Federal Court  Cour fédérale

Date: 20090921

Docket: IMM-1202-09

Citation: 2009 FC 941

Ottawa, Ontario, September 21, 2009

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

SHAMINDER KANG

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), of a decision of the Immigration Appeal Division (the IAD) of the Immigration and Refugee Board dated February 25, 2009, where it reopened Shaminder Kang's (the Respondent) appeal of a deportation order.

Issues

[2] The Applicant raises the following issues:

(a) Did the IAD apply the correct legal test for reopening an appeal?

(b) Did the IAD misconstrue what is meant by a breach of natural justice?

[3] The application for judicial review shall be allowed for the following reasons.

Factual Background

[4] The Respondent is a citizen of India who became a permanent resident of Canada in 1977. He never became a Canadian citizen. He was convicted of numerous criminal offences including assault (June 2003 and July 2006) and theft (October 2004).

[5] On November 30, 2007, the Respondent was convicted of assault with a weapon and of uttering threats, under paragraphs 267(*a*) and 264.1(1)(*a*) of the *Criminal Code*, R.S.C. 1985, c. c-46 respectively.

[6] As a result of those convictions, a report was made on January 28, 2008, under section 44 of the Act alleging that the Respondent is criminally inadmissible to Canada under subsection 36(1). That report was referred to the Immigration Division (the ID) of the Immigration and Refugee Board on February 8, 2008.

[7] The ID commenced the admissibility hearing on March 14, 2008, but adjourned the hearing for two months in order to allow the Respondent an opportunity to consult legal counsel. On

May 14, 2008, the ID once again adjourned to allow the Respondent time to consult legal counsel. On May 29, 2008, the ID resumed the admissibility hearing.

[8] At that hearing, the Respondent admitted the inadmissibility allegations contained in the report and a deportation order was made against him.

[9] On the day following the inadmissibility hearing, the Respondent filed a Notice of Appeal to the IAD appealing the deportation order.

[10] On September 30, 2008, the IAD held a scheduling hearing. The Respondent received notice but failed to attend or provide an explanation for his absence.

[11] On October 21, 2008, the IAD held an abandonment hearing in the Respondent's appeal, of which he was given notice. The Respondent did not attend and the IAD made an order dismissing the appeal as abandoned.

Impugned Decision

[12] On November 28, 2008, counsel for the Respondent filed an application before the IAD seeking an order to reopen the Respondent's appeal of the deportation order pursuant to section 71 of the Act. The Respondent alleged there was a breach of natural justice in the proceeding before the IAD as he was not represented by a designated representative and suffered from alcoholism which required such representation. The Minister (the Applicant) opposed the reopening.

[13] In a decision issued on February 25, 2009, the IAD allowed the appeal and ordered the deportation appeal to be reopened.

[14] The IAD reproduced several passages from the transcript of the proceeding before the ID in its reasons. The IAD also noted that as part of the application to reopen, the Respondent had provided some notes from his doctor and declarations from relatives to the effect that he was suffering from alcoholism, drug dependency and other medical ailments to support his claim that he was unable to truly appreciate the significance of the proceedings at the IAD.

[15] The IAD then concluded there was some information before it that could imply a lack of understanding of the process. The IAD based this conclusion on excerpts from the transcript of the ID proceedings where the Respondent made comments that the IAD described as "non sequiturs as they do not appear to logically connect to the comment by the presiding member" (*Shaminder Kang v. The Minister of Public Safety and Emergency Preparedness* (February 25, 2009), VA8-02108 at paragraph 8 (IAD) (IAD Reasons)).

Relevant Legislation

[16] *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

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	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

observe a principle of natural justice.	justice naturelle.

The Appellant's Arguments

[17] Firstly, the Appellant submits that the IAD exceeded its jurisdiction to reopen appeals under section 71 of the Act which explicitly restricts its jurisdiction to reopen an appeal from a deportation order to cases where the IAD finds that it has, itself, failed to observe a principle of natural justice.

[18] In the reasons for reopening the appeal, the IAD does not identify any actual breaches of natural justice on the part of the IAD in the Respondent's case but simply a possibility that he lacked an understanding of the process. Moreover, in the reasons, the IAD relies on evidence from the proceedings before the ID and not the IAD.

[19] Secondly, the Appellant submits that the IAD erred in law in misconstruing the scope of a breach of natural justice. Specifically, what natural justice entails when an individual's mental incapacity is such that the principles of natural justice would require a designated representative to be appointed.

[20] The Appellant draws attention to the *Immigration Appeal Division Rules*, S.O.R./2002-230 (Immigration Appeal Division Rules) at subsection 19(1) which put the onus of seeking a designated representative on counsel and not on the IAD itself.

[21] The Appellant also holds that the threshold for a breach of natural justice by reason of incapacity is much higher that a possible lack of understanding. In order for there to be a breach of natural justice, there must be evidence on the record that the individual suffers from a mental illness (*Mattia v. Canada (Minister of Employment and Immigration)*, [1987] 3 F.C. 492) (T.D.) (*Mattia*) or that the individual was effectively deprived of the ability to make a free, informed and independent decision caused by some form of psychological duress (*Kaur v. Canada (Minister of Employment and Immigration)*, [1990] 2 F.C. 209 (C.A.)).

[22] The Appellant emphasizes that there was little evidence before the IAD as to the Respondent's alleged mental illness and that the IAD granted the appeal on the basis that there was evidence that could imply a lack of understanding.

[23] The Respondent submits that the IAD decision to reopen the appeal was appropriate. He relies on this Court's decision in *Aslam v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 514, [2004] F.C.J. No. 620 (QL) where it was held that procedural rules should be interpreted and applied in a way that does not compromise the right to a full and fair hearing.

[24] The Respondent also alleges that, in using the ID decision, the IAD made inferential findings that there was a breach of natural justice.

[25] The Respondent holds that the medical evidence before the IAD was sufficient to show the medical and psychiatric impairments that he was suffering when the proceedings before the IAD were initiated.

[26] The Respondent also relies on sections 57 and 58 of the Immigration Appeal Division Rules which allow the IAD to deal with matters arising during appeals for which there are no provisions as it sees fit and to act on its own initiative and vary certain procedural requirements, in arguing that the IAD can appoint a designated representative when it sees fit.

[27] The Respondent also alleges that the IAD decision is interlocutory in nature. Therefore, the Court should not consider the Applicant's application for judicial review.

Analysis

Did the IAD apply the correct legal test for reopening an appeal?

Standard of review

[28] The question as to whether or not the IAD applied the correct legal test for reopening an appeal is a question of law that attracts a standard of correctness (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 (*Dunsmuir*)).

[29] The enabling statutory provision and the jurisprudence of this Court makes it quite clear that in order for an appeal to be reopened, the IAD must be satisfied that it has itself failed to observe a

principal of natural justice (*Ye v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 964, 254 F.T.R. 238; *Nazifpour v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 35, [2007] 4 F.C.R. 515; *Canada (Minister of Citizenship and Immigration) v. Ishmael*, 2007 FC 212, 309 F.T.R. 147; *Wilks v. Canada* (*Minister of Public Safety and Emergency Preparedness*), 2009 FC 306, [2009] F.C.J. No. 354 (QL) (*Wilks*)). Paragraph 40 in *Wilks* states that:

> 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. …

[30] The IAD had to ask itself whether it had committed an error, a breach of natural justice, that prejudiced the Respondent in dismissing the appeal for abandonment. The breach must be the fault of the IAD.

[31] In this case, the Respondent was given notice of all of the steps in the appeal process that lead to the order to dismiss the appeal for abandonment. He also had time to seek counsel to represent him and attend the hearing. None of these facts are disputed by the Respondent.

[32] The reasons given by the IAD are based almost entirely on the transcript from the proceedings at the ID. There is no indication in the reasons that it asked the question as to whether or not the IAD committed an error that amounted to a breach of natural justice and its evaluation of the evidence does not allow one to infer such a conclusion.

Did the IAD misconstrue what is meant by a breach of natural justice?

[33] In its reasons, the IAD stated:

> … Appellant's counsel suggests that a designated representative should have been appointed.
>
> …..While no request was made for a designated representative in the ID or the IAD, there was some information before the IAD that could imply a lack of understanding of the process, as alleged by the appellant's counsel. In that respect I refer to the comments from the hearing at the ID….. (IAD Reasons, at paragraphs 7 and 8)

[34] It is difficult to tell from this comment whether or not the IAD did indeed conclude that the onus lies on the IAD to ascertain if a designated representative should be appointed. There is no statutory duty for the IAD to do so. The Immigration Appeal Division Rules do not put an onus on the IAD but rather leaves the door open to counsel of either party to make such a request (section 19).

[35] In past cases, appeals have been ordered reopened when mental illness was proven to be the cause of an inability to understand proceedings and their ramifications. *Mattia* is the case relied upon by both parties. In that case, the appellant suffered from schizophrenia and had received treatment during the appeal period; the evidence presented in that case included diagnoses by immigration medical officers, the appellant's own testimony and documentary evidence of hospitalization.

[36] The IAD did not make any mention as to whether or not the declarations sworn by some of the Respondent's relatives held any weight in the decision or were in any way persuasive. It also

noted that a doctor's notes had been provided. The medical evidence before the IAD was clearly not of the same nature of that provided in *Mattia*. Beyond mentioning its existence, the IAD did not refer to the medical evidence in its reasons nor did it evaluate it or seemed to rely on it.

[37] On the whole, the reasons provided by the IAD do not provide much insight into the grounds relied upon it in the granting of the appeal or how exactly the IAD found that natural justice had been breached by the ID in declaring the appeal as being abandoned. The only thing that is clear is that the IAD felt that, at the ID hearing, the Respondent showed signs of not fully understanding the proceedings. That is not sufficient to support the conclusion that the ID caused a breach of natural justice in dismissing the appeal as abandoned.

[38] In *Nazifpour*, above, the Federal Court of Appeal at paragraph 74 was clear:

> If the purpose of enacting section 71 was not to exclude the IAD's right to reopen a decision for any reason other than a breach of a principal of natural justice, it is difficult to see what purpose the provision serves. …

[39] The decision in the case at bar does not fall in the acceptable range of possible outcomes in view of the law and the facts of this case.

[40] The Court's intervention is warranted.

[41] No question of general importance was submitted and none arises.

JUDGMENT

THIS COURT ORDERS that the application for judicial review is allowed. The matter is remitted back for redetermination by a newly constituted panel of the Immigration Appeal Division. No question is certified.

"Michel Beaudry"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-1202-09
STYLE OF CAUSE:	**THE MINISTER OF CITIZENSHIP AND IMMIGRATION and SHAMINDER KANG**
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APPEARANCES:

Banafsheh Sokhansanj	FOR APPLICANT
Narindar S. Kang	FOR RESPONDENT

SOLICITORS OF RECORD:

John H. Sims, Q.C. Deputy Attorney General of Canada Vancouver, British Columbia	FOR APPLICANT
Kang & Company Surrey, British Columbia	FOR RESPONDENT