Chapter Four

Visas under IRPA

Introduction

Permanent residents, protected persons and foreign nationals who are in possession of a permanent resident visa may appeal removal orders made against them. This chapter deals with the last category – i.e. a removal order appeal by a foreign national, which is referred to in subsection 63(2) of the *Immigration and Refugee Protection Act (IRPA)*[1]:

> A foreign national who holds a permanent resident visa may appeal to the Immigration Appeal Division against a decision at an examination or admissibility hearing to make a removal order against them.

What IRPA changed

Under the *Immigration Act*[2], the right of appeal to the IAD extended not only to persons holding "valid immigration visas", but also to those with "valid visitor's visas". The *IRPA* eliminated appeals by holders of visitor's visas.

A Jurisdictional Issue

Foreign nationals other than protected persons only have a right of appeal against a removal order if they hold a permanent resident visa. If the Appeal Division decides that the appellant is in possession of such a visa, it can proceed to determine the legal validity of the removal order and to consider the exercise of its discretionary jurisdiction. If the Appeal Division determines that the appellant is not in possession of such a visa, then it has no jurisdiction to hear the appeal and the appeal is dismissed for lack of jurisdiction.

For the purposes of determining if the appellant holds a permanent resident visa (the *IRPA* term for an immigrant visa), pre-*IRPA* case law dealing with the validity of visas, particularly on the issue of when a visa can be considered invalid, continues to be instructive, despite some differences in the wording of the former *Act* and the *IRPA* provisions, and there is almost no new case law on the issue.

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1 *Immigration and Refugee Protection Act*, S.C. 2001, as amended.

2 *Immigration Act*, R.S.C., 1985, c. I-2, as amended.

Visa must be Valid

One obvious difference between the wording of the relevant provisions – paragraph 70(2)(b) of the *Immigration Act* and subsection 63(2) of the *IRPA* - is that the current provision does not use the word "valid" to qualify permanent resident visas. In *Zhang* [3], the applicant argued that the omission indicated that Parliament intended to remove validity of the visa as a prerequisite for the IAD to have jurisdiction. The Federal Court rejected the argument that the notion of validity, which was a legislative requirement under the *Immigration Act*, no longer existed under the *IRPA.* The Court supported the IAD's view that the statutory intent behind the old and new provisions was largely the same.

Visas and the Immigration Process

The two-stage immigration process and the significance of visas under the *IRPA* remain the same as they were under the *Immigration Act*.

> […] a visa only allows an individual to present himself for landing at a port of entry at which time there is a second examination to determine if he or she still meets the requirements of the Act and regulations for the purposes of landing, […].[4].

General Principle and Exceptions

Among the many cases under the *Immigration Act* concerning the validity of visas, the *Hundal*[5] decision stands out because it set out a general principle that created a presumption of valid visas, subject to four exceptions:

> The general principle is that once a visa is issued it remains valid. But there are four exceptions: (1) The *De Decaro* exception: a visa becomes ipso facto invalid where there is a frustration or impossibility of performance of a condition on which the visa was issued. (2) The *Wong* exception: a visa is invalid where there is a failure to meet a condition of the granting of the visa itself before the visa is issued. The visa is then void ab initio. (3) A visa ceases to be valid when it reaches its expiry date. (4) A visa is no longer valid if revoked or cancelled by a visa officer.[6]

The first two of the exceptions seem to have been included in order to account for decisions of the Federal Court of Appeal where visas had been found to be invalid.[7] However, decisions following *Hundal* have since explicitly reversed the *De Decaro* ruling and cast enough doubt on the authority of the *Wong* ruling, such that it can now be said that only the third and fourth exceptions above apply today.

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3 *Zhang, Xiao Ling v. M.C.I.* (F.C., no. IMM-4249-06), de Montigny, June 5, 2007, 2007 FC 593.

4 *Canada (Minister of Citizenship and Immigration)* v. *Hundal* [1995] 3.F.C. 32 , para. 13.

5 *Hundal, supra,* footnote 4.

6 *Hundal, supra,* footnote 4.

7 *Hundal, supra,* footnote 4, para.14. Justice Rothstein acknowledged that he had to deal with FCA dicta which were binding on him. He would have been referring to *De Decaro* and *Wong*.

The general principle and the exceptions are discussed below.

