Federal Court  Cour fédérale

Date: 20180109

Docket: IMM-2602-17

Citation: 2018 FC 15

Ottawa, Ontario, January 9, 2018

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

MING GUO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant has been a permanent resident of Canada since 1993. In 2011, he pleaded guilty to improper use of a credit card and received a suspended sentence. As a result a removal order was issued against him on July 9, 2012 by the Immigration Division [ID] as he was deemed inadmissible to Canada for serious criminality.

[2] On January 25, 2013, the Immigration Appeal Division [IAD] and Canada Border Services Agency [CBSA] agreed to a stay of the Applicant's removal from Canada for a four year period subject to various terms and conditions. In addition to bi-yearly reporting obligations, the Applicant was also required to inform the CBSA and the IAD in writing of any change in address. This obligation rested with him, as per the terms of the stay order, for a period of four years (ending with a reconsideration on January 25, 2017).

[3] The Applicant alleges that the last time he reported to CBSA in July 2016, a CBSA officer told him that things were "finished" and that he did not need to report to CBSA anymore.

[4] However, after his removal was stayed, the Applicant moved twice, but failed to advise the IAD of his change of address. He did however report one of his address changes to the CBSA.

[5] On December 15, 2016, a Notice of Reconsideration [the Notice] was sent to the Applicant at his last known address and to legal counsel who represented the Applicant during the removal order appeal. The Notice advised the Applicant that the IAD would be reconsidering his removal order. The Notice also advised the Applicant that he needed to provide a written statement to the CBSA and the IAD as to his compliance with conditions of the stay order. The Notice further warned that a failure to provide the information to the IAD could result in the IAD declaring the Applicant's appeal abandoned.

[6] No written statement was received from the Applicant.

[7] A stay reconsideration hearing was scheduled, and a Notice to Appear was sent to the Applicant on January 16, 2017.

[8] On January 27, 2017, counsel for the Applicant requested that he be removed as counsel of record because of his inability to locate the Applicant.

[9] On February 3, 2017, the Notice to Appear sent to the Applicant was returned to the IAD as undeliverable. The Applicant did not attend at the stay conference. This led to the decision under review.

I. Decision Under Review

[10] The decision under review is the abandonment decision of February 24, 2017.

[11] In this decision, the IAD notes that the Applicant was in default of the proceedings because he failed to keep the IAD apprised of his contact details. Therefore, pursuant to s.168(1) of the *Immigration and Refugee Protection Act* [IRPA], the IAD determined the appeal to be abandoned.

II. Issues

[12] The Applicant raises the following issues:

A. Preliminary Matter: Striking of Certified Tribunal Record
B. Did the IAD fetter its discretion?

C. Was the conclusion that the Applicant had no intention of pursuing his claim reasonable?

III. Standard of Review

[13] This case involves the IAD's interpretation and application of the provisions of its home statute, inviting the reasonableness standard: *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*., 2016 SCC 47 at paras 22-23); *Wilks v Canada (Citizenship and Immigration)*, 2009 FC 306 at paras 25-27 [*Wilks*].

[14] On issues of fettering discretion, the Federal Court of Appeal has held that while fettering of discretion used to be reviewable on a correctness standard, a decision which is the product of fettered discretion is *per se* unreasonable (*Stemijon Investments Ltd. v Canada (Attorney General)*, 2011 FCA 299 at paras 23-24 [*Stemijon*]; *Gordon v Canada (Attorney General)*, 2016 FC 643 at paras 25-28).

IV. Analysis

A. *Preliminary Matter: Striking of Certified Tribunal Record*

[15] At the opening of the hearing I granted the Applicant's motion to strike pages 74-214 of the certified tribunal record as the information contained in those pages post-dated the decision under review, and does not fall into any exceptions warranting its admissibility (*Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at para 13-14). Accordingly the information contained therein has not been considered for the purpose of these Reasons.

B. *Did the IAD fetter its discretion?*

[16] The Applicant argues that the IAD unreasonably fettered its discretion by focusing on its "one-step abandonment policy" and s.168 of the IRPA. An administrative decision which is the result of fettered discretion "draws upon something other than the law—for example a decision based solely upon an informal policy statement without regard or cognizance of law…" (*Stemijon*, at para 24).

[17] The Applicant argues that the IAD should have taken into account other provisions of the IRPA instead of focusing solely on s.168 of the IRPA. The Applicant argues that s.164 of the IRPA allows for an abandonment hearing to be held in absence of an applicant. The Applicant further argues that s.67 of the IRPA allows for an appeal to be allowed or removal stayed without the presence of the applicant. Further, the Applicant points to s.175 which allows the IAD to base its conclusions on "credible and trustworthy evidence."

[18] Here, there is no indication that the IAD simply focused on the one-step abandonment policy to the exclusion of the governing terms of s.168. The IAD appropriately based its decision on s.168 which in its text, context, and purpose permits the IAD to declare an application abandoned in circumstances such as these. This cannot be said to be a fettering of discretion.

[19] None of the provisions cited by the Applicant assist him. As the Respondent notes, s.164 of the IRPA simply allows for the IAD to hold an in-person *or* telecommunication hearing (*Sundaram v Canada (Minister of Citizenship and Immigration)*, 2006 FC 291 at para 14).

Section 164 is not relevant to the hearing of an abandonment proceeding where the Applicant has not responded.

[20] Further, ss. 67 and 175 simply speak to the conditions under which an appeal will be allowed and under which the IAD can accept evidence. These provisions do not assist the Applicant.

[21] Here the IAD reasonably based its decision on s.168 and its own administrative policies, including the "one-step abandonment process". In *Prassad v Canada (Minister of Employment and Immigration)*, [1989] 1 SCR 560 at 568-569 [*Prassad*], the Supreme Court of Canada held that tribunals like the IAD are "masters in their own house" and "[i]n the absence of specific rules laid down by statute or regulation, [administrative tribunals] control their own procedures…". *Prassad* concerned the decision of an immigration adjudicator to deny an adjournment to an applicant while the applicant pursued a ministerial appeal. The Court held that the adjudicator was entitled to do so.

[22] This case is analogous. Here, the IAD has adopted a one-step abandonment process to deal with appeals in a fair and expeditious manner. It is entitled to do so according to s.162(2) of the IRPA. By doing so, the IAD guides its discretion in applying s.168.

[23] The IAD, assisted by the one-step abandonment policy, had regard to the governing law in s.168. Regarding s.168, it is accepted that the IAD is entitled to declare an appeal abandoned

on the return of mail: *Jones v Canada (Citizenship and Immigration)*, 2011 FC 84 at para 21 [*Jones*]. Therefore, the IAD did not err in doing so in this case.

[24] In essence, the Applicant is arguing that the IAD should have taken proactive steps to ascertain his whereabouts. This argument is misguided as that obligation rested with the Applicant. It was his obligation to keep the IAD apprised of his address at least within the four year period which he failed to do. To now argue that his failing resulted in a positive obligation on the part of the IAD is not a credible argument.

C. *Was the conclusion that the Applicant had no intention of pursuing his claim reasonable?*

[25] This Court has held that s. 168(1) "imputes a degree of responsibility" on an applicant, especially to provide the IAD with up to date contact information (*Wilks*, at para 40). Section 168 allows the IAD to declare an application abandoned if an applicant does not live up to the degree of responsibility required.

[26] The Applicant relies on a number of cases in the refugee context to argue that to be in default of proceedings, "it must be clear that…an applicant's behaviour evidences, in clear terms, a wish or intention not to proceed" (*Cabrera Peredo v Canada (Citizenship and Immigration)*, 2010 FC 390; *Emani v Canada (Citizenship and Immigration)*, 2009 FC 520, at para 20). The Applicant argues that he should have been given an opportunity to explain his circumstances in a show cause hearing.

[27] However, these cases are governed by s.65 of the *Refugee Protection Division Rules*, SOR/2012-256, which impose special rules for refugee proceedings including an obligation on the Refugee Division to give a claimant an opportunity to explain why the claim should not be abandoned. The Refugee Division must also consider that explanation and all other relevant factors in deciding an abandonment proceeding.

[28] Similar rules do not apply to the IAD here, particularly regarding show cause hearings. The IAD has developed a one-step abandonment process which outlines the factors the IAD will consider to determine whether a show cause hearing may be convened. One of these is "a recent pattern of responding to the IAD and the appellant's current failure is out of character with how the appellant has pursued the appeal to date."

[29] The IAD reasonably concluded that s.168 should be applied in this case without a show cause hearing. The IAD had indications that the Applicant did not have a clear intention to pursue his claim with a consistent pattern of non-response. The Applicant's lawyer could not contact him, and subsequently recused himself for this reason. He did not appear at his reconsideration hearing. No response was received to a request for a written statement of compliance. Critically, the Applicant did not notify the IAD of two separate address changes.

[30] As noted above, the law provides that "[T]he IAD is rightly entitled to declare an appeal abandoned in the case of returned mail…" (*Jones,* at para 21*).* The discretion lies with the IAD to analyze the facts and determine whether the Applicant's appeal was abandoned, and there is no need for a show cause hearing.

[31] There is no duty on the IAD to pursue the Applicant. As noted in *Dubrézil v Canada (Minister of Citizenship and Immigration)*, 2006 FC 142 at para 12 [*Dubrézil*]:

> If the applicant's reasoning were followed, it would imply that each time a person is absent, lacks diligence or acts in such a way that clearly suggests that the appeal has been abandoned, the IAD would be bound to investigate to find those persons, to remind them of their obligations and to summon them to a new hearing before deciding that the proceedings are abandoned. I cannot accept such an interpretation, especially because in this case the applicant did not advise the IAD of the change in his contact information, so that in any event the IAD would not have been able to contact him to summon him to a new hearing if it had had such an obligation.

[32] This finding in *Dubrézil* is equally applicable to this case.

[33] At the time the stay of removal was granted the Applicant confirmed that he understood conditions and agreed to be bound by them. Furthermore, the four year time frame did not expire until January 2017. It is not reasonable for the Applicant to argue that he assumed as of July 2016 – being the last date he contacted CBSA – that he had fulfilled all obligations of the stay order.

[34] As such, the IAD's conclusion that the Applicant had no intention of pursuing his claim falls within the range of acceptable outcomes based on the facts and the law.

V. Certified Question

[35] The Applicant proposed a certified question relating to the obligations on the IAD when reconsidering a stay of removal. Specifically the Applicant asks if the IAD should be required to

consider if special relief should be granted under sections 67 and 68 of the IRPA before declaring an appeal abandoned under section 168.

[36] I decline to certify this question as there is settled law on this issue, as noted above (*Mudrak v Canada (Citizenship and Immigration)*, 2016 FCA 178 at para 36).

JUDGMENT in IMM-2602-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. No question is certified.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2602-17
STYLE OF CAUSE:	MING GUO v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	DECEMBER 4, 2017
JUDGMENT AND REASONS:	MCDONALD J.
DATED:	JANUARY 9, 2018

APPEARANCES:

Mr. Samuel Loeb	FOR THE APPLICANT
Ms. Amina Riaz	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT