Minister initiated a reconsideration of the paragraph 115(2)(*b*) danger opinion prior to the applicant's return to the country. When another danger opinion was issued on February 23, 2011, the applicant filed two (2) applications for leave and judicial review: the first application challenged the 2011 danger opinion, and the second application sought a declaration that the 2003 removal order was spent and of no remaining legal force.

[6] Justice Russell of the Federal Court heard both applications in October 2011 and allowed the judicial review of the danger opinion on a breach in procedural fairness because the applicant was not given the opportunity to cross-examine a detective who provided evidence (*Nagalingam v Canada (Minister of Citizenship and Immigration)*, 2012 FC 176, 253 CRR (2d) 310 [*Nagalingam*, 2012 FC 176]). Justice Russell also allowed, in part, the judicial review of the 2003 removal order (*Nagalingam v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 362, 6 Imm LR (4th) 323 [*Nagalingam*, 2012 FC 362]). Justice Russell held that "the 2003 [Deportation] Order …, although valid when made, has now been executed and its force is spent. Hence, it cannot now be used as the basis of any future deportation of the Applicant and the Court prohibits the Respondent from using the 2003 Order to remove the Applicant from Canada".

[7] The Immigration Officer issued a subsection 44(1) report stating that the applicant is inadmissible under paragraph 36(2)(*a*) of the Act for reasons of criminality, on the basis of the 2000-2001 convictions. The applicant was served with this report on September 9, 2011. Following that report, a new deportation order was issued against the applicant on September 16, 2011. The applicant is currently seeking judicial review of the subsection 44(1) report in a separate proceeding

before this Court (IMM-6450-11). It is also this new deportation order that would have been the subject of the applicant's appeal to the IAD, if the Division had concluded to having jurisdiction.

[8] In a decision dated February 21, 2012, the IAD determined that it did not have jurisdiction under subsection 64(1) of the Act to hear the applicant's appeal because the applicant has been found inadmissible on grounds of organized criminality. The IAD's decision is the one under review in the present application.

The impugned decision

[9] The IAD concluded that it did not have jurisdiction to hear an appeal by the applicant pursuant to subsection 64(1) of the Act because the applicant was found inadmissible for organized criminality, which is all that subsection 64(1) of the Act requires, and thus dismissed the applicant's appeal of the deportation order issued against him.

Issue

[10] This application raises the following issue: Did the IAD member err in law in finding that it lacked jurisdiction to hear the applicant's appeal?

Legislative Provisions

[11] The relevant legislative provisions in this case are set out in Annex to this judgment.

Standard of review

[12] This application raises a question of true jurisdiction. The standard of review for such questions is that of correctness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 50 and 59, [2008] 1 SCR 190; *Nabiloo v Canada (Minister of Citizenship and Immigration)*, 2008 FC 125 at para 9, 323 FTR 258 [*Nabiloo*]).

Analysis

[13] The applicant submits that the IAD member erred in finding that the IAD did not have jurisdiction to hear his appeal. The applicant contends that the 2003 order continues to operate and hence does not deprive the IAD of its jurisdiction.

[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.]

[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.]

[16] In *Kang v Canada (Minister of Citizenship and Immigration)*, 2005 FC 297, Justice Mactavish observed the following at para 25:

> [25] As the Federal Court of Appeal noted in Medovarski, in enacting IRPA, Parliament re-balanced the interests of public safety and individual rights by broadening the categories of persons who may be removed without an appeal to the IAD. To this end, section 64 is designed to limit the opportunities for admission to Canada for those involved in serious criminality, human rights violations or activities giving rise to national security concerns.
>
> [Emphasis added.]

[17] It therefore follows that in light of subsection 64(1) of the Act, it is not the 2003 deportation order that operates to deprive the applicant of an appeal of another deportation order eight (8) years later, but the finding of inadmissibility. Hence, the fact that the applicant was deported and that the

2003 deportation order is spent does not erase the Immigration and Refugee Board's findings that made him inadmissible in the first place. This interpretation and approach is consistent with other decisions of the Federal Court (*Holway v Canada (Minister of Citizenship and Immigration)* 2005 FC 1261, 279 FTR 277; *Thevasagayampillai v Canada (Minister of Citizenship and Immigration)*, 2005 FC 596, 280 FTR 149; *Kang*, above; *Nabiloo*, above).

[18] With respect to the mootness issue, the applicant submits that his appeal to the IAD would not be moot because the initial deportation order from 2003 is spent and has no remaining legal force (*Nagalingam*, 2012 FC 362, above). Therefore, the outcome of the appeal would be determinative of whether or not the applicant can be deported. As such, the applicant submits that the IAD has jurisdiction to hear his appeal, because it is not moot (*Jamil v Canada (Minister of Citizenship and Immigration)*, 2005 FC 758, 277 FTR 163). However, and the Court agrees with the respondent, the fact that the potential mootness of removal orders was discussed by Justice Mactavish in *Jamil* cannot support the applicant's contention that this amounts to the legal reasoning behind the IAD finding that it did not have jurisdiction.

[19] In summary, in the case at bar, the applicant's argument with respect to the deportation order is irrelevant to the application of subsection 64(1) of the Act. As noted above, the provision does not preclude an individual from appealing to the IAD because a deportation order has been issued; rather, it states that no applicant found inadmissible on grounds of organized criminality (among others) can appeal to the IAD. It is the finding of inadmissibility that operates to preclude an appeal at the IAD, not the existence of a deportation order. Thus, the Court cannot agree with the applicant that the inadmissibility finding against the applicant was extinguished by his removal (i.e.

the execution of the 2003 deportation order). The admissibility finding remained intact and was not "erased" or "nullified" by the execution of the 2003 deportation order.

[20] Finally, the applicant's argument to the effect that the IAD failed to provide adequate reasons is without merit.

[21] For all of the above reasons, the Court finds that the IAD was correct in finding that it did not have jurisdiction in this case. For this reason, the application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;

2. There are no questions for certification;

3. A copy of the Reasons for Judgment and Judgment is to be placed in file IMM-6450-11.

"Richard Boivin"

Judge

Annex

The following provisions from the *Immigration and Refugee Protection Act*, SC 2001, c 27, are relevant to the case at bar:

PART 1 IMMIGRATION TO CANADA	PARTIE 1 IMMIGRATION AU CANADA
…	[…]
DIVISION 4 INADMISSIBILITY	SECTION 4 INTERDICTIONS DE TERRITOIRE
Rules of interpretation	Interprétation
33. The facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur.	**33.** Les faits – actes ou omissions – mentionnés aux articles 34 à 37 sont, sauf disposition contraire, appréciés sur la base de motifs raisonnables de croire qu'ils sont survenus, surviennent ou peuvent survenir.
…	[…]
Serious criminality	Grande criminalité
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 :
…	[…]
Criminality	Criminalité
(2) A foreign national is inadmissible on grounds of criminality for	(2) Emportent, sauf pour le résident permanent, interdiction de territoire pour criminalité les faits suivants :
(*a*) having been convicted in Canada of an offence under an Act of Parliament punishable by way of indictment, or of two offences under any Act of Parliament not arising out of a single occurrence;	*a*) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable par mise en accusation ou de deux infractions à toute loi fédérale qui ne découlent pas des mêmes faits;
…	[…]

Application

(3) The following provisions govern subsections (1) and (2):

(*a*) an offence that may be prosecuted either summarily or by way of indictment is deemed to be an indictable offence, even if it has been prosecuted summarily;

(*b*) inadmissibility under subsections (1) and (2) may not be based on a conviction in respect of which a record suspension has been ordered and has not been revoked or ceased to have effect under the Criminal Records Act, or in respect of which there has been a final determination of an acquittal;

…

Organized criminality

37. (1) A permanent resident or a foreign national is inadmissible on grounds of organized criminality for

(*a*) being a member of an organization that is believed on reasonable grounds to be or to have been engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment, or in furtherance of the commission of an offence outside Canada that, if committed in Canada, would constitute such an offence, or engaging in activity that is part of such a pattern; or

(*b*) engaging, in the context of transnational crime, in activities such as people smuggling, trafficking in persons

Application

(3) Les dispositions suivantes régissent l'application des paragraphes (1) et (2) :

a) l'infraction punissable par mise en accusation ou par procédure sommaire est assimilée à l'infraction punissable par mise en accusation, indépendamment du mode de poursuite effectivement retenu;

b) la déclaration de culpabilité n'emporte pas interdiction de territoire en cas de verdict d'acquittement rendu en dernier ressort ou en cas de suspension du casier - sauf cas de révocation ou de nullité - au titre de la Loi sur le casier judiciaire;

[…]

Activités de criminalité organisée

37. (1) Emportent interdiction de territoire pour criminalité organisée les faits suivants :

a) être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle se livre ou s'est livrée à des activités faisant partie d'un plan d'activités criminelles organisées par plusieurs personnes agissant de concert en vue de la perpétration d'une infraction à une loi fédérale punissable par mise en accusation ou de la perpétration, hors du Canada, d'une infraction qui, commise au Canada, constituerait une telle infraction, ou se livrer à des activités faisant partie d'un tel plan;

b) se livrer, dans le cadre de la criminalité transnationale, à des activités telles le passage de clandestins, le trafic de

or money laundering.

Application

(2) The following provisions govern subsection (1):

(*a*) subsection (1) does not apply in the case of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest; and

(*b*) paragraph (1)(*a*) does not lead to a determination of inadmissibility by reason only of the fact that the permanent resident or foreign national entered Canada with the assistance of a person who is involved in organized criminal activity.

…

DIVISION 7
RIGHT OF APPEAL

…

No appeal for inadmissibility

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.

…

personnes ou le recyclage des produits de la criminalité.

Application

(2) Les dispositions suivantes régissent l'application du paragraphe (1) :

a) les faits visés n'emportent pas interdiction de territoire pour le résident permanent ou l'étranger qui convainc le ministre que sa présence au Canada ne serait nullement préjudiciable à l'intérêt national;

b) les faits visés à l'alinéa (1)*a*) n'emportent pas interdiction de territoire pour la seule raison que le résident permanent ou l'étranger est entré au Canada en ayant recours à une personne qui se livre aux activités qui y sont visées.

[…]

SECTION 7
DROIT D'APPEL

[…]

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, ni par dans le cas de l'étranger, son répondant.

[…]

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2411-12
STYLE OF CAUSE:	Panchalingam Nagalingam v MCI
PLACE OF HEARING:	Toronto, Ontario
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REASONS FOR JUDGMENT:	BOIVIN J.
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APPEARANCES:

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