General Principle: Once issued, a visa remains valid

The Federal Court of Appeal in *De Decaro*[8] held that the death of a principal applicant between the issuance of the immigrant visas and arrival of at a port of entry invalidated the visas of the accompanying dependants. Justice Marceau voiced a strong dissent. His reasoning was echoed by Justice Rothstein in *Hundal*[9]. Both considered that there was no need to read into the legislation notions of conditional visas or invalidity of visas resulting from a failure to meet a condition. The scheme of the Act provided for a comprehensive immigration process in two stages. First, a visa officer issued a visa to an applicant if the officer concluded that the applicant was admissible. At the second stage, an immigration officer at the port of entry would determine if the holder still met the requirements of the Act. The second stage of the process provided the necessary control if a change occurred after the visa was issued.

Justice Rothstein used the same rationale for narrowing the application of *De Decaro*. He also took into consideration that if every change of condition after issue of a visa rendered the visa invalid, the right of appeal would be so limited as to be virtually meaningless. By narrowly defining the circumstances that resulted in visas becoming invalid, the Court was able to give meaning to the *Immigration Act* as a whole, including paragraph 70(2)(b), which gave valid visa holders the right of appeal to the Appeal Division. The Court stated the general principle that once a visa was issued, it remained valid, subject to four possible exceptions. The Federal Court of Appeal wholly endorsed Justice Rothstein's analysis and conclusion.[10]

First Exception: A condition becomes impossible to meet [11]

Justice Rothstein distinguished the facts in *Hundal*[12] from those in the *De Decaro*[13] case, which was the basis of the first exception. The "*De Decaro* exception" referred to a situation in which the visa was issued on a condition which subsequently became impossible to satisfy. Justice Rothstein construed this exception as narrowly as possible, as can be seen from his finding that although Mr. Hundal's spouse had withdrawn her sponsorship, the situation could be distinguished from the one covered by the exception because it would not have been impossible to reinstate the sponsorship.

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8 *De Decaro: Canada (Minister of Employment and Immigration)* v. *De Decaro*, [1993] 2 F.C. 408 (C.A).

9 *Hundal, supra,* footnote 4.

10 *Canada (Minister of Citizenship and Immigration)* v. *Hundal* (FCA no, A-406-95), Strayer, Linden, Robertson, November 20, 1996.

11 *Hundal, supra*, footnote 4, para. 15-16.

12 *Hundal, supra,* footnote 4.

13 *De Decaro, supra,* footnote 8.

When *McLeod*[14] came before the Federal Court of Appeal, more than five years had passed since *De Decaro* was decided, and the *Hundal* decision, based on the same reasoning expressed by the dissenting judge in *De Decaro*, had been affirmed by the Federal Court of Appeal. The Court thought it opportune to reconsider its earlier decision in *De Decaro*. Justice Strayer remarked that the parties in *McLeod* were all in agreement that there was nothing in the *Act* to support the view that visas were rendered invalid by a change of circumstances after the issue of a visa. As a result, *De Decaro* was reversed and the first exception no longer exists.

Second Exception: Failure to meet a condition of the granting of the visa itself before the visa is issued[15]

This is known as the "*Wong*" exception. The facts in *Wong*[16] were similar to those in *De Decaro* in that Ms. Wong was also an accompanying dependant. However, her father died before, rather than after, the issuance of the immigrant visas. The Federal Court of Appeal saw a clear distinction. Justice MacGuigan stated:

> Whatever should be the result where an element upon which the issuance of a visa is based subsequently ceases to exist, we are at least satisfied that, where, as here, the principal reason for the issuance of a visa ceased to exist before its issuance, such a visa cannot be said to be "a valid immigrant visa".

However, in the subsequent *Oloroso*[17] case, Justice Gibson reviewed the case law and questioned whether the *Wong* exception too was suspect. He was not convinced that the reasoning which applied to *De Decaro* exception could be extended to circumstances falling within the *Wong* exception. However, he noted that the Federal Court of Appeal had endorsed the reasoning of Justice Noêl in *Seneca*[18], a case whose facts he applied by analogy. Justice Noêl had concluded that it was not logical to take away the right of appeal to the Appeal Division on the basis that visas were improperly issued, when that was the very issue to be decided. Justice Gibson set aside the decision of the Appeal Division that it lacked jurisdiction. It would therefore seem that the second exception – i.e. the *Wong* exception, no longer exists either.

Third Exception: Visa has expired[19]

A visa that has an expiry date is not valid after the expiry date.

