Date: 20090323

Docket: IMM-2666-08

Citation: 2009 FC 306

Ottawa, Ontario, March 23, 2009

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

CALVIN ANTHONY WILKS

Applicant

and

THE IMMIGRATION AND REFUGEE BOARD and THE MINISTER OF PUBLIC SAFETY (CANADA BORDER SERVICES AGENCY)

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] Calvin Anthony Wilks applies, pursuant to section 72 of *the Immigration and Refugee Protection Act* (IRPA), for judicial review of a May 28, 2008 decision of the Immigration Appeal Division Panel (the IAD Panel) refusing his application to re-open his appeal.

[2] Mr. Wilks, who had landed status, was ordered deported from Canada to Jamaica for reasons of serious criminality following an admissibility hearing on October 31, 2005. He appealed the Removal Order to the Immigration Appeal Board (IAD) that same day.

[3] On April 30, 2007, the IAD sent Mr. Wilks correspondence requiring his confirmation of his readiness to proceed. When no response was received, the IAD sent Mr. Wilks a Notice to Appear at a show cause conference as to why the appeal should not be declared abandoned. Mr. Wilks neither responded nor appeared at the June 27, 2007 show cause conference. As a result, his appeal was determined to be abandoned pursuant to s. 168(1) of IRPA on July 10, 2007.

[4] On November 26, 2007, Mr. Wilks filed a change of address with the IAD. In March 2008 he was arrested at that address and is detained on an immigration warrant.

[5] On March 28, 2008 Mr. Wilks' lawyer was advised that the IAD correspondence and Notice to Appear to Mr. Wilks had not been returned to the IAD. On March 31, 2008, the IAD recorded the return of the undelivered readiness correspondence sent the previous year on April 30, 2007.

[6] Mr. Wilks applied to re-open his appeal. On May 28, 2008 the IAD Panel denied his application to re-open the appeal because it did not find the IAD had failed to observe a principle of natural justice and also because it had no jurisdiction to re-open the appeal on equitable grounds.

The Issues

[7] Mr. Wilks submitted that the IAD breached a principle of natural justice by failing to contact him by a still-valid mobile telephone number recorded in his original contact information when he had not responded to the IAD correspondence and Notice. Mr. Wilks says he has a prior history of attending when required. He also questioned the late receipt of the returned readiness correspondence eleven months after it had been mailed. Finally, he submitted that he should be entitled to equitable relief in the circumstances.

[8] The issues are as follows:

> Did the IAD Panel err in its finding of fact or in determining that the IAD had not breached the principles of natural justice when it refused to reopen his appeal?

The Facts

[9] Calvin Anthony Wilks is a Jamaican citizen. He was sponsored by his sister and received landed status in Canada in 1984 when he was twenty years old. In 1997, Mr. Wilks was convicted of trafficking cocaine and received a sentence of six months imprisonment.

[10] An admissibility hearing commenced on whether he should be held inadmissible on grounds of serious criminality following his conviction for trafficking in a controlled substance. The admissibility hearing was adjourned on numerous occasions because Mr. Wilks was unable to obtain legal counsel. However, he attended as required at all times. On October 31, 2005, he was held to be inadmissible. As a result, Mr. Wilks was ordered to be deported from Canada.

[11] Mr. Wilks appealed the Removal Order on the same day as the inadmissibility decision. In his Notice of Appeal, Mr. Wilks provided his residential address and a mobile cell phone number.

[12] The IAD acknowledged receipt of his appeal on November 17, 2005. The IAD letter informed him that "It is your responsibility to let us know where we can contact you. The IAD is not responsible for trying to locate you if you move." The letter also included a note advising that, under s. 168(1) of IRPA, if he should fail to appear or communicate when requested, his appeal may be determined to be abandoned.

[13] On April 30, 2007, the IAD sent Mr. Wilks correspondence requesting his Notice of Readiness. He was required to complete and return the form no later than 15 days of receipt of the letter. Mr. Wilks did not respond to the readiness correspondence. On June 1, 2007, the IAD sent Mr. Wilks a Notice to Appear to attend a show cause conference to show why his appeal should not be declared abandoned. Mr. Wilks did not respond or attend the show cause conference on June 27, 2007. On July 4, 2007 Mr. Wilks' appeal was determined to be abandoned.

[14] At the time the readiness correspondence and the Notice to Appear were mailed Mr. Wilks was no longer living at the original address on the IAD file. He had moved. Shortly after moving to a new address, he had to vacate his new premises as well. He spent two months at a shelter during which time he lost his identification and his landing documentation.

[15] In February 2007 Mr. Wilks moved into a new residence. With the help of social service agencies he obtained new identification and then, in November 2007, filed a change of address notice with the IAD. He declares, however, that he still had his original mobile telephone with him until the latter part of 2007. The mobile telephone number was listed in his IAD original contact information and that he could be reached at that number.

[16] In March 2008, Mr. Wilks was arrested at his new address on an immigration warrant. He has remained in custody since arrest. While in detention he obtained the services of legal counsel who made inquires at the IAD. On March 28, 2008, the IAD wrote to advise Mr. Wilks' lawyer that there had been no return of mail sent. Three days later, on March 31, 2008, the IAD received and date stamped as returned the readiness correspondence sent to Mr. Wilks eleven months earlier. On April 9, 2008, an IAD clerk phoned Mr. Wilks' lawyer advising that the IAD was in receipt of the returned readiness correspondence and asked for Mr. Wilks current address.

[17] On May 1, 2008 Mr. Wilks applied to re-open the appeal of the negative admissibility decision. The IAD Panel denied the application to re-open his appeal on May 28, 2008.

The Decision Under Review

[18] The IAD Panel noted that at the time Mr. Wilks was ordered deported he resided at 2417 Brookhurst Road, Mississauga, Ontario L5J 1R4 which was the address he provided on filing his appeal to the IAD. The address remained on file until he filed a change of address on November 26, 2007. The Panel noted that both the readiness correspondence and the Notice to Appear were sent

to Mr. Wilks at the Brookhurst address and were not returned to the IAD prior to the abandonment decision (made on June 1, 2007). Finally the IAD Panel noted that the IAD was not in receipt of any returned mail marked undelivered prior to March 31, 2008 when the readiness correspondence was returned to the IAD marked "return to sender-moved/unknown".

[19] The IAD Panel noted that its ability to declare an appeal abandoned derives from s. 168(1) of IRPA. When Mr. Wilks failed to respond to the readiness correspondence, he was afforded an opportunity to show cause why the appeal should not be considered abandoned. The IAD Panel considered the question of whether Mr. Wilks was given adequate notice of the show cause conference. It decided adequate notice was provided in that the IAD sent out the notice to the address on file. Previous correspondence sent to Mr. Wilks at the Brookhurst address had not been returned.

[20] The IAD Panel acknowledged the possibility that the address might not be correct because of human error. The Panel stated that an important indicator that there was no problem is the absence of returned mail. It noted that the IAD relies on a presumption of regularity in the postal handling of mail. The post office is presumed to do its job in accordance with the regulations governing mail. This presumption was refutable by credible evidence to the contrary. Since there was no returned mail until March 2008 and even then only one of several letters sent to Mr. Wilks returned, the Panel stated that "it cannot be concluded that procedural fairness was breached in respect of the provision of adequate notice."

[21] The IAD Panel decided that while it had a duty of care, Mr. Wilks had a positive obligation to inform the IAD of any change of address. He had been reminded of that obligation in the Notice of Appeal documentation and in the IAD acknowledgement of his Notice of Appeal. The Panel noted that he did not file a change of address until six months after his appeal had been abandoned. The Panel held that Mr. Wilks did not, after re-establishing his residence, file a change of address "without delay" while ten months lapsed when he re-established his residence in February 2007 and when he filed his change of address in November 2007.

[22] The IAD Panel noted counsel's submissions concerning the late return of the readiness correspondence. It found that if the mail had been returned in a timely manner, the IAD would, in accordance with general operating practise, attempt to contact Mr. Wilks. The Panel held that a condition precedent to the IAD taking extra steps to telephone an appellant is that the IAD must be aware there is a problem with the mail such that direct contact is required. However, the Panel found there was no evidence that the readiness correspondence was returned on a date other than indicated by the March 31, 2008 date stamp. Since the IAD had no previous knowledge that Mr. Wilks was no longer at the address he had provided, the IAD Panel did not perceive any fault to lie with the IAD for the failure of timely notice to Mr. Wilks.

[23] The IAD Panel held that the only ground for re-opening an appeal is a breach of natural justice. The Panel held that "it is satisfied that the IAD did not fail to observe a principle of natural justice when it declared the appeal abandoned for the following reason."

[24] Finally, the IAD Panel noted that while the IAD has equitable jurisdiction in appeals, it did not in respect of re-opening appeals. The Panel noted that Mr. Wilks' circumstances speak to a re-opening of the appeal on equitable grounds but the Panel may only re-open an appeal when it is clearly established that the IAD has failed to observe a principle of natural justice.

Standard of Review

[25] The Supreme Court of Canada in *Dunsmuir v. New Brunswick,* 2008 SCC 9 at para. 62 stated that, in determining the appropriate standard of review, two steps are involved. First, the court must determine whether the jurisprudence has already assessed the degree of deference to be accorded with regard to the particular issue at hand. Second, if the jurisprudence has not determined an appropriate standard of review the court must evaluate the standard of review factors. The Supreme Court confirmed this analysis in *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12.

[26] In *Dubrézil v. Canada (M.C.I.)*, 2006 FC 142, Justice Noël, deciding on the same issue as in this proceeding, found that the standard of review was patent unreasonableness.

[27] Issues that will attract review on the reasonableness standard include matters of fact, mixed law and fact, discretion and policy: *Dunsmuir* at paras. 51 and 53. The IAD Panel's decision is based on mixed fact and law and, therefore, the standard of review is reasonableness.

Law

[28] Section 168 of IRPA states as follows:

Abandonment of proceeding	Désistement
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.

[29] *Immigration Appeal Division Rules,* SOR/2002-230, subsection 13(4) states :

Change to contact information	Changement de coordonnées
13.(4) If the contact information of the person or their counsel changes, the person must without delay provide the changes in writing to the Division and the Minister.	13.(4) Dès que les coordonnées de la personne en cause ou celles de son conseil, le cas échéant, changent, la personne en cause transmet les nouvelles coordonnées par écrit à la Section et au ministre.

[30] Pursuant to s.71 of IRPA the only ground the IAD can grant a motion to re-open an appeal is if the IAD failed to observe a principle of natural justice. The section states as follows:

Reopening appeal	Réouverture de l'appel
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	**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

principle of natural justice. principe de justice naturelle.

Analysis

[31] Mr. Wilks submits that the IAD Panel erred in finding that the IAD did not fail to observe a principle of natural justice. He also submits that he was entitled to judicial review on equitable grounds but abandoned that submission during argument.

[32] Mr. Wilks referred to three immigration cases, *Canada (Minister of Citizenship and Immigration, Minister of Public Safety and Emergency Preparedness) v. Ishmael,* 2007 FC 212; *Dubrézil v. Canada (Minister of Citizenship and Immigration),* 2006 FC 142; and *Ramcharan v. Canada (Minister of Public Safety and Emergency Preparedness),* [2008] I.A.D.D. No. 358.

[33] Mr. Wilks acknowledges that in *Ishmael* there was adequate notice to the applicant who was aware of the hearing at issue. Mr. Wilks argues that his circumstances are different than that in *Ishmael* since he did not have actual notice of the show cause hearing because the IAD had his then still-valid mobile telephone number on record and did not attempt to contact him.

[34] Mr. Wilks submits that, in *Ramcharan*, the IAD scheduling unit attempted to contact the appellant at his work and telephone number provided in his Notice of Appeal (although unsuccessfully). The point being that IAD was telephoning appellants during the same year that Mr. Wilks' show cause conference was scheduled.

[35] In *Dubrézil*, Justice Noël found there was no breach of procedural fairness when "The IAD did what it could to contact the applicant." However, in *Dubrézil*, there is no mention of whether the IAD had telephone contact information for Mr. Dubrézil.

[36] Mr. Wilks does not dispute that he was in receipt of the November 17, 2005 IAD acknowledgement of the Notice of Appeal. This IAD letter confirmed receipt of his Notice of Appeal and reminded him of the importance of informing the IAD of any change of contact information. Mr. Wilks says it is the later readiness correspondence and the Notice to Appear which he did not receive.

[37] Mr. Wilks submits that the IAD should have used the provided mobile telephone number to contact him after there was no response to its letters and notices. Mr. Wilks submits that the IAD Panel erred in finding that the IAD had not breached procedural fairness by not attempting to phone him when it had his mobile telephone number on hand.

[38] The wording of section. 71 of IRPA, "[T]he Immigration Appeal Division … may reopen an appeal if it is satisfied that it failed to observe a principle of natural justice" (emphasis added), makes it clear that the breach must be the fault of the IAD as an entity and not merely to the decision maker who determines the appeal to be abandoned.

[39] The IAD processes involve documentation. The transmission of the documents is ordinarily done through the mail. Given the regulatory regime that governs the postal delivery and return of

mail the IAD is entitled to rely on the presumption mail is delivered to the address provided by an applicant and, if the address is no longer valid, that mail will be returned to the IAD.

[40] While s. 71 of IRPA exists to prevent the person concerned from being prejudiced by an error of the IAD, it does not permit a person concerned to benefit from his own actions or omissions. Mr. Wilks' hearing was properly considered abandoned by the IAD under s. 168(1) of IRPA because he did not appear when required or communicate with the IAD when requested to do so. Section 168(1) imputes a degree of responsibility on an applicant. Mr. Wilks was aware that he was required to keep his contact information up to date at the IAD but he failed to fulfill his responsibility.

[41] In *Dubrézil*, Justice Noël made it very clear that responsibility for maintaining contact lay with the applicant. The last known mailing address for Mr. Dubrézil was the Bordeaux prison. Letters were returned to the IAD from the prison, as Mr. Dubrézil was no longer resident there. The IAD then sent its letter to his last known address on file, which was also unsuccessful. Justice Noël stated:

> The IAD was not bound to act as the applicant'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.

[42] Given the above limit to the IAD's obligations, the IAD is not obligated to take further measures such as telephoning when it relies on a mailing address provided by an applicant unless it

has an indication that the provided address is invalid. Without an indication that the mail was going to an invalid address, there is no obligation on the IAD to make further efforts to contact Mr. Wilks.

[43] The IAD had no reason to believe Mr. Wilks had not received any of its correspondence or the Notice to Appear since none were returned before the abandonment determination was issued on July 4, 2007. The IAD Panel's conclusion that the IAD is entitled to presume that its correspondence and Notices sent to the address provided by Mr. Wilks were received when that mail was not returned was reasonable.

[44] There remains the question of the late return of the readiness correspondence on March 31, 2008.

[45] Mr. Wilks submits three possibilities: (1) the mail was unlawfully delayed by a person living at the indicated address; (2) the mail was in the possession of Canada Post even though mail may not be detained for more than 30 days; and (3) a clerical error on the part of the IAD failing to log and handle the Readiness correspondence returned on an unspecified earlier date such that it did not make it into Mr. Wilks' file.

[46] The first two possibilities do not assist Mr. Wilks in that they do not indicate a breach of natural justice by the IAD at the time Mr. Wilks appeal was determined to be abandoned. The IAD Panel accepted the date stamp of March 31, 2008 as being the date the readiness correspondence was returned. The Panel noted that the decision maker checked that the mail had been sent to the

address on file and that no mail had been returned at the time the abandonment decision was made on July 4, 2007.

[47] However, the presence of a date stamp itself does not rule out the third possibility that the return mail was received earlier but had not been properly recorded at the time. Was there evidence before the IAD Panel upon which the Panel could conclude as it did?

[48] On careful review of the Record, I find that there was evidence upon which the IAD Panel could find the date stamp properly reflected the date of receipt of the readiness correspondence. First, the date stamp is accompanied by initials, which is an indication that the usual IAD procedures were being followed when the readiness correspondence was returned on March 31, 2008. Second, the IAD staff proceeded to follow up on April 9, 2008, in accordance with IAD procedure of phoning an applicant when mail was returned. The IAD Panel was cognizant of both these facts and could reasonably conclude from this evidence that the date stamp reflected the actual date of return of the readiness correspondence.

[49] Equally important, the IAD Panel noted that there was no contrary evidence concerning the return date of the readiness correspondence.

[50] Since the IAD Panel had evidence upon which to base its finding, I conclude the IAD Panel factual finding was reasonable.

[51] In his original written submission, Mr. Wilks had submitted that he was entitled to equitable relief. That submission was withdrawn at the hearing, correctly, in my view.

[52] In *Ishmael*, Justice Shore found that the IAD had erred in law because it found that natural justice had not been breached, and yet re-opened the appeal, apparently on equitable grounds. Section 71 of IRPA provides that the IAD only has jurisdiction to re-open an appeal when natural justice has been breached. The IAD found that the appellant had received adequate notice, and therefore no breach of procedural fairness. Yet it re-opened the appeal. Justice Shore noted at para. 22:

> "The Panel's decision to re-open simply ignores its own assessment of the evidence and, therefore, falls outside of its jurisdiction to re-open an appeal." (original emphasis)

[53] In considering an application to re-open under s. 71 of IRPA, the legislation and jurisprudence is clear. The IAD does not have jurisdiction to re-open an appeal under s. 71 on equitable grounds.

[54] The application for judicial review is dismissed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The application for judicial review is dismissed.

2. No question of general importance is certified.

"Leonard S. Mandamin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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