Federal Court  Cour fédérale

Date: 20180926

Docket: IMM-1461-18

Citation: 2018 FC 942

[ENGLISH TRANSLATION]

Ottawa, Ontario, September 26, 2018

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

RODRIGUEZ CENELIA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Rodriguez Cenelia is applying to this Court for judicial review of a decision by the Immigration Appeal Division [IAD] on February 27, 2018, to refuse to reopen his appeal of an exclusion order issued against him in November 2014 on grounds of serious criminality under paragraph 36(1)(a) of the *Immigration and Refugee Protection Act*, (S.C. 2001, c. 27) [IRPA]. The application for judicial review was made under section 72 of the IRPA.

I. Facts

[2] It appears that the applicant did not attend the hearing that was to take place on November 22, 2017, before the IAD. That decision indicates that the panel waited several minutes before noting the absence of the applicant or his counsel. After noting the absence, the panel declared the appeal to be abandoned under subsection 168(1) of the IRPA. That subsection reads as follows:

168 (1) A Division may determine that a proceeding before it has been abandoned if the Division is of the opinion that the applicant is in default in the proceedings, including by failing to appear for a hearing, to provide information required by the Division or to communicate with the Division on being requested to do so.	**168 (1)** Chacune des sections peut prononcer le désistement dans l'affaire dont elle est saisie si elle estime que l'intéressé omet de poursuivre l'affaire, notamment par défaut de comparution, de fournir les renseignements qu'elle peut requérir ou de donner suite à ses demandes de communication.

[3] However, the IRPA provides for the possibility of applying to reopen an appeal. That section reads as follows:

71 The Immigration Appeal Division, on application by a foreign national who has not left Canada under a removal order, may reopen an appeal if it is satisfied that it failed to observe a principle of natural justice.	**71** L'étranger qui n'a pas quitté le Canada à la suite de la mesure de renvoi peut demander la réouverture de l'appel sur preuve de manquement à un principe de justice naturelle.

[4] Such an application to reopen the appeal was made, and it is that decision for which judicial review is being sought. In that decision by the panel, which was made up of different members than the panel that was to hear the appeal of the removal order, the application to

reopen the appeal was dismissed. The panel found that the evidence does not demonstrate that there was a breach of a principle of natural justice.

II. The decision for which judicial review is requested

[5] The IAD decision states that a notice to appear at a hearing was sent to the applicant on September 12, 2017, at the last address on record with the IAD. The same notice to appear was also sent to the office of his counsel at the time. They were required to attend a hearing scheduled on November 22, 2017, at 9:00 a.m.

[6] The applicant provided the IAD with an explanation, with supporting evidence, that he had not received the notice to appear even though he had lived at the same address for 10 years. Apparently, a neighbour in the same building had received the notice and had returned the envelope containing the notice on November 27, 2017. As a result, the applicant went to the office of the Immigration and Refugee Board on November 28 to clarify the situation.

[7] To support his claim that he had not received the notice to appear, the applicant submitted an affidavit. The record also contains a written statement from his spouse, who states that she received the notice to appear on November 27, 2017, from a neighbour. Lastly, the office of the counsel who was representing the applicant at the time also filed a written statement indicating that the notice to appear had not been received.

[8] Despite this evidence, which was not contradicted, and the absence of any reply evidence that the Minister might have filed, the IAD conducted a rather brief analysis. The IAD notes that

the notice to appear had been *sent* to the correct address, as the applicant confirmed. The IAD also notes that there was a statement that a document was provided prepared by a hearing support assistant confirming that the notice to appear had been *sent*. Citing subsection 36(2) of the *Immigration Appeal Division Rules*, the IAD notes that the notice is considered to have been received seven days after the day it was mailed. The letter was not returned. Thus, the IAD concludes as follows:

> [16] The panel concludes that in sending the notices to appear to the appellant and his lawyer, the IAD complied with a procedure ensuring the application of the rules of justice.

[9] There is no indication in the decision of which rule of natural justice may be in question, which makes it somewhat difficult to understand the panel's conclusion that the appellant failed to demonstrate that the IAD had breached a rule of natural justice. Nevertheless, it was easy to see that the difficulty was the absence of the individual whose rights are affected and who was therefore unable to benefit from the *audi alteram partem* rule.

III. Positions of the parties

[10] The applicant accepts that the standard of review that applies in this case is that of reasonableness. However, the applicant seems to believe that the breach of a rule of natural justice means that the decision is unreasonable. I find this argument to be particularly circular, and, for all intents and purposes, equivalent to the application of the correctness standard of review.

[11] Moreover, the applicant insists on the serious consequences for him of the deportation order since he has been a permanent resident of Canada since 1979; thus, he argues that the simple fact that notices to appear were sent, with no proof of their receipt, is insufficient. Lastly, I note that the applicant does not clearly identify the principle of natural justice that should give rise to a new hearing. At the hearing, it appeared that he was alleging in general that he has the right to be heard, given the serious consequences a removal order has for him.

[12] The respondent obviously argues that there was no breach of natural justice. On the basis of *Jones v Canada (Citizenship and Immigration)*, 2011 FC 84 [*Jones*], the respondent argues that the reasonableness standard of review applies in this case.

[13] The respondent notes that since July 2015, the IAD has chosen to eliminate the practically automatic scheduling of a show cause hearing in cases where an applicant fails to respond to a request or a notice to appear. As I understand, while in the past there was the possibility of a "show cause hearing," that has now been eliminated. It is not particularly clear how the virtually complete elimination of these show cause hearings helps the respondent's case. In fact, some of the case law the respondent cites with regard to reopening appeals dates back prior to 2015, meaning to a time when the show cause hearing existed.

[14] For example, the respondent cites *Jones*, but the circumstances of that case are completely different. In *Jones*, the applicant was required to report any change in address to the IAD, which he failed to do (he reported the change to the Border Services Agency). A show cause hearing ("no show conference") was scheduled, and the applicant failed to attend. The IAD

decision for which judicial review was being sought was based on the fact that Jones had not provided his new address even though he was obligated to do so. The Federal Court refused to conclude that a duty to make inquiries of other government departments in order to obtain an address could be a breach of natural justice or of procedural fairness (paragraph 19, *Jones*). In our case, the applicant's address is not the subject of controversy.

[15] Essentially, the respondent is claiming that sending the notice to appear is sufficient.

IV. Analysis

[16] The facts in this case are straightforward. The application to reopen was dismissed. This remedy is provided for under section 71 of the IRPA.

[17] In this case, the breach of natural justice is upholding a removal order without even giving the individual an opportunity to present a case. If the individual subject to the order fails to appear without a valid reason or to fulfill one of his or her obligations [*Jones*], that is his or her choice, and the IAD cannot be criticized for not hearing the individual. However, when evidence is presented that the reason that the individual did not attend is that the notice to appear was not received at the address provided, in the absence of reply evidence demonstrating, for example, that the notice was received or that there are reasons for which the applicant's evidence cannot be believed, how can it not be concluded that there has been a breach of a fundamental principle of our law, the *audi alteram partem* rule? In my view, the breach of a principle of natural justice in this case is the IAD's decision not to hear the applicant even though he submitted, with supporting evidence, that he did not attend because he had not received the

notice to appear. He had not known that he was supposed to appear. When the IAD states that it is satisfied that the applicant's absence is inconsequential and that even though he had not been advised, his case could be decided, there is a breach of natural justice. The breach of natural justice is precisely the applicant's absence through no fault of his own.

[18] Since *Nazifpour v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 35, there has been no doubt that the jurisdiction to reopen an appeal before the Immigration Appeal Division of the *Immigration and Refugee Board* [IAD] is limited to reopening only in cases where there has been a breach of natural justice and not to examine other remedies in "equity" as has previously been the case. The wording of the Act indicates that this is a power that is granted, that the IAD can reopen the appeal, but this power is limited.

[19] I considered the standard of review that must be applied in this case. I find it incongruous that the IAD can refuse to reopen an appeal when a principle of natural justice was allegedly breached. The right to adequate participation in decisions that have an impact on the individual derives from the *audi alteram partem* rule, one of the most fundamental principles of our law. This principle of natural justice is now based on the broad principle of procedural fairness *(Judicial Review of Administrative Action in Canada*, Brown & Evans, Thomson Reuters, loose-leaf, #7:1310, 7:1331), as with the rule that the adjudicator must be impartial.

[20] The standard of review "for determining whether the decision maker complied with the duty of procedural fairness will continue to be "correctness"" (*Mission Institution v Khela*, [2014] 1 SCR 502, 2014 SCC 24, at paragraph 79). After some uncertainty in the federal courts

that might appear in certain decisions, this was resolved in *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69, and the correctness standard of review applies to issues of procedural fairness, including, obviously, violations of the *audi alteram partem* rule. The immediate effect of the correctness standard is that the reviewing court does not need to show deference to the administrative tribunal's decision because there can be several "possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9, paragraph 47): according to this standard, latitude is not given to the administrative tribunal, which would mean that the reviewing court must determine whether the decision has qualities of reasonableness. The reviewing court intervenes if the decision is not correct in terms of procedural fairness.

[21] The incongruity comes from the fact that the judicial review for a violation of the rules of procedural fairness would be conducted based on the correctness standard, whereas the review of a tribunal's evaluation of a breach of that same procedural fairness would be conducted on the reasonableness standard. This brings to mind *Rogers Communications Inc. v Society of Composers, Authors and Music Publishers of Canada*, [2012] 2 SCR 283, 2012 SCC 35 [*Rogers Communications Inc.*]. Paragraphs 15 and 16 of the majority decision (8:1) presenting this issue read as follows:

> [15] Because of the unusual statutory scheme under which the Board and the court may each have to consider the same legal question at first instance, it must be inferred that the legislative intent was not to recognize superior expertise of the Board relative to the court with respect to such legal questions. This concurrent jurisdiction of the Board and the court at first instance in interpreting the *Copyright Act* rebuts the presumption of reasonableness review of the Board's decisions on questions of law under its home statute. This is consistent with *Dunsmuir*, which directed that "*[a] discrete and special administrative regime* in

> which the decision maker has special expertise" was a "facto[r that] will lead to the conclusion that the decision maker should be given deference and a reasonableness test applied" (para. 55 (emphasis added)). Because of the jurisdiction at first instance that it shares with the courts, the Board cannot be said to operate in such a "discrete . . . administrative regime". Therefore, I cannot agree with Abella J. that the fact that courts routinely carry out the same interpretive tasks as the board at first instance "does not detract from the Board's particular familiarity and expertise with the provisions of the *Copyright Act*" (para. 68). In these circumstances, courts must be assumed to have the same familiarity and expertise with the statute as the board. Accordingly, I am of the opinion that in *SOCAN v. CAIP*, Binnie J. determined in a satisfactory manner that the standard of correctness should be the appropriate standard of review on questions of law arising on judicial review from the Copyright Board (*Dunsmuir*, at para. 62).
>
> [16] I must also respectfully disagree with Abella J.'s characterization, at para. 62, of the holding in *ATA* as meaning that the "exceptions to the presumption of home statute deference are . . . constitutional questions and questions of law of central importance to the legal system and outside the adjudicator's specialized expertise". *Dunsmuir* had recognized that questions which fall within the categories of constitutional questions and questions of general law that are both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise were to be reviewed on a correctness standard (paras. 58 and 60). *ATA* simply reinforced the direction in *Dunsmuir* that issues that fall under the category of interpretation of the home statute or closely related statutes normally attract a deferential standard of review (*ATA*, at para. 39; *Dunsmuir*, at para. 54). My colleague's approach would in effect mean that the reasonableness standard applies to all interpretations of home statutes. Yet, *ATA* and *Dunsmuir* allow for the exceptional *other* case to rebut the presumption of reasonableness review for questions involving the interpretation of the home statute.

[22] The parties agreed in that case that the reasonableness standard of review had to apply in this Court. The parties presented no submissions on any other standard of review. The applicant conceded, and the respondent seems to rely on *Jones*, where the Court concludes at paragraph 12

that evaluating whether the tribunal erred in determining that there was no breach of natural justice was an issue of mixed fact and law and was reviewable on the reasonableness standard.

[23] With respect, I am not convinced that this should be the case. One could certainly try to differentiate our case: the facts are clearly different; *Jones* seems to have been argued on a different basis at a time when show cause hearings were commonplace, and one such hearing had even been scheduled. Moreover, the decision in *Rogers Communications Inc.* was rendered after that in *Jones*. However, it is not necessary to conclude that the correctness standard of review, which is less demanding of an applicant, should apply because, in my view, the IAD's decision is unreasonable.

[24] The rules of procedural fairness are variable. In *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, the Court established that the nature and extent of the rules of fairness varied based on different factors:

> 22 Although the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected, it is helpful to review the criteria that should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances. I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.
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> [Emphasis added]

[25] I consider the third factor, regarding the importance of the decision to the individual or individuals affected, to be particularly relevant in this case:

> 25 A third factor in determining the nature and extent of the duty of fairness owed is the importance of the decision to the individual or individuals affected. The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated. This was expressed, for example, by Dickson J. (as he then was) in *Kane v. Board of Governors of the University of British Columbia*, 1980 CanLII 10 (SCC), [1980] 1 S.C.R. 1105, at p. 1113:
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> > A high standard of justice is required when the right to continue in one's profession or employment is at stake. [. . .] A disciplinary suspension can have grave and permanent consequences upon a professional career.
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> As Sedley J. (now Sedley L.J.) stated in *R. v. Higher Education Funding Council, ex parte Institute of Dental Surgery*, [1994] 1 All E.R. 651 (Q.B.), at p. 667:
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> > In the modern state the decisions of administrative bodies can have a more immediate and profound impact on people's lives than the decisions of courts, and public law has since *Ridge v. Baldwin* [1963] 2 All E.R. 66, [1964] A.C. 40 been alive to that fact. While the judicial character of a function may elevate the practical requirements of fairness above what they would otherwise be, for example by requiring contentious evidence to be given and tested orally, what makes it "judicial" in this sense is principally the nature of the issue it has to determine, not the formal status of the deciding body.
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> The importance of a decision to the individuals affected, therefore, constitutes a significant factor affecting the content of the duty of procedural fairness.

[26] As Lord Sedley did, it is important to recognize that administrative decisions have more of an impact on the life of individuals than many judicial decisions.

[27] In this case, Mr. Cenelia is appealing the removal order issued against him in November 2014. Can it be seriously argued that this order (deportation order in his case) does not have very grave consequences for him and his spouse? Is it not necessary to have a relatively high level of procedural fairness in his case, obviously including the right to participate in the decision-making process? Does he not have the right to be heard if he is not at fault for not attending?

[28] As I said, the right to participate in the case is fundamental and becomes all the more important when there are considerable consequences on the lives of litigants. In this case, a deportation order was issued in November 2014, and, nearly three years later (in September 2017), a notice to appear was sent by regular mail. There is no proof of receipt on record, no registered mail, no bailiff.

[29] The respondent is not wrong to cite section 36 of the *Immigration Appeal Division Rules*, SOR/2002-230:

When a document is considered received by the Division	**Date de réception d'un document par la Section**
36 (1) A document provided to the Division is considered to be received by the Division on the day the document is date stamped by the Division.	**36 (1)** Tout document transmis à la Section est considéré comme ayant été reçu le jour où la Section y appose la date de réception au moyen d'un

	timbre dateur.
When a document sent by regular mail is considered received by a party	**Date de réception d'un document envoyé par courrier ordinaire à une partie**
(2) A document sent to a party by regular mail is considered to be received seven days after the day it was mailed. A document sent to a party by regular mail to or from a place outside Canada is considered to be received 20 days after the day it was mailed. If the seventh day or the twentieth day, as the case may be, is a Saturday, Sunday or statutory holiday, the document is considered to be received on the next working day.	**(2)** Tout document envoyé par courrier ordinaire à une partie est considéré comme ayant été reçu sept jours après sa mise à la poste. Celui envoyé à partir d'un lieu situé hors du Canada ou vers un tel lieu est considéré comme ayant été reçu vingt jours après sa mise à la poste. Si le septième jour ou le vingtième jour, selon le cas, est un samedi, un dimanche ou un autre jour férié, le document est alors considéré comme ayant été reçu le premier jour ouvrable suivant.

But that is clearly just a presumption that is not irrebuttable.

[30] The evidence on record appears to rebut the presumption. That evidence was not questioned during the application to reopen. As a result, the applicant formally declares that he did not receive the notice to appear. His spouse confirms this. The lawyer to whom the respondent states that it sent the notice claims to have received nothing. That is the evidence on record. There is no doubt that the notice to appear was sent. It is the receipt of the notice that is at issue.

[31] It seems that to justify its conclusion that there is no breach of the principles of natural justice, the IAD relies solely on the argument that the notice to appear was sent to the correct

address. The IAD states that it “complied with a procedure ensuring the application of the rules of justice” (paragraph 16).

[32] In neither the French nor the English version of section 71 is there an indication that the test is a procedure intended to ensure the application of the rules of justice. As a result, I do not see how the procedure is intended to ensure the application of the rules of natural justice. How does the procedure ensure compliance with the *audi alteram partem* rule? While the Act describes an obligation of result, to respect the rules of natural justice, the IAD transforms it into a form of obligation of means. And again, these means are rather weak, since it claims that one can simply claim a presumption that sending the notice is considered as the notice being received at its destination. However, there is no discussion of the evidence that contradicts the presumption, nor was that evidence called into question at the IAD hearing. One is not obligated to accept evidence. It can be challenged. The evidence may lack credibility and probative value. However, this observation must be made rather than seeking refuge behind a procedure that does not even establish receipt of the notice to appear, only that it is assumed to have reached its destination after a certain period.

[33] The respondent attempted to argue that it is necessary to avoid formality and act quickly. The respondent cited a notice from the Immigration and Refugee Board of Canada indicating that it was essentially abandoning show cause hearings for individuals who do not appear for an appeal. The reason provided was administrative convenience given the large backlog of cases.

[34] Contrary to the argument made, this new policy is not set out in the Act or Regulations. It is simply a manifestation of the IAD's ability to proceed quickly and without formality. Furthermore, subsection 162(2) of the IRPA is careful to stipulate that fairness and natural justice must take precedence:

162 (2) Each Division shall deal with all proceedings before it as informally and quickly as the circumstances and the considerations of fairness and natural justice permit.	**162 (2)** Chacune des sections fonctionne, dans la mesure où les circonstances et les considérations d'équité et de justice naturelle le permettent, sans formalisme et avec célérité

[35] This announced change to the process is not disputed. The show cause hearing does not seem to have been required under the IRPA, but it promoted the review of cases where the litigant did not attend. Since this type of hearing is now exceptional, it is at the stage of the application to reopen that it is necessary to examine whether the appeal of the removal order was addressed in accordance with the rules of natural justice, including the opportunity to be heard. It may be pertinent to reiterate that the Minister cannot justify an action that might be unreasonable or violate procedural fairness on the basis of a policy the Minister adopted: a policy is not the law (*Agraira v Canada (Public Safety and Emergency Preparedness)*, [2013] 2 SCR 559, 2013 SCC 36).

[36] In addition to the fact that the IAD should examine how the litigant's absence in a serious matter with grave consequences on his life, when he claims that he did not receive the notice to appear, did not constitute a breach of a principle of natural justice, the rationale for finding that there is no breach is also insufficient. This lack of rationale is in itself a factor to be considered when examining reasonableness when the reviewing Court is seeking to understand the basis of

the decision (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, [2011] 3 SCR 708, 2011 SCC 62, paragraphs 14 to 16).

[37] The only rationale is provided at paragraph 16 of the decision, where the IAD states that it "complied with a procedure ensuring the application of the rules of justice." A procedure may be intended to achieve a goal, but the goal would have to be achieved, and the litigant would have to be informed of what the procedure entails. In this case, it is unclear what the procedure entails, especially since the applicant's absence is presented, without even being disputed, as being the result of him having not received the notice to appear, through no fault of his own (unlike in *Jones*). What is the procedure that is intended to ensure that natural justice was maintained? Only that a notice to appear was sent? Natural justice is protected, including the fundamental right to be heard, by the sole fact that a notice was sent, without considering whether it was received, even when the receipt of the notice is in serious dispute.

[38] Moreover, it is not indicated how a procedure apparently intended to ensure the application of the rules of justice could satisfy a test that concerns a breach of a principle of natural justice. The procedure may have an intended goal, but the question is to determine whether, on the merits of the case, there was a breach.

[39] Therefore, it is clear that the decision has none of the qualities of reasonableness, meaning justification, transparency and intelligibility in the decision-making process. I would add that, considering the gravity of the decision made against the applicant, it would have been necessary to take this into account in assessing the nature and extent of the duty of procedural

fairness to give the litigant the opportunity to be heard. We are far from being contented with a procedure intended to ensure the application of the rules. Natural justice demands better, and a litigant facing deportation should have the opportunity to be heard if he is not responsible for his absence.

[40] Consequently, the application for judicial review must be allowed. The applicant has simply asked to have the decision to refuse to reopen the appeal set aside and to have the case referred back to a different panel for redetermination. Given this limited finding, there is no need to refer this case directly to the IAD to hear the appeal on merit.

[41] The parties agree that this case raises no serious question of general importance.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed. The case is referred back to a different IAD panel for reconsideration under section 71 of the IRPA. No question is certified.

"Yvan Roy"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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