Federal Court  Cour fédérale

Date: 20190726

Docket: IMM-6577-18

Citation: 2019 FC 1008

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, July 26, 2019

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

BILAL ABOU EL-HASSAN

Applicant

and

THE MINISTER OF IMMIGRATION AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

[1] The applicant is appealing the refusal issued by the Immigration Appeal Division (IAD) to reopen the appeal he filed on February 13, 2014, against a deportation order issued against him on the same day by the Immigration Division, which he abandoned in January 2017. This followed the applicant's guilty plea to a charge under section 57 of the *Criminal Code*, RSC

1985, c C-46, for using a passport, which was set aside by the Quebec Court of Appeal almost 16 months after the appeal to the IAD was abandoned.

[2] The facts of this case are relatively straightforward. The applicant is a Lebanese national. In March 2002, he was granted permanent resident status in Canada. In December 2013, he pleaded guilty to using a forged passport. It is a forged Lebanese passport in this case.

[3] Since this offence is punishable by a maximum term of imprisonment of 14 years, an inadmissibility report for serious criminality was issued against the applicant under paragraph 36(1)(a) and subsection 44(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act). A hearing was then held before the Immigration Division, which issued the deportation order in question against the applicant on February 13, 2014. As I have already mentioned, the applicant appealed this decision to the IAD on the same day.

[4] Shortly after the applicant filed his appeal, he left Canada for Lebanon, where he remains. In January 2017, he withdrew his appeal. However, in June of the same year, he was informed that there had been a misunderstanding about the offence of using a forged passport for which he had been charged, since the offence under section 57 of the *Criminal Code* only applies to Canadian passports. The applicant therefore filed a motion for leave to appeal to the Quebec Court of Appeal. This motion was received on May 31, 2018. The Quebec Court of Appeal set aside the guilty plea entered by the applicant on the charge of using a forged passport and acquitted him.

[5] On the basis of that judgment, the applicant brought an application to reopen the appeal before the IAD. The application is based on paragraph 67(1)(b) of the Act, which provides that an appeal to the IAD is allowed where the IAD is satisfied that, at the time that the appeal is disposed of, a principle of natural justice has not been observed. The applicant submits that if he had not been wrongly convicted of using a forged passport, the deportation order would not have been issued and he would not have lost his permanent resident status.

[6] On December 12, 2018, the IAD dismissed the application. It agreed with the respondent that it is not section 67 of the Act that governs this application to reopen the appeal, but section 71, which allows a foreign national who has not left Canada under a removal order to apply to reopen an appeal if the IRB is satisfied that it failed to observe a principle of natural justice.

[7] Since the applicant became a "foreign national" within the meaning of the Act when he abandoned his appeal in January 2017 and has resided outside Canada since February 2014 after the removal order was issued, the IAD considers that the conditions for reopening an appeal under section 71 are not met. The IAD therefore dismissed the applicant's application to reopen his appeal.

[8] The applicant essentially alleges that the IAD considered section 71 of the Act in isolation when it was required, in his opinion, to interpret it in accordance with subsection 51(3) of the *Immigration Appeal Division Rules*, SOR/2002-230 (Rules), which allows "a person" to request to reinstate an appeal that was made to the IAD and then withdrawn and requires the IAD

to grant such a request not only on evidence of a breach of a principle of natural justice, but also if it is otherwise in the interests of justice to do so.

[9] In the alternative, he urges the Court to make an exception to the principle of judicial comity since following *Nazifpour v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 35, leave to appeal to the SCC refused, 31976 (June 28, 2007) [*Nazifpour*], which limited the scope of section 71 of the Act to cases where the reopening of an appeal is justified when the IAD has not observed one of the principles of natural justice, would create an injustice in the particular circumstances of this case.

[10] The only issue to be resolved in this case is whether the IAD committed a reviewable error in refusing this application to reopen an appeal based solely on section 71 of the Act.

[11] It is not disputed that this issue must be considered under the standard of reasonableness since there is no doubt that the IAD's consideration of an application for reopening an appeal raises questions of mixed fact and law within its expertise (*Pham v Canada (Citizenship and Immigration)*, 2018 FC 1251 at para 25). Under this standard of review, the Court will intervene if the decision in question does not possess, among other things, the attributes of justification, transparency and intelligibility (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[12] Although this is a deferential standard, I nevertheless believe, for the reasons that follow, that there are grounds for intervention.

[13] The respondent urges me to dismiss this judicial review on the basis that the argument based on section 51 of the Rules is a new argument, raised for the first time on judicial review. According to the case law of this Court, he adds, such a procedure is not desirable since it amounts to asking the Court to pronounce a declaratory judgment, which is not its role in judicial review. In short, its role in this area is rather to control the legality of decisions taken by administrative decision makers with particular expertise in their respective fields of competence, and not to decide in their place.

[14] In particular, the respondent urges me not to rule on the interaction between section 71 of the Act and section 51 of the Rules when the IAD has not been called upon to do so, and therefore not to rule on what is essentially a question of interpretation that falls first and foremost within the expertise of the IAD, without the benefit of the IAD's position on this issue. The respondent notes that administrative decision makers should be given the opportunity to address an issue first and make their views known, particularly when the issue relates to their area of expertise.

[15] I do not disagree with these principles, but I do not believe that, on this basis, we are in a situation here that would require the dismissal of the applicant's application for judicial review.

[16] It is true that the application to reopen the appeal, made on written submissions only, does not mention section 51 of the Rules by name, but it does not mention section 71 of the Act either. There is also a reference to [TRANSLATION] "sections 43 et seq." of the Rules, suggesting that the applicant had the Rules in mind when he made his application. The applicant also argues

that it was in the interests of justice that his appeal be reopened (Certified Tribunal Record at p 83 at para 42), which again suggests that he had the Rules in mind.

[17] What is quite clear, however, is that the applicant was approaching the IAD to reopen his appeal, which had been discontinued a few months earlier. It would certainly have been desirable for the applicant to have made an explicit reference to section 51 of the Rules, or even to section 71 of the Act, but it is not necessarily fatal in my opinion, given not only the explicit and implicit references to the Rules found in the application he made to the IAD, but also the circumscribed and limited nature of that application.

[18] Technically, this application involved only one and/or the other of two provisions of the Act and the Rules, namely section 71 of the Act, the application of which, it is true, is limited to very specific circumstances (*Nazifpour* at paras 78 and 80), and section 51 of the Rules, which seems at first glance to be more permissive to the extent that (i) it is addressed to "a person" who has filed and then withdrawn an appeal to the IAD, which again at first glance appears to be directed at someone in the applicant's situation, not just a "foreign national" who has not left Canada as a result of a removal order; and (ii) it also allows the appeal to be reinstated where it is in the interests of justice to do so, and not only when the IAD commits a breach of a principle of natural justice.

[19] However, the IAD considered only one of them. Yet, as an administrative decision maker with particular expertise, she is presumed to know the law she is mandated to apply (*Agapi v Canada (Citizenship and Immigration)*, 2018 FC 923 at para 17). In particular, it should

be presumed that the IAD was also aware of the few decisions of colleagues who applied both section 71 of the Act and section 51 of the Rules to an application to reopen an appeal, being of the opinion that one incorporates the other and that, as a result, section 51 widens the cases in which appeals may be reopened (*Andrade v Canada (Public Safety and Emergency Preparedness)*, 2014 CanLII 96243 (CA IRB) at para 17; *Elwinni v Canada (Citizenship and Immigration)*, 2010 CanLII 95521 (CA IRB) at paras 11, 12 and 18).

[20] This discussion is absent from the IAD's decision, and in my view this affects intelligibility and transparency, especially since, at first sight, but without deciding it, the applicant appears to have the profile of someone who is authorized, pursuant to section 51 of the Rules, to make an application to reinstate an appeal, namely that of "a person" who has filed an appeal with the IAD, but has subsequently withdrawn it. In short, I believe that the IAD had a duty to consider the applicant's application according to the only two options available to it, despite the fact that the applicant did not make any explicit reference, in the application, to section 51 of the Rules. Perhaps section 51 of the Rules does not apply to the applicant's case, but we do not know why, whereas this provision has been applied in other cases before this same court.

[21] The applicant was the victim of a miscarriage of justice that had a significant impact on his status in Canada. This is therefore a case where, in my opinion, it is imperative that form does not prevail over substance. In any event, as I mentioned earlier, the application to reopen the appeal at issue here refers generally to the Rules and implicitly to section 51. This should

have been sufficient, in my opinion, to cause the IAD to consider the Rules and to question their impact, if any, on said application.

[22] I would like to point out that, to date, the issue of the interaction between section 71 of the Act and section 51 of the Rules has not been the subject of particularly in-depth reflection and discussion by the IAD. It also seems that this question has not yet been raised before the Court. Yet this cohabitation is very real and poses very real interpretation challenges as well.

[23] However, I will follow the respondent's advice and refrain from offering my views on the issues raised by this relationship, which is in accordance with the precautionary principle that it is preferable to leave it to an administrative decision maker to deal with an issue first when it falls within his or her particular jurisdiction. I will leave this, as it should be, to the IAD.

[24] The respondent argued, assuming that section 51 of the Rules applies to the applicant's case, that it is not necessarily in the interests of justice to grant the application to reopen the appeal, given all the circumstances of this case and despite the quashing of the conviction on which the removal order was based. I understand that if this provision applies at all, it is not clear to the respondent that there is a case for reopening the appeal. It will also be up to the IAD to assess this question, if it ultimately arises, since it undoubtedly falls within its area of expertise. This is an additional reason to return the file to the IAD.

[25] The applicant's application for judicial review will therefore be allowed and the matter returned to another member of the IAD for reconsideration.

[26] At the hearing of this judicial review, I indicated to the parties that I would invite them to submit a question for certification if I had to rule on the interpretation of section 71 of the Act and section 51 of the Rules and how the two provisions should interact with each other. Since I did not, and the matter has been returned to the IAD for consideration of the applicant's claim in relation to section 51, I do not see the need to certify a question of general importance.

JUDGMENT in IMM-6577-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed;

2. The decision of the Immigration Appeal Division, dated December 12, 2018, refusing to reopen the applicant's appeal against a deportation order issued against him by the Immigration Division, is set aside, and the matter is returned to the Immigration Appeal Division, differently constituted, for reconsideration in light of the reasons in this judgment;

3. No question of general importance is certified.

"René LeBlanc"
Judge

Certified true translation
This 16th day of August, 2019.
Michael Palles, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6577-18
STYLE OF CAUSE:	BILAL ABOU EL-HASSAN v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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