Federal Court  Cour fédérale

Date: 20190627

Docket: IMM-2792-18

Citation: 2019 FC 873

Ottawa, Ontario, June 27, 2019

PRESENT: Mr. Justice Norris

BETWEEN:

MOHSEN DEHGHANI

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] The applicant, Mohsen Dehghani, was born in Iran in August 1982. He has been a permanent resident of Canada since January 2000.

[2] In November 2011, the applicant was convicted of criminal harassment and given an intermittent sentence of 90 days' incarceration. In June 2014, he was convicted of personation and given a sentence of 11 days in jail. As a result of these convictions, on January 19, 2017,

the Immigration Division [ID] of the Immigration and Refugee Board of Canada [IRB] found the applicant to be inadmissible on the basis of serious criminality under section 36(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The ID issued a deportation order.

[3] Since he had been given sentences of less than six months for these offences, the applicant had a right to appeal the inadmissibility finding to the Immigration Appeal Division [IAD] (see section 64(2) of the *IRPA*).

[4] The applicant filed an appeal to the IAD immediately. However, on April 12, 2018, the IAD dismissed the appeal as abandoned because the applicant had failed to return a completed Confirmation of Intent to Proceed with his appeal. In fact, the applicant had completed and submitted the form within time except he only provided it to the Canada Border Services Agency [CBSA] office at 74 Victoria Street, Toronto, and not also to the IAD office, which is located in a different suite at the same municipal address, as he was required to do.

[5] The applicant submitted a request to reopen his appeal. In a decision dated May 23, 2018, the IAD rejected this request.

[6] The applicant now applies for judicial review of this decision under section 72(1) of the *IRPA*.

[7] For the reasons that follow, I am allowing the application and remitting the matter to the IAD for redetermination.

[8] Section 168(1) of the *IRPA* provides that a Division of the IRB 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." As with all other matters before it, the Division must make such a determination "as informally and quickly as the circumstances and considerations of fairness and natural justice permit" (*IRPA*, s 162(2)).

[9] The IAD also has the authority, under section 71 of the *IRPA*, to reopen an appeal that has been disposed of. However, it may do so only if it is satisfied that there was a failure on the part of the IAD to observe a principle of natural justice when it rendered the previous decision that was dispositive of the appeal (*Nazifpour v Canada (Citizenship and Immigration)*, 2007 FCA 35 at para 83; *Jones v Canada (Citizenship and Immigration)*, 2011 FC 84 at paras 15-18).

[10] The parties submit, and I agree, that the IAD's decision refusing to reopen the applicant's appeal is reviewable on a standard of reasonableness. A decision about whether the IAD failed to observe a principle of natural justice is typically one of mixed fact and law, something that is generally reviewed on a reasonableness standard (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 51 and 53-54 [*Dunsmuir*]). Applying this standard, the reviewing court examines the decision for "the existence of justification, transparency and intelligibility within the decision-

making process" and determines "whether the decision falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at para 47).

[11] As did Justice Diner in *Huseen v Canada (Citizenship and Immigration)*, 2015 FC 845 at paras 19-20, with respect to a similar power on the part of the Refugee Protection Division to reopen a refugee claim, I would understand the necessary precondition to reopening an appeal before the IAD as there having been a denial of natural justice or procedural fairness (while also recognizing that the distinction between the two concepts has now largely if not entirely disappeared).

[12] In *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*], the Supreme Court of Canada emphasized that the common law duty of procedural fairness is "flexible and variable" (*Baker* at para 22). Several factors must be considered in determining what is required in the specific context of a given case, including: (1) the nature of the decision being made; (2) the nature of the statutory scheme under which the decision is made; (3) the importance of the decision to the individual(s) affected; (4) the legitimate expectations of the party challenging the decision; and (5) the procedures followed by the decision-maker itself and its institutional constraints (*Baker* at paras 21-28).

[13] Looking at the issue more broadly, "the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their

views and evidence fully and have them considered by the decision-maker" (*Baker* at para 22). Further, the values underlying the duty of fairness "relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision" (*Baker* at para 28).

[14] In my view, applying the *Baker* factors, the applicant was entitled to a relatively high degree of natural justice or procedural fairness when the question of whether to terminate his appeal by declaring it to be abandoned was being decided (cf. *Cenelia v Canada (Citizenship and Immigration)*, 2018 FC 942 at paras 27-28). Among other things, the fate of the applicant's appeal is clearly a matter of great importance to him and he had no reason to think that his appeal was at risk when the decision was made to dismiss it as abandoned.

[15] The second IAD member concluded that the first member who dismissed the appeal did not breach any principle of natural justice because the IAD had advised the appellant clearly in earlier correspondence that his appeal could be determined to be abandoned without any further notice to him. In the view of the second IAD member, the IAD did not have any obligation "to allow the appellant to explain himself" before dismissing his appeal as abandoned.

[16] In my view, this conclusion is unreasonable. The applicant had kept the IAD up to date on his contact information (which had not changed in any event). He had been told in a letter from the IAD dated February 6, 2017, that his Notice of Appeal had been received and that

before any steps could be taken in the appeal the IAD needed to receive a copy of the relevant record from the ID. On March 13, 2018, the IAD wrote to the applicant asking him to provide confirmation that he still intended to proceed with his appeal or, if not, to provide confirmation of that. A response was required no later than April 3, 2018. It appears that the applicant completed the Notice of Confirmation of Intent to Proceed on March 22, 2018. It was received by the CBSA on April 3, 2018. As far as the applicant knew, he had done everything that was expected of him for his appeal to continue to proceed. He had no reason to think that his appeal was at risk of being dismissed as abandoned.

[17] The mistake the applicant made was providing a copy of the confirmation of his intent to proceed only to the CBSA and not also to the IAD. There is no reason to think that this was anything but an honest mistake. This could well be why, when it learned that the applicant was asking to reopen his appeal, the CBSA informed the IAD that it had indeed received the applicant's confirmation of his intention to proceed within time and suggested that, in the interests of fairness, the appeal should be reopened. The second IAD member was unmoved by this submission.

[18] The applicant contends that it was unreasonable for the second IAD member to find that there was no breach of natural justice by the IAD in proceeding with a one-step abandonment process as opposed to a two-step process (i.e. deciding to declare an appeal abandoned without notice as opposed giving notice of a show cause hearing prior to the decision being made). I agree with the applicant.

[19] No doubt all of the problems that flowed from the applicant's single mistake could have been avoided if the IAD had told him that his appeal was at risk of being dismissed as abandoned before deciding to dismiss the appeal. The IAD has determined that not everyone who is in default in the proceedings is entitled to notice and an opportunity to demonstrate why their appeal should not be dismissed as abandoned. Rather, it has reserved to itself the discretion to proceed with an abandonment determination by a one-step or a two-step process, depending on the circumstances of the case. One of the factors the IAD has expressly identified to guide the exercise of this discretion is whether "[t]here is a recent pattern of responding to the IAD and the appellant's current failure to respond is out of character with how the appellant has pursued the appeal to date" (Immigration and Refugee Board of Canada, *Notice – The Immigration Appