Immigration and Refugee Board of Canada
Immigration Appeal Division

Commission de l'immigration et du statut de réfugié du Canada
Section d'appel de l'immigration

IAD File No. / N° de dossier de la SAI : VB1-00167

Client ID no. / N° ID client: XXXXX XXXXX

Reasons and Decision – Motifs et decision

SPONSORSHIP

Appellant(s)	Sarwan Singh DHALIWAL	**Appelant(e)(s)**
Respondent	The Minister of Citizenship and Immigration	**Intimé(e)**
Date(s) of Hearing	N/A	**Date(s) de l'audience**
Place of Hearing	In Chambers	**Lieu de l'audience**
Date of Decision	10 January 2012	**Date de la décision**
Panel	Erwin Nest	**Tribunal**
Counsel for the Appellant(s)	Amandeep Singh Barrister and Solicitor	**Conseil(s) de l'appelant(e) / des appelant(e)(s)**
Designated Representative(s)	N/A	**Représentant(e)(s) Désigné(e)(s)**
Counsel for the Minister	Jasbir Sandhu	**Conseil du ministre**

Canada

REASONS FOR DECISION

[1] Sarwan Singh DHALIWAL (the "appellant") appeals from the refusal to approve the permanent resident visa application for his spouse Paramjit Kaur DHALIWAL (the "applicant") and her three sons Jaspreet Singh MAHLA, Jasdeep Singh MAHLA, Sukhman Singh MAHLA (the "accompanying dependents") from India. The application was refused because the First Secretary (Immigration) from the High Commission of Canada in New Delhi, India, found the applicant to be a person described in the paragraph 35(1)(a) of the *Immigration and Refugee Protection Act* (the "*Act*").[1] The visa officer determined the applicant is inadmissible, pursuant to the paragraph 36(2)(b) of the *Act*.

[2] Paragraphs 35(1)(a) and 36(2)(b) of the *Act* provide as follows:

> **35.**(1) A permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for
>
> (a) committing an act outside Canada that constitutes an offence referred to in sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act*;
>
> **36.**(2) A foreign national is inadmissible on grounds of criminality for
>
> (b) having been convicted outside Canada of an offence that, if committed in Canada, would constitute an indictable offence under an Act of Parliament, or of two offences not arising out of a single occurrence that, if committed in Canada, would constitute offences under an Act of Parliament;

[3] In coming to his/her conclusion, the visa officer considered the following factors into consideration:

- since 1991 the applicant was serving in the Punjab Police Force and she is currently a Head Constable;
- during the interview with the visa officer, on June 3, 2010, the applicant stated she witnessed or was asked to attend interrogations during which the prisoners were beaten with lathi stick on the sole of their feet by either the Police Station House Officer or the Police Station head until "they would cry and feel pain and they would confess.";

[1] *Immigration and Refugee Protection Act* (the "*Act*"), S.C. 2001, c. 27.

- when asked if she felt sorry for the persons who were beaten, the applicant told the visa officer, "We only beat the person who is at fault or who has committed a crime or whom we suspect has committed one."; and

- at the interview with the visa officer, the applicant was asked if she knew about the existence of any "Torture Centres" in the Punjab where persons suspected of terrorist activities or sympathies in 1980's and in 1990's were being systematically tortured and abused, the applicant told the visa officer, she was aware of their existence as her father was a high-ranking officer of the PPF and her brother served in the Punjab Police Force. Though she stated she did not feel good about it, she did not disassociate herself from those acts or from the organization.

[4] The Immigration Appeals Division (the "IAD") sent an early review letter to the appellant dated August 5, 2011, as is its practice, requesting from the parties written information or arguments in connection with a refusal, pursuant to the subsection 35(1) of the *Act.*[2] The appellant was asked to provide written arguments to the IAD on why the subsection 64 of the *Act* does not apply to his appeal.

[5] Section 64 of the *Act* sets out the circumstances where no appeal may be made to the IAD.