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[14] *McLeod v. Canada (Minister of Citizenship and Immigration),* (FCA no. A-887-96), November 6, 1998; [1999] 1 F.C. 257.

[15] *Hundal, supra,* footnote 4. para. 17.

[16] *M.E.I. v. Wong* (F.C.A. no. A-907-91), Hugessen, MacGuigan, Decary, May 17, 1993.

[17] *Oloroso v. Canada (Minister of Citizenship and Immigration)* [2001] 2 F.C. 45.

[18] *Canada (Minister of Citizenship and Immigration) v. Seneca* [1998] 3 F.C. 494 (T.D.), affirmed by *Canada (Minister of Citizenship and Immigration) v. Seneca* [1999] F.C.J. No. 1503.

[19] *Hundal, supra,* footnote 4. para. 18.

Fourth Exception: Visa is cancelled or revoked[20]

The fourth exception to a visa remaining valid is when it is revoked by a visa officer. In *Hundal [?],* Justice Rothstein considered that although there were no express provisions in the *Immigration Act* for revocation of a visa, the case law indicated that authority to revoke existed by necessary implication. He went on to say that in some circumstances the requirement to return a visa might be interpreted to constitute a cancellation of the visa.

Revocation has raised issues as to when it takes effect: is a visa cancelled when the Minister decides that it is or must the visa holder have been notified of the revocation? The three decisions below illustrate differing views.

In a case decided by the Appeal Division under the *Immigration Act* - *Hundal,*[21] a visa officer sent a telegram to the appellant at the address she provided to the visa post to notify her of the withdrawal of the sponsorship and the subsequent invalidity of the visa. The appellant claimed not to have received the telegram. The Appeal Division held that the Federal Court - Trial Division decision in *Hundal*[22] was distinguishable from the facts in the case before it as a visa officer had made a decision to cancel the visa and that decision had been communicated to the appellant. Procedural fairness did not require actual notice to the appellant of the revocation of her visa. The visa office had done all that could be expected of it in sending the notice to the address the appellant provided. The appellant was not the holder of a valid visa when she arrived at a port of entry and consequently, she did not have a right of appeal to the Appeal Division.

In another case heard by the Appeal Division, *Lionel*[23], an immigration officer in Canada decided to cancel the appellant's visa, and asked officials at the visa post to "attempt to retrieve" the visa. The appellant was advised by telegram to attend at the High Commission with his passport and visa; however, he was never advised that the visa was no longer valid. He proceeded to the port of entry. The Appeal Division held that it was not sufficient to invite the appellant to the visa post for a meeting; the revocation of his visa had to be explicitly conveyed to him. As this was not done, the visa remained valid and the appellant was in possession of a valid visa when he arrived at the port of entry.

In the *Chhoker*[24] case decided under the *IRPA*, a sponsor withdrew her sponsorship after a permanent resident visa had been issued to her husband. He left for

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[20] *Hundal, supra,* footnote 4. para. 19.

[21] *Hundal, Kulwant Kaur v. M.C.I.* (IAD V97-01735), Clark, August 17, 1998.

[22] *Hundal, supra,* footnote 4.

[23] *M.C.I. v. Lionel, Balram Eddie* (IAD T98-01553), D'Ignazio, April 9, 1999. The facts in this case are very similar to the facts in *Medel v. Canada (Minister of Employment and Immigration),* [1990] 2 F.C. 345 (C.A.) which is discussed in more detail in Chapter 5 at 5.4.2.

[24] *Chhoker, Gurtej Singh v. M.C.I.,* (IAD VA3-00958), Workun, January 4, 2004. Although the decision does not specifically conclude to a lack of jurisdiction, the appeal was dismissed without any reference to humanitarian and compassionate considerations, suggesting an implicit recognition that appellant did not, in fact, have a right of appeal.

Canada soon afterwards and did not receive the telegram sent by the visa office notifying him that the visa was not valid for travel to Canada and requesting that he return the visa. When he arrived at the port-of-entry, an exclusion order was made against him. He appealed under subsection 63(2) of the *IRPA*. The issue identified at the outset of the hearing was "whether or not the appellant was in possession of a permanent resident visa." Minister's counsel contended that the appellant did not hold a permanent resident visa and that consequently, the IAD lacked jurisdiction to hear the appeal. The member concluded that the visa became invalid when it was cancelled prior to the arrival of the appellant at the port-of-entry.

CASES