Federal Court  Cour fédérale

**Date: 20121220**

**Docket: IMM-4994-11**

**Citation: 2012 FC 1534**

**Ottawa, Ontario, December 20, 2012**

**PRESENT: The Honourable Mr. Justice Mandamin**

**BETWEEN:**

**SUKHCHAINPREET SINGH SIDHU**

**Applicant**

**and**

**THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Immigration Appeal Division (IAD) which dismissed an appeal from the Applicant for want of jurisdiction. The Applicant appealed an Immigration Division (ID) decision which found him inadmissible on grounds of serious criminality pursuant to s 36(1)(b) of the *Immigration and Refugee Protection Act* , SC 2001, c 27 (*IRPA*). The IAD determined, pursuant to s 64 of *IRPA*, that it did not have jurisdiction to hear the merits of the appeal or to make an interlocutory determination because the Applicant was inadmissible for organized criminality.

**Background**

[2] As a result of a conviction in the United States for smuggling drugs from Canada, the Applicant became the subject of a s 44(1) *IRPA* Report on the basis that he was inadmissible to Canada for organized criminality pursuant to s 37(1)(b) of *IRPA*, specifically transnational crime. The IAD to be inadmissible to Canada for serious criminality.

[3] In IMM-3327, relating to the above matter, I held that the IAD, correctly interpreted section 37(1)(b) of *IRPA* to include "drug smuggling" as one of the activities leading to a finding of inadmissibility, and it reasonably considered the law as it applies to the facts in the case at bar. Accordingly, I dismissed that application for judicial review.

**Decision Under Review**

[4] The decision under review arises from an appeal brought to the IAD by the Applicant of the ID's February 3, 2010 decision which found that the Applicant was inadmissible to Canada under s. 36(1)(b) of *IRPA*. The applicant appealed but requested an adjournment pending his application for leave and judicial review of a second IAD decision that also found the Applicant inadmissible under s. 37(1)(b) (see IMM-3327-11) The IAD held that it did not have jurisdiction to hear the appeal pursuant to s 64(1) of *IRPA* and dismissed the appeal.

[5] The IAD noted that on, May 6, 2011, it directed that written submissions be filed with respect to the jurisdiction of the IAD to entertain the Applicant's appeal in light of the second

removal order issued against him on May 2, 2011 on the grounds of organized criminality under s 37(1)(b) of *IRPA*. The IAD acknowledged submissions from the Applicant that indicated that leave for review of the May 2, 2011 decision was being sought. The Applicant submitted that the IAD should not deal with his appeal from the February 3, 2010 ID decision until the decision of the Federal Court in the leave application with respect to the s 37(1)(b) of *IRPA* finding is known.

[6] The IAD held that the issue was a jurisdictional one. The IAD stated that its jurisdiction was defined by s 63 of *IRPA*, which articulates the parameters of that jurisdiction. The IAD noted that while s 63(3) of *IRPA* provides a right of appeal to the IAD in respect of permanent residents under removal order, subsection 64(1) of *IRPA* qualifies that right.

[7] The IAD held that as the Applicant was found to be described in s 37(1)(b) of *IRPA* and a removal order was issued, there had been a finding of the Applicant's inadmissibility on grounds of organized criminality, one of the exceptions set out in s 64(1) of *IRPA*. The IAD states that s 64(1) of *IRPA* operates to exclude a right of appeal where there has been a finding of inadmissibility on grounds of organized criminality and thus the IAD has no jurisdiction with respect to the Applicant's appeal from the removal order issued February 3, 2010.

[8] The IAD further concluded that, having no jurisdiction to deal with the appeal on its merits, it had no jurisdiction with respect to the making of an interlocutory decision to postpone the making of a final decision in the matter to take into account the Applicant's application for judicial review of the s 37(1)(b) of *IRPA* finding. The IAD dismissed the appeal.

**Legislation**

[9] *Immigration and Refugee Protection Act* SC 2001, c 27

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| 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. |
| […] | […] |
| 63. (3) A permanent resident or a protected person may appeal to the Immigration Appeal Division against a decision at an examination or admissibility hearing to make a removal order against them. | 63. (3) Le résident permanent ou la personne protégée peut interjeter appel de la mesure de renvoi prise au contrôle ou à l'enquête. |
| […] | […] |
| 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. |

**Issue**

[10] The issue arising in this case is whether the IAD erred by finding it lacked jurisdiction to entertain the appeal by the Applicant.

