Date: 20080527

Docket: IMM-4658-07

Citation: 2008 FC 670

Ottawa, Ontario, May 27, 2008

PRESENT: The Honourable Mr. Justice Blanchard

BETWEEN:

DEWITT FRÉDÉRIC JUSTE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] This is an application for judicial review of a decision of the Immigration and Refugee Board's Immigration Appeal Division (the panel) dated October 22, 2007, dismissing the application to reopen filed by the applicant under section 71 of the *Immigration and Refugee Protection Act*, R.S.C. 1985, c. I-2 (the Act).

II. Factual background

[2] The applicant was born in Port-au-Prince, Haiti, on August 15, 1971, and is a Haitian citizen.

[3] On November 2, 1991, the applicant was granted landing in Canada.

[4] On October 19, 2001, the applicant was convicted of possession of a substance (cocaine), an indictable offence under subsections 4(1) and 4(3) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, which carries a maximum term of imprisonment of seven (7) years. The applicant was sentenced to eight (8) months' imprisonment and eighteen (18) months' probation.

[5] On February 6, 2002, the applicant was issued a report under section 27 of the *Immigration Act 1978* (the former Act), indicating that he was a person described in paragraph 27(1)(*d*) of the former Act, now paragraph 36(1)(*a*) of the Act.

[6] On December 12, 2002, a removal order was issued against the applicant under paragraph 45(*d*) of the Act.

[7] On October 23, 2003, the panel granted the applicant a stay of five years with various conditions set out in the notice of decision dated November 10, 2003.

[8] On June 30, 2005, the panel reviewed the appeal and granted a stay of removal order on the conditions set out in the notice of decision dated July 6, 2005.

[9] On October 13, 2006, the Minister's representative requested a review of the appeal on the grounds that the applicant had failed to comply with some of the conditions of the stay.

[10] On October 19, 2006, the applicant faxed a letter to the panel indicating his new address and explaining why he had not provided it when he had moved.

[11] On November 17, 2006, the panel received two letters dated November 10, 2006: one signed by the applicant and the other by his spouse. The letters asked the panel to make allowances for the applicant because of the special circumstances of the case.

[12] The hearing took place on December 4, 2006, before the panel, with the applicant and the Minister's counsel present. The applicant was not represented by counsel. At the start of the hearing, the applicant indicated that he agreed to proceed alone, since he had always proceeded alone in any case.

[13] At the hearing, the Minister's counsel filed Exhibit R-7, which he had received on Friday, November 30, 2006, at 6:55 p.m. It was a request to institute proceedings against the applicant for offences under subsection 5(2) of the *Controlled Drugs and Substances Act* that he had allegedly committed on September 14 and 21, 2005, and October 11, 2005, namely, narcotics trafficking. The applicant did not object to the filing of Exhibit R-7, and the panel accepted it on the record.

[14] On March 13, 2007, the panel

(a) Upheld the removal order;

(b) Noted that there were insufficient humanitarian and compassionate considerations to warrant special relief;

(c) Terminated the stay;

(d) Dismissed the applicant's appeal.

[15] On May 22, 2007, the applicant filed with the panel an application to reopen under section 71 of the Act.

[16] On June 22, 2007, the Minister's representative forwarded to the applicant and the panel the Minister's response regarding the application to reopen.

[17] On October 22, 2007, the panel denied the application to reopen.

[18] On November 9, 2007, this application for judicial review was filed.

III. Impugned decision

[19] In its decision dated October 22, 2007, the panel denied the application to reopen. The decision is quoted in full below:

> The application to reopen made by the appellant on May 22, 2007, is denied. The appellant did not demonstrate a breach of natural justice in this case. He had a hearing, at which he was present, and he had to object if the questions and the documents presented by the Minister were not

> satisfactory, something he did not do. This is not a sufficient reason to warrant a reopening.
>
> I certify that this is the decision and reasons of the member in this appeal.

IV. Statutory framework

[20] The relevant provisions of the *Immigration and Refugee Protection Act* and the *Controlled Drugs and Substances Act* are quoted in the Annex.

V. Issue

[21] Did the panel err in denying the application to reopen on grounds that there was no breach of natural justice?

VI. Standard of review

[22] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court of Canada found that there should be only two standards of review: correctness and reasonableness. The Court indicated that the standard of correctness must be maintained in respect of jurisdictional and some other questions of law (see *Dunsmuir* at paragraph 50). When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis to decide whether the decision is correct.

[23] It is well settled that the standard of review to be applied to issues of breach of natural justice is correctness (see *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2005] F.C.J. No. 2056 (QL) at paragraph 46 and *Olson v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 458, [2007] F.C.J. No. 631 (QL) at paragraph 27).

[24] Since there is an issue of a breach of natural justice in this case, the applicable standard of review is correctness.

VII. Analysis

[25] Through section 71 of the Act, Parliament has restricted the panel's right to reopen an appeal to matters concerning a breach of natural justice (*Ye v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 964, [2004] F.C.J. No. 1185). To reopen an appeal, the IAD must be satisfied that it failed to observe a principle of natural justice. In this case, the panel's decision clearly states that no such breach occurred. It is that denial that is at issue here.

[26] The applicant raises essentially two arguments. First, he claims that the panel failed to observe a principle of natural justice by omitting to address the arguments found at paragraphs 16 and 34 of his application to reopen. These arguments can basically be summed up as follows:

(a) The applicant's explanation as to why he had omitted to inform the parties concerned of his new address, as required by the conditions of the stay (condition No. 1);

(b) The fact that the applicant's testimony had made it possible to convict in Canada four of the six assailants who were accused of rape; and

(c) The fact that he did not want to be separated from his [TRANSLATION] "three beautiful little girls" and that the panel should have taken into account the best interests of the children under subsections 68(1) and 68(2) of the Act.

[27] In those paragraphs, the applicant is alleging that the panel infringed on his right to a fair hearing by an impartial tribunal. Because the panel omitted to address the arguments raised by the applicant in his application to reopen, he claims that the decision was capricious and unreasonable. The applicant is also claiming that the panel completely ignored his explanations in support of his application to reopen.

[28] Second, the applicant is alleging that the panel failed to observe a principle of natural justice by accepting the filing of Exhibit R-7 on the day of the hearing. In doing so, the panel contravened its obligation to ensure that the applicant is fairly and equitably heard, and that he has the opportunity and the time to put forward his arguments, and, especially, to present evidence in support of his allegations. By accepting a piece of evidence that had taken the applicant by surprise, the panel had taken advantage of the fact that the applicant was not represented by counsel. Furthermore, the applicant is stressing the determinative aspect of Exhibit R-7 for the decision rendered.

[29] I will deal with these two arguments below.

[30] I cannot characterize the panel's failure to address the arguments in paragraphs 16 to 34 of the applicant's application to reopen as a breach of natural justice. The applicant is basically challenging the panel's findings of fact, claiming that it had ignored certain pieces of evidence, including some documents that he had filed and his answers, and that it was selective in assessing the evidence. The applicant is essentially trying to present arguments on the merits in the guise of a breach of the principles of natural justice. The applicant had the option of filing with the Federal

Court an application for leave and for judicial review of the decision, a much broader remedy than an application to reopen, which is restricted to breaches of natural justice. Since the application of section 71 of the Act is limited, the panel did not err in finding as it did and not expressly addressing every allegation mentioned above.

[31] Similarly, I cannot see a breach of the principles of natural justice in the filing of Exhibit R-7, which was the applicant's second argument. The following excerpt from the hearing transcript demonstrates how Exhibit R-7 was introduced:

> Mr. Sabourin: It is a document I myself received on Friday afternoon, so I couldn't disclose it earlier. I apologize.
>
> Member: So it's R-7.
>
> Mr. Sabourin: . . . inaudible . . . and….
>
> Member: And what is it?
>
> Mr. Sabourin: . . . and to the appellant. They are requests to institute proceedings by the police, who apparently mentioned that Mr. Juste will be charged in the next few days with drug trafficking.
>
> Member: Okay
>
> Mr. Sabourin: Well, accused, not charged. The . . . inaudible . . . of innocence is in force in Canada.
>
> Member: So, as you know, Mr. Juste, every person is presumed innocent until proven guilty. Okay, so that, that means the police will accuse you of something but . . .
>
> Appellant: Yes.
>
> Member: I will accept it on the record, because the Minister's counsel gave it, gave it to me, but there is always the rule that you are presumed innocent until proven guilty. So, the questions we will, we will ask you today will have to do with what has happened up to today. Maybe Mr. Sabourin will also ask you questions about that document, we'll see . . .. (Emphasis added.)

I am of the opinion that this excerpt of the hearing transcript, as well as a careful reading of the reasons dated March 13, 2007, indicate that there has been no breach of natural justice. The applicant was informed of the type of document it was and did not object to its being filed. The panel limited the document's probative power and repeated the presumption of innocence in the applicant's favour. Furthermore, nothing indicates that Exhibit R-7 was used to cross-examine the applicant. It is also evident that the panel attached little weight to the content of the exhibit, except concerning the mention of the fact that the applicant was unemployed, a fact which he had admitted during his testimony. In addition, the reasons for the review of the stay of removal order dated March 13, 2007, are based on several determining factors other than Exhibit R-7, such as

(i) his violation of condition 1 of the stay, namely, to inform the panel and the Minister of Citizenship and Immigration of any change of address;

(ii) his violation of conditions 2 and 3, according to which he had to provide a copy of his passport or travel document and apply for an extension of the validity period of any passport or travel document before it expired.

(iii) his violation of condition 10, namely, to make reasonable efforts to seek and maintain full-time employment;

(iv) the fact that he did not remember the ages of his children, which showed his lack of interest in them; and

(v) the fact that he still did not take responsibility for the indictable offence to which he pleaded guilty in 2001.

I cannot find that the panel's acceptance of Exhibit R-7 contributed to a breach of natural justice. It is evident from reading the reasons dated March 13, 2007, that the violations of conditions 1, 2, 3 and 10 of the stay were the determining factors in the decision to uphold the removal order against the applicant.

[33] For these reasons, I am of the opinion that the panel committed no error in finding that the applicant had not demonstrated a breach of natural justice. Consequently, this application will be dismissed.

[34] The parties did not propose a serious question of general importance to be certified as set out in paragraph 74(*d*) of the Act. I am satisfied that no such question was raised in this case. No question will therefore be certified.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that

1. The application for judicial review is dismissed.

2. No serious question of general importance is certified.

"Edmond P. Blanchard"
Judge

Certified true translation
Susan Deichert, Reviser

Annex

Controlled Drugs and Substances Act, S.C. 1996, c. 19:

4. (1) Except as authorized under the regulations, no person shall possess a substance included in Schedule I, II or III.

…

(3) Every person who contravenes subsection (1) where the subject-matter of the offence is a substance included in Schedule I

(*a*) is guilty of an indictable offence and liable to imprisonment for a term not exceeding seven years; or

(*b*) is guilty of an offence punishable on summary conviction and liable

(i) for a first offence, to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months, or to both, and

(ii) for a subsequent offence, to a fine not exceeding two thousand dollars or to imprisonment for a term not exceeding one year, or to both.

4. (1) Sauf dans les cas autorisés aux termes des règlements, la possession de toute substance inscrite aux annexes I, II ou III est interdite.

…

(3) Quiconque contrevient au paragraphe (1) commet, dans le cas de substances inscrites à l'annexe I :

a) soit un acte criminel passible d'un emprisonnement maximal de sept ans;

b) soit une infraction punissable sur déclaration de culpabilité par procédure sommaire et passible :

(i) s'il s'agit d'une première infraction, d'une amende maximale de mille dollars et d'un emprisonnement maximal de six mois, ou de l'une de ces peines,

(ii) en cas de récidive, d'une amende maximale de deux mille dollars et d'un emprisonnement maximal d'un an, ou de l'une de ces peines.

5. (1) No person shall traffic in a substance included in Schedule I, II, III or IV or in any substance represented or held out by that person to be such a substance.

(2) No person shall, for the purpose of trafficking, possess a substance included in Schedule I, II, III or IV.

5. (1) Il est interdit de faire le trafic de toute substance inscrite aux annexes I, II, III ou IV ou de toute substance présentée ou tenue pour telle par le trafiquant.

(2) Il est interdit d'avoir en sa possession, en vue d'en faire le trafic, toute substance inscrite aux annexes I, II, III ou IV.

Immigration and Refugee Protection Act, R.S.C. 1985, c. I-2:

36. (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for

(*a*) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;

(*b*) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or

(*c*) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.

…

45. The Immigration Division, at the conclusion of an admissibility hearing, shall make one of the following decisions:

(*a*) recognize the right to enter Canada of a Canadian citizen within the meaning of the *Citizenship Act*, a person registered as an Indian under the *Indian Act* or a permanent resident;

(*b*) grant permanent resident status or

36. (1) Emportent interdiction de territoire pour grande criminalité les faits suivants :

a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;

b) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;

c) commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans.

[…]

45. Après avoir procédé à une enquête, la Section de l'immigration rend telle des décisions suivantes :

a) reconnaître le droit d'entrer au Canada au citoyen canadien au sens de la *Loi sur la citoyenneté*, à la personne inscrite comme Indien au sens de la *Loi sur les Indiens* et au résident permanent;

temporary resident status to a foreign national if it is satisfied that the foreign national meets the requirements of this Act;

(*c*) authorize a permanent resident or a foreign national, with or without conditions, to enter Canada for further examination; or

(*d*) make the applicable removal order against a foreign national who has not been authorized to enter Canada, if it is not satisfied that the foreign national is not inadmissible, or against a foreign national who has been authorized to enter Canada or a permanent resident, if it is satisfied that the foreign national or the permanent resident is inadmissible.

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.

b) octroyer à l'étranger le statut de résident permanent ou temporaire sur preuve qu'il se conforme à la présente loi;

c) autoriser le résident permanent ou l'étranger à entrer, avec ou sans conditions, au Canada pour contrôle complémentaire;

d) prendre la mesure de renvoi applicable contre l'étranger non autorisé à entrer au Canada et dont il n'est pas prouvé qu'il n'est pas interdit de territoire, ou contre l'étranger autorisé à y entrer ou le résident permanent sur preuve qu'il est interdit de territoire.

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.

FEDERAL COURT

SOLICITORS OF RECORD

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