[6] The letter sets out timelines for submissions and advises as follows:

> Section 64 of the *Act* provides as following:
>
> 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,

---

[2] **35.**(1) A permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for

(*a*) committing an act outside Canada that constitutes an offence referred to in sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act*;

(*b*) being a prescribed senior official in the service of a government that, in the opinion of the Minister, engages or has engaged in terrorism, systematic or gross human rights violations, or genocide, a war crime or a crime against humanity within the meaning of subsections 6(3) to (5) of the *Crimes Against Humanity and War Crimes Act*; or

(*c*) being a person, other than a permanent resident, whose entry into or stay in Canada is restricted pursuant to a decision, resolution or measure of an international organization of states or association of states, of which Canada is a member, that imposes sanctions on a country against which Canada has imposed or has agreed to impose sanctions in concert with that organization or association.

> violating human or international rights, serious criminality or organized criminality.
>
> Serious criminality
>
> (2) For the purpose of subsection (1), serious criminality must be with respect to a crime that was punished in Canada by a term of imprisonment of at least two years.
>
> The IAD may make a decision on the basis of the documents provided by the parties..... If a member of the IAD determines that section 64 applies to your appeal, the member can dismiss your appeal for lack of jurisdiction, without holding a hearing

[7] Submissions were received.[3]

[8] The appellant's counsel submitted that the section 64 of the *Act* does not apply in this case, because the visa officer based his/her decision on anecdotal evidence obtained at an informal interview. There was no documentary evidence provided to corroborate the allegations the applicant committed an act outside Canada, described in the subsection 35(1) of the *Act*. The appellant's counsel noted, during the interview the applicant denied, on several occasions, participating in the act "... that may be construed as offending section 35(1)".

[9] The appellant's counsel submitted that the issue of what acts constitute the acts caught, pursuant to subsection 35(1) of the *Act* and whether the applicant committed those acts should be subject to a full hearing, and this matter should not be summarily dismissed without canvassing the above issues. In addition, the appellant's counsel submitted the visa officer is not a competent authority in the applicant's actions and in light of the fact the State of India is not a state that engaged in terrorism or a state that has sanctions imposed against it, the appeal cannot be dismissed without a full hearing on "matters at hand."

[3] Written submissions from the appellant received September 19, 2011; written submissions from the respondent received October 11, 2011; no final reply received from the appellant.

[10] In his written submissions the Minister's counsel submitted that given the applicant has been found by the visa officer to be inadmissible for violating human and international rights, pursuant to subsection 35(1) of the *Act*, the appellant cannot appeal to the IAD from the refusal of the application for permanent residence in Canada, pursuant to subsection 64(1) of the *Act*. The Minister's counsel asked the IAD to dismiss the appeal because of the lack of jurisdiction. In support of his position, the Minister's counsel provided the case law, as follows:

- *Thevasagayampillai* v. *Canada* (*Minister of Citizenship and Immigration*), 2005 FC 596;
- *Holway* v. *Canada* (*Minister of Citizenship and Immigration*), 2005 FC 1261; and
- *Senthuran* v. *Canada* (*Minister of Citizenship and Immigration*), 2010 CanLII 80105 (IRB).

[11] The Minister's counsel submitted the proper forum to hear the appellant's counsel's arguments concerning the lack of evidence to substantiate the finding of the visa officer of the applicant's inadmissibility, pursuant to paragraph 35(1)(a) of the *Act* is by way of judicial review, pursuant to section 72 of the *Act*.

Does the IAD have jurisdiction to hear this appeal?

[12] With respect to the jurisdictional issues in this appeal, I find what the appellant's counsel asked the IAD to do, namely to allow the panel to come to its own conclusion whether or not the applicant is inadmissible pursuant to paragraph 35(1)(a), and paragraph 36(2)(b) of the *Act*, is what the Federal Court said the IAD cannot do, which is to revisit the finding of the visa officer.

[13] As stated in by Madam Justice Mactavish in the case of *Kang*,[4] at paragraphs 41 and 42:

> [41] From a plain reading of the statue, I am satisfied that jurisdictional question for the I.A.D. is not whether the foreign national (or his or her spouse) 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 statue is clear: the I.A.D. is without jurisdiction to deal further with the matter.

[4] *Kang, Sarabjeet Kaur* v. *M.C.I.* (F.C., no. IMM-2445-04), Mactavish, February 25, 2005, 2005 FC 297.

> [42] If I were to accept Ms. Kang's submission that it was incumbent on the I.A.D 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 inadmissibility would essentially confer a right of appeal on the very individuals who have been denied such a right by virtue of the section.

[14] I find helpful the case law submitted by the Minister's counsel in clarifying the interpretation of the section 64 of the *Act*.

[15] I am guided by the decision in *Holway*[5] where the Federal Court stated:

> [7] The Visa Officer's decision that the Applicant's father is a person described in s. 35(1) of *IRPA* is not contested in the instant application. Leave has already been denied in relation to that decision.
>
> ISSUES
>
> [8] The Applicant raises four issues in this application:
> (1) Did the IAD have the jurisdiction to hear the appeal?
> .....
>
> ANALYSIS
>
> The Jurisdiction Issue
>
> [13] Before a foreign national may enter Canada he or she must make an application to an immigration officer to obtain a visa or other required document. *IRPA* stipulates at subsection 11(1) that the officer shall issue such a document if, following an examination, the officer is satisfied that the person is not inadmissible and meets the requirements of *IRPA*:
>
> > 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 shall be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.

[5] *Holway* v. *Canada* (*Minister of Citizenship and Immigration*), 2005 FC 1261.

[14] Section 33 of *IRPA* sets out the manner in which inadmissibility should be assessed:

> 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.

[15] Subsection 35(1)(b) sets out the relevant ground of inadmissibility in this case:

> 35.(1) A permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for
>
> (b) being a prescribed senior official in the service of a government that, in the opinion of the Minister, engages or has engaged in terrorism, systematic or gross human rights violations, or genocide, a war crime or a crime against humanity within the meaning of subsections 6(3) to (5) of the *Crimes Against Humanity and War Crimes Act*; or
>
> Exception
>
> (2) Paragraphs (1)(b) and (c) do 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.

[16] In addition to assessing whether a foreign national is inadmissible on grounds of human rights violations, an immigration officer must also, of course, examine inadmissibility on other stipulated grounds.

[17] In the event of a finding of inadmissibility, there is a right of appeal to the IAD in certain cases:

> RIGHT OF APPEAL
>
> Competent jurisdiction
>
> 62. The Immigration Appeal Division is the competent Division of the Board with respect to appeals under this Division.

[18] Generally speaking, it is my view that the jurisprudence of this Court supports the IAD's Decision in this case that it did not have jurisdiction to consider the Applicants appeal.

[19] The case law supporting the position of the IAD and the position of the Respondent in this application is as follows:

- *Thevasagayampillai v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 725; 2005 FC 596
- *Kang v. Canada (Minister of Citizenship and Immigration*), [2005] F.C.J. No. 367; 2005 FC 297
- *Touita v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 668; 2005 FC 543
- *Alleg v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 443; 2005 FC 348
- *Williams v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 814; 2004 FC 662
- *Canada (Minister of Citizenship and Immigration) v. Bhalrhu*, [2004] F.C.J. No. 1498; 2004 FC 1236

.....

[24] Although the arguments advanced by Applicant's counsel may not have been raised specifically in previous jurisprudence, I nevertheless feel that the position advanced by the Applicant is not consistent with general statements made by this Court concerning the purpose and effect of s. 64 in the relevant case law and, in particular, with the position taken by Mactavish J. in *Kang v. Canada (Minister of Citizenship and Immigration)* , [2005] F.C.J. No. 367 and Martineau J. in *Thevasagayampillai v. (Canada) Minister of Citizenship and Immigration*, [2005] F.C.J. No. 725.

[16] I have considered the visa officer’s finding of inadmissibility of the applicant on the ground of violating human or international rights. I find that pursuant to subsection 64(1) of the *Act*, no appeal may be made to the IAD by the appellant.

CONCLUSION

[17] After reviewing the documentary evidence and written submissions of the parties, I conclude that the appeal is dismissed for lack of jurisdiction because the appellant has not shown, on the basis of the information provided, that he has a right of appeal in these circumstances.

NOTICE OF DECISION

The appeal is dismissed.

(signed) **"Erwin Nest"**

Erwin Nest

10 January 2012

Date

Judicial Review – Under section 72 of the *Immigration and Refugee Protection Act*, you may make an application to the Federal Court for judicial review of this decision, with leave of that Court. You may wish to get advice from counsel as soon as possible, since there are time limits for this application.