**Standard of Review**

[11] The issue of whether the IAD correctly interpreted its jurisdiction also attracts the standard of correctness *Nabiloo v Canada (Minister of Citizenship & Immigration)*, 2008 FC 125, 323 FTR 258 (Eng).

**Analysis**

[12] The Applicant notes the IAD responded to the Applicant's request for a postponement of his serious criminality appeal pending the Federal Court's determination of the organized criminality matter by refusing to take jurisdiction for the postponement request. The Applicant argues the IAD's decision is extremely short and makes no mention of the factors the IAD is required to consider when assessing a request for a postponement as required by Rule 48 of the *Immigration Appeal Division Rules*, SOR/2002-230 [*Rules*]. The Applicant submits the decision makes no mention of the fact that the s 37(1)(b) of *IRPA* decision is the subject of judicial review, notwithstanding submissions made to that effect.

[13] The Applicant submits the IAD was required to consider Rule 48 which provides that the IAD "must consider any relevant factors" when evaluating whether to grant an adjournment. The Applicant submits that Rule 48(4)(j), the "nature and complexity of the matter to be heard," was a particular factor that ought to have been considered by the IAD but was not.

[14] The Applicant submits that *Sandy v Canada (MCI)* 2004 FC 1468, [2004] FCJ No 1770 [*Sandy*] provides guidance on the use and importance of R 48. The Applicant also relies on this Court's decision in *Hardware v Canada* 2009 FC 338, [2009] FCJ no 421 [*Hardware*] where it was recognized that the IAD has discretion to refuse or grand adjournments. The Applicant is not contending that he has an absolute right to an adjournment, but rather that the IAD fettered its discretion to grant the adjournment by strictly applying s 64(1) of *IRPA* without regard for the complexity of the Applicant's case.

[15] The IAD's jurisdiction to hear an appeal is set out in sections 63 and 64 of *IRPA*. Section 64 states that no appeal can be made to the IAD if the individual has been found to be inadmissible for organized criminality. In this case, the evidence before the IAD was that the Applicant had been found inadmissible for organized criminality under s 37(1)(b) of *IRPA*.

[16] In addition, in IMM-3327-11 I decided that the IAD did made no reviewable errors in its s 37(1)(b) analysis. It correctly and reasonably found that the Applicant was inadmissible for organized criminality due to his participation in the activity of drug smuggling in a transnational organized criminality context.

[17] In my view, the IAD correctly held that it did not have jurisdiction to hear the Applicant's appeal of the ID's s 36(1) finding.

[18] The Applicant's argument that the IAD was required to consider the factors set out in Rule 48 must be rejected. Rule 48 sets out a number of factors to be taken into consideration when the IAD has jurisdiction to consider whether to grant an adjournment or not. In this case, s 64 of *IRPA* operates to deny the IAD jurisdiction to hear the appeal. The IAD was not engaged in determining whether or not to grant the adjournment, but rather whether the IAD had the jurisdiction to do so. The IAD correctly determined that it did not have jurisdiction to hear both the request for the postponement and the appeal, since it had decided that the Applicant was inadmissible under s 37(1)(b) of *IRPA*.

[19] Finally, there was no requirement to consider the factors in Rule 48 concerning postponements. With regard to the submission by the Applicant that the IAD should have granted an adjournment even if the IAD did not have jurisdiction, at that time, to hear the merits of the appeal, this argument should also be rejected. In *Nabiloo*, at para 4, Justice Snider stated, "a tribunal that does not have jurisdiction to decide a matter does not have jurisdiction to consider preliminary or interlocutory issues pertaining to that matter". As the IAD was without jurisdiction to hear the Applicant's s 36(1) appeal, it was without jurisdiction to consider the adjournment. The IAD made no errors in this regard.

[20] In conclusion, the IAD's decision stands. As the IAD had already correctly found that the Applicant was inadmissible for organized criminality under s 37(1)(b) of *IRPA*, the IAD was correct in determining that s 64 precluded it from hearing the Applicant's s 36(1) appeal.

[21] The Applicant's application for judicial review must be dismissed.

**JUDGMENT**

**THIS COURT ORDERS that:**

1. The application for judicial review is dismissed.

2. No question of general importance is certified.

"Leonard S. Mandamin"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-4994-11 |
| **STYLE OF CAUSE:** | SUKHCHAINPREET SINGH SIDHU v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | FEBRUARY 7, 2012 |
| **REASONS FOR JUDGMENT:** | MANDAMIN J. |
| **DATED:** | DECEMBER 20, 2012 |

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| Mr. Martin Anderson<br>Ms. Leila Jawando | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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