Federal Court of Appeal | Cour d'appel fédérale

Date: 20230512

Docket: A-136-21

Citation: 2023 FCA 102

CORAM: **LASKIN J.A.**
RIVOALEN J.A.
MONAGHAN J.A.

BETWEEN:

DORINELA PEPA

Appellant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Heard by online video conference hosted by the Registry on May 3, 2023.

Judgment delivered at Ottawa, Ontario, on May 12, 2023.

REASONS FOR JUDGMENT BY: MONAGHAN J.A.

CONCURRED IN BY: LASKIN J.A.
RIVOALEN J.A.

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REASONS FOR JUDGMENT

MONAGHAN J.A.

[1] In March 2018, the appellant, Dorinela Pepa, then aged 20, came to Canada while in possession of a permanent resident visa as an accompanying dependent child of her father. However, after the visa was issued, and before she came to Canada, the appellant married. On her arrival in Canada, she advised the point of entry officer of her marriage. Because of the

change in her circumstances, the appellant was admitted for further examination and was not landed. Her visa had a September 16, 2018 expiry date.

[2] A further examination occurred on April 6, 2018, followed by two reports under section 44 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [*IRPA*]. An admissibility hearing before the Immigration Division of the Immigration and Refugee Board (ID) commenced on September 25, 2018, but reconvened on October 16, 2018, after receipt of further submissions from the parties. At the conclusion of the hearing, the ID issued an exclusion order against the appellant listing her as a foreign national inadmissible for misrepresentation under paragraph 40(1)(*a*) of the *IRPA*.

[3] Subsection 63(2) of the *IRPA* states "[a] foreign national who holds a permanent resident visa may appeal to the Immigration Appeal Division against a decision to make a removal order against them made under subsection 44(2) or made at an admissibility hearing." An exclusion order is a form of removal order: section 223 of the *Immigration and Refugee Protection Regulations*, S.O.R./2002-227.

[4] Although the appellant appealed the ID's decision to the Immigration Appeal Division of the Immigration and Refugee Board (IAD), the IAD concluded that she had no right to appeal under subsection 63(2) because, when the removal order was issued, her visa had expired and so was no longer valid. As a result, the IAD determined it lacked jurisdiction to consider an appeal. In doing so, the IAD relied primarily on *Ismail v. Canada (Citizenship and Immigration)*, 2015 FC 338 [*Ismail*] and two earlier IAD decisions.

[5] The appellant then applied to the Federal Court for judicial review of both the removal order and the IAD's decision. The Federal Court (2021 FC 348 *per* Roussel J.) dismissed both applications.

[6] The Federal Court concluded that the ID had not breached the appellant's right to procedural fairness and the ID's decision to issue a removal order was reasonable. Because the Federal Court declined to certify a question under paragraph 74(*d*) of the *IRPA* with respect to that application, the ID's decision is not the subject of an appeal in this Court.

[7] This appeal concerns the judicial review of the IAD decision and comes to this Court by way of the following certified question for appeal under paragraph 74(*d*) of the *IRPA*:

> 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, at the time the report under subsection 44(1) is made, at the time it is referred to the ID, as the case may be, or at the time the exclusion order is issued?

[8] On this appeal, we must decide whether the Federal Court identified and then properly applied the correct standard of review: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para. 45. Effectively, this Court "steps into the shoes" of the Federal Court and focuses on the administrative decision.

[9] The appellant submits that the issue before the IAD was a jurisdictional issue, so that the Federal Court should have applied the correctness standard. However, I agree with the Federal Court that the IAD was not faced with a question of jurisdictional boundaries between administrative tribunals and that the applicable standard of review of the IAD decision is

reasonableness: Federal Court's reasons at para. 16, citing *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 25 and *Momi v. Canada (Citizenship and Immigration)*, 2019 FCA 163 at para. 21. I also conclude that the Federal Court properly applied that standard of review.

[10] Before us, the appellant submits that the IAD unreasonably interpreted subsection 63(2) as providing a right of appeal only to a person who holds a valid permanent resident visa at the time the removal order is issued. The appellant asserts that it is sufficient that the visa is valid at the time of entry or of the section 44 report. Moreover, says the appellant, the IAD misunderstood the finding in *Ismail* and should have applied *McLeod v. Canada (Minister of Citizenship and Immigration)* (1998), [1999] 1 F.C. 257, 46 Imm. L.R. (2d) 295 (FCA).

[11] I disagree largely for the reasons given by the Federal Court, before which the appellant advanced these same arguments.

[12] Before us, the appellant also submits that the IAD failed to undertake a textual, contextual and purposive analysis when it interpreted subsection 63(2) and this was unreasonable. Again, I disagree. The IAD undertook the required analysis by reviewing and adopting precedents bearing on the issue before it.

[13] In addition to *Ismail*, the IAD relied on *Asif v. Canada (Public Safety and Emergency Preparedness)*, 2018 CanLII 131198 (CA IRB) [*Asif*] and *Far v. Canada (Public Safety and Emergency Preparedness)*, 2016 CanLII 90984 (CA IRB) [*Far*]. Both of those decisions

determined that a holder of a permanent resident visa that expired before the removal order was made had no right of appeal under subsection 63(2).

[14] The IAD described the *Asif* decision as a "thorough" one that contained a "comprehensive outline of the applicable legislation includ[ing] reference to section 63(2) of the IRPA, which also curtails the IAD's jurisdiction in the case at hand" (IAD reasons at paras. 12-13).

[15] *Far* relied on *Zhang v. Canada (Citizenship and Immigration)*, 2007 FC 593 [*Zhang*], where again the Federal Court undertook a textual, contextual and purposive analysis of subsection 63(2). It is perhaps worth noting that in *Zhang* the Federal Court, although addressing a revoked rather than expired visa, stated as follows (at para. 16):

> If subsection 63(2) applied to "invalid" visas, like those that have been revoked, would it also apply to ones that have expired? This logic defies common sense. From reading Ms. Zhang's submissions, it appears that any foreign national holding a visa in his hand would be entitled to an appeal under subsection 63(2), regardless of whether the Canadian government intended to give that document any legal effect. The fact that Ms. Zhang still held the physical copy of her visa did not change the legal consequence of its revocation. Rather than pursuing an appeal of the immigration officer's removal order before the Board, she should have sought judicial review of the officer's decision in this Court. That option was still open to her, despite the fact that she did not qualify for an appeal under subsection 63(2).

[16] In *Ismail*, the Federal Court both referred to *Zhang* and interpreted subsection 63(2) using a textual, contextual and purposive analysis.

[17] In these circumstances, “having reviewed the case law presented and the submissions of the parties” (IAD reasons at para. 12), it was reasonable for the IAD not to undertake its own statutory interpretation analysis.

[18] The certified question posed in this appeal asks us to choose the correct statutory interpretation of subsection 63(2). Consequently, the certified question does not reflect the reasonableness standard of review applicable in this case: *Canada (Citizenship and Immigration) v. Galindo Camayo*, 2022 FCA 50 at paras. 37-44. Accordingly, I would reformulate the certified question as follows:

> Is it reasonable for the Immigration Appeal Division to find that it does not have jurisdiction to hear an appeal pursuant to subsection 63(2) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 if the permanent resident visa is expired at the time the removal order is issued?

I would answer Yes.

[19] For these reasons, I would dismiss the appeal. As the respondent does not seek costs, I would award none.

"K.A. Siobhan Monaghan"
J.A.

“I agree
J.B. Laskin J.A.”

“I agree
Marianne Rivoalen J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A JUDGMENT OF THE HONOURABLE MADAM JUSTICE ROUSSEL DATED APRIL 21, 2021, DOCKET NOS. IMM-6268-19 AND IMM-6270-19

DOCKET:	A-136-21
STYLE OF CAUSE:	DORINELA PEPA v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	MAY 3, 2023
REASONS FOR JUDGMENT BY:	MONAGHAN J.A.
CONCURRED IN BY:	LASKIN J.A. RIVOALEN J.A.
DATED:	MAY 12, 2023

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