Federal Court  Cour fédérale

Date : 20110125

Dossier : IMM-628-10

Citation : 2011 FC 84

Ottawa, Ontario, January 25, 2011

PRESENT: The Honourable Mr. Justice de Montigny

ENTRE :

DONOVAN ANTHONY JONES

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This Application is brought pursuant to s. 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("IRPA") and s. 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7. It is an application for judicial review of a decision by the Immigration Appeal Division ("IAD") of the Immigration and Refugee Board, dated January 25, 2010, wherein the IAD dismissed the Applicant's motion to reopen his appeal, which had been declared abandoned on August 14, 2009.

I. Facts

[2] The Applicant emigrated from Jamaica as a teenager with his mother and siblings in 1988. Pursuant to some traumatic experiences, including witnessing the shooting of his own brother and being threatened at gunpoint, he became involved in criminal activity. His criminal record spans a 10-year period from October 1992 to October 2002. He has been convicted of several serious offences including robbery; in February 1993 he was also convicted of the dangerous operation of a motor vehicle and carrying a concealed weapon. In addition, he has a number of non-compliance offences including failing to attend court, failing to comply with a recognizance, and failing to appear. His last criminal offence was in 2002, when he was fined $300 for possessing marihuana.

[3] The Applicant was ordered deported by the Immigration Division on October 28, 2004 as a result of his conviction in 1997 for trafficking in a narcotic, for which he was sentenced to eight months in jail. He appealed the deportation order to the IAD and on April 28, 2006, he obtained a temporary stay of removal. Under this order, he was required to report changes in address to both the Canadian Border Services Agency ("CBSA") and the IAD. The stay order also specified that his appeal would be reviewed on or about March 22, 2009.

[4] Subsequently, the Applicant moved house without informing the IAD of his new address, although he did report the change to CBSA. He claims that he misunderstood his obligation and thought that reporting to the CBSA only would be sufficient, whereas in fact he was also required to make a separate report to the IAD. As such, notification of his June 25, 2009 appeal review, sent by the IAD on March 10, 2009, did not reach him because it was sent to his former address, the most recent one the IAD had on file. He therefore did not attend his appeal review hearing.

[5] By Notice to Appear dated July 8, 2009, the IAD thereafter advised the Applicant that a "no show" conference would take place on August 14, 2009. He did not receive this notification either because it was also sent to his old address. As a result, he did not appear at the conference and that day his appeal was declared abandoned.

[6] On December 9, 2009, after having been contacted by the CBSA about his removal, the Applicant contacted the IAD and sought to reopen his appeal. He had provided new address information to the IAD on November 24, 2009, after having been called in to the Greater Toronto Enforcement Centre for possible removal from Canada. On January 25, 2010, the IAD dismissed the Applicant's motion to re-open his appeal.

[7] The Applicant is the father of eight children, and supports his unwell, depressed wife and their children through his job; the family is not currently on social assistance. The Applicant claims that if he were to be removed from Canada, his family would likely disintegrate and would need social assistance.

[8] On February 15, 2010, my colleague Justice James J. Russell granted the Applicant a stay of removal until such time as this application for judicial review could be dealt with.

II. The impugned decision

[9] The IAD first set out the procedural and factual background of the Applicant's case, before dismissing the Applicant's motion. The panel noted that under s. 71 of IRPA, it could only reopen

an appeal if it concluded that the IAD had failed to observe a principle of natural justice, relying on *Nazifpour v Canada (M.C.I.)*, 2007 FCA 35 for that proposition. The panel concluded that there was no such failure in this case. It found that the Applicant should have been aware of the requirement that he keep the IAD informed of his current address, as this was indicated both in the standard IAD documentation issued to all appellants, and by the specific conditions listed in the 2006 stay order. It found that all notices had been properly sent by the IAD, and that the Applicant had failed to take the second opportunity he was given by failing to appear at the "no show" conference. Since there was no evidence of any denial of natural justice or breach of procedural fairness on behalf of the IAD, and since the panel had no jurisdiction to examine any equitable relief in such an application, the IAD denied the application to reopen the appeal.

III. Issues

[10] This application for judicial review raises the following three questions:

a) What is the applicable standard of review?
b) Did the IAD err in its interpretation of s. 71 of the IRPA by limiting the inquiry to whether the IAD had failed to observe a principle of natural justice?
c) Did the IAD err in fact in determining that there was no breach of natural justice?

IV. Analysis

A. *The Standard of Review*

[11] The Applicant maintains that because the issue is the interpretation of s. 71 of IRPA, which is a question of law, the applicable standard of review is correctness. The Respondent disagrees, stating that the case is not concerned with a determination of a legal test, since the test is set out unambiguously in s. 71, but rather whether the IAD erred in a reviewable manner in concluding that

no breach of natural justice occurred when it declared the appeal abandoned. Accordingly, in his view, the application raises issues of mixed fact and law, and the standard of reasonableness.

[12] It seems to me that the Applicant raises both a legal and a factual question in his Application. Indeed, he calls into question the proper interpretation to be given to s. 71 of IRPA, which is clearly a legal issue reviewable on the correctness standard. When it comes to evaluating whether the tribunal erred in determining that there was no breach of natural justice, however, the issue is one of mixed fact and law and it is reviewable on the reasonableness standard.

B. *Did the IAD err in its Interpretation of s. 71 of IRPA?*

[13] Counsel for the Applicant contends that the IAD erred in law by interpreting its own jurisdiction under s. 71 of IRPA as being limited to situations where the IAD itself had committed a breach of natural justice. The Applicant also argued that instead of taking such a narrow approach to the section, the IAD should have focused on broader questions, such as whether the case was ever heard on the merits, whether the Applicant had had his day in court, and whether he had expressly stated his intention to abandon the case.

[14] Unfortunately for the Applicant, such a reading of s. 71 has been consistently rejected by this Court and by the Federal Court of Appeal. For ease of reference, it is worth setting out this provision:

Right of Appeal	**Droit d'appel**
Reopening appeal	**Réouverture de l'appel**
71. The Immigration Appeal Division, on application by a	71. L'étranger qui n'a pas quitté le Canada à la suite de la

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.	mesure de renvoi peut demander la réouverture de l'appel sur preuve de manquement à un principe de justice naturelle.

[15] It is true that under the former legislation, the IAD had a continuing equitable jurisdiction to accept and address additional evidence. But this Court has consistently held that Parliament, in enacting s. 71 of IRPA, has limited the jurisdiction of the IAD to reopen an appeal only to those cases involving breaches of the rules of natural justice: see, for example, *Ye v Canada (M.C.I.)*, 2004 FC 964; *Griffiths v Canada (M.C.I.)*, 2005 FC 971; *Baldeo v Canada (M.C.I.)*, 2006 FC 79.

[16] Far from overruling that case law, the Federal Court of Appeal explicitly upheld it in *Nazifpour*, above. After having carefully considered the particular wording of s. 71, as well as its legislative history and the overall objectives of IRPA – one of which was to give more importance to national security and the expeditious removal of persons ordered deported on the ground of serious criminality – the Court of Appeal found that an interpretation of that section which removes the right to reopen its decisions for reasons other than breach of a principle of natural justice would be consistent with that statutory aim. The Court of Appeal then concluded, in no uncertain terms:

> 78. Despite the absence of evidence establishing that the IAD's jurisdiction to reopen on the basis of new evidence had in fact been abused by appellants, it is, in my opinion, likely that Parliament enacted section 71 in order to avoid another round of proceedings before the IAD by unsuccessful appellants on the basis of new evidence.
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> 79. While the objectives of *IRPA* are not limited to the expeditious removal of criminals, deportees who have new evidence that they would be at serious risk if removed may bring it to the attention of a PRRA officer under section 112. New evidence relating, for example, to the appellant's rehabilitation or family circumstances

> (including the best interests of affected children) may form the basis of an application under section 25 of *IRPA* to remain in Canada on humanitarian and compassionate grounds.
>
> 80. It is true that the drafter could easily have avoided all ambiguity by including the word "only" in the text of section 71. However, in my opinion, the reading which best effectuates the general objects of *IRPA*, and attributes a plausible function to section 71 itself, is that the section implicitly removes the IAD's jurisdiction to reopen appeals on the ground of new evidence, a jurisdiction which would otherwise be judicially inferred from the nature of the statutory discretion to relieve against deportation. Section 12 of the *Interpretation Act* is therefore not helpful to the appellant.

[17] There is nothing ambiguous in those paragraphs. And if any doubts remained, they would be dispelled by the concluding paragraph of the reasons provided by the Court in that case:

> 83. For these reasons, I would dismiss the appeal and answer in the affirmative the following slightly modified version of the certified question:
>
> > Does section 71 of *IRPA* extinguish the continuing "equitable jurisdiction" of the IAD to reopen an appeal against a deportation order, except where the IAD has failed to observe a principle of natural justice?

[18] This interpretation of the Federal Court of Appeal decision has indeed been systematically followed by this Court: see, for example, *Canada (M.C.I.) v Kang*, 2009 FC 941; *Wilks v Canada (M.C.I.)*, 2009 FC 306. I am therefore unable to accept the interpretation put forward by the Applicant, despite the interesting arguments submitted by his counsel, as it would amount to reversing what appears to be the unanimous jurisprudence of this Court and of the Court of Appeal.

C. *Did the IAD err in Determining that there was no Breach of Natural Justice?*

[19] The Applicant argues that if a breach of fundamental justice was indeed required to reopen the appeal, then that requirement was met and the IAD erred in fact by determining that there was no such breach. It is alleged that the IAD was at fault in not making further inquiries of other government departments in order to obtain an address for the Applicant when it was faced with returned mail from the Applicant's last known address.

[20] I do not find this argument compelling. The Applicant himself admits that the IAD was not required by the case law to do anything beyond sending the hearing notifications to the last address provided. This point is well taken, in light of the decision reached by Mr. Justice Simon Noël, among others, in *Dubrézil v Canada (M.C.I.)*, 2006 FC 142, where he stated:

> [12] If the appellant'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 appellant 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. The Iad was not bound to act as the appellant's legal counsel, or to remind him of the seriousness of the proceedings in which he was involved, or to ensure that he properly understood that he had to show up at his scheduling conference or that he was bound to advise the IAD of his change of address. The appellant did have the opportunity to argue his grounds at a full hearing before the IAD, but the IAD did not find that these grounds were sufficient to justify re-opening the appeal.

[21] It may well be that in some cases, the IAD goes out of its way to make an inquiry, either by contacting the CBSA or by using the telephone numbers provided in the Notices of Appeal or

subsequent notices change of contact information to try to make direct contact with an appellant. But the IAD cannot be faulted for not having done so here, particularly when there is nothing in the file to indicate that a change of address has been made to CBSA. The IAD is rightly entitled to declare an appeal abandoned in the case of returned mail, and is not required to investigate with a view to determining if a change of address has been filed with CBSA or other government departments.

[22] Furthermore, it appears that this argument advanced before the Court was not made to the IAD on the motion to reopen. In his reopening motion materials the Applicant set out a variety of facts which he felt warranted him being granted a reopening, but he admitted that he himself was fault in not informing the IAD of his change of address. He now changes tack and tries to blame the IAD for his predicament. In raising this new argument on the requirements of natural justice in the circumstances of his case, the Applicant is supplementing the record that was before the IAD and is attempting to convert the underlying challenge (to the refusal to reopen the appeal) into a challenge to the original abandonment decision. This is not permitted in the context of this application for judicial review of the decision not to reopen his appeal. It is well established that the reasonableness of a tribunal's decision must be assessed on the basis of the arguments that were put to that tribunal. The member could not have erred in failing to find that natural justice was breached for the reasons given by the Applicant when the argument which allegedly supports such a finding was not put to the IAD.

[23] In any event, the argument of the Applicant does not hold water. First of all, it is not entirely clear whether the IAD did in fact receive the mail returned as undeliverable, and there is

nothing in the record to that effect. Second, I do not see how the argument can be made that the Minister, who knew the correct address, should have shared this address with the tribunal, either of its own initiative or at the prompting of the IAD. As for the first possibility, I fail to understand how the tribunal's decision could be overturned on judicial review based on a failure to act by the opposing party, since such alleged misconduct by a party in no way represents a reviewable unreasonable decision on the part of the tribunal itself. Alternatively, requiring the tribunal to obtain the contact information from the Minister would seem to undermine the conditions and rules set out in the stay of removal order made by the IAD in 2006, one of which was that the Applicant keep both the Minister and the tribunal informed of his address. The wording of that condition is to be contrasted to the wording of other conditions on the same stay, wherein only the Department of Citizenship and Immigration, rather than the Department *and* the IAD, is mentioned (see, for example, conditions 2, 9 and 10).

[24] Moreover, conditions 5 and 6 make it abundantly clear that the Department and the IAD are not to be confused or equated. Condition 5 requests the Applicant to report in writing to the Department if charged with a criminal offence, while Condition 6 requests that he reports to the Department *and* the IAD if convicted of a criminal offence. It may be that the direction to inform individually both the Department and the IAD of any change of address could have been made even clearer, but I do not think it can be considered ambiguous as it stands, when read in the context of the other conditions set out in the stay of removal order.

[25] The only authority cited by the Applicant in support of his argument (*Sabet v Canada (M.C.I.)*, [1998] FCJ No 926) is far from convincing. In that case, the decision of the Board was set

aside because it was found that the Board should have been more attentive to the Applicant's failure to appear, which resulted from the fact that he had been kidnapped. Needless to say, there is no possible analogy between that case and the Applicant's failure to make the required report of his change of address.

[26] For all of the foregoing reasons, I do not believe that the IAD's finding that there had been no breach of natural justice was unreasonable.

[27] Having said this, I am also of the view that this would be an appropriate case for the Minister to refrain from deporting the Applicant until an application under section 25 of IRPA to remain in Canada on humanitarian and compassionate grounds can be dealt with. The Applicant has clearly met all the other conditions of his conditional stay of removal, he has not been charged with any criminal offence since 2002, he his the father of eight children and his removal from Canada would most likely have a most detrimental impact both on his wife and on his children. While the Applicant has clearly been negligent in not reporting his change of address to the IAD, and while there is nothing in his file that could justify this Court overturning the IAD's decision not to reopen his appeal, it appears that he would be a strong candidate for an H&C decision.

[28] Counsel for the Applicant submitted two questions for certification purposes:

> 1. Does section 71 of IRPA contemplate in a broad sense a violation of natural justice where there has been no hearing on the merits of the case? In other words, does section 71 of the IRPA necessitate a violation by the IAD in a hearing itself or is the concern rooted in the question as to whether the Applicant has been denied a hearing, on unreasonable grounds?

> 2. Being aware that there is confusion by Appellants about the administrative significance of ensuring that a change of address be sent to both the IAD and CBSA/CIC and that most Appellants may very well report that change of address to CBSA/CIC, is the IAD failure to inquire of CBSA/CIC about whether a change of address has been submitted constitute a failure of natural justice? Further, given its knowledge that Appellants do get confused, is its failure to make it clearer that the IAD and CBSA are separate and apart for purposes of giving a change of address, constitute a breach of natural justice?

[29] In my view, neither of these two questions meets the requirements for certification pursuant to s. 74(d) of the Act – that is, a serious question of general importance that is determinative of the appeal. As I have already indicated in these reasons, both of these questions have been dealt with and decided time and again by the case law of this Court and of the Federal Court of Appeal. Moreover, the second question has not been raised before the IAD and cannot be appropriately addressed by the Court of Appeal.

JUDGMENT

THIS COURT'S JUDGMENT IS THAT this application for judicial review is dismissed.

« Yves de Montigny »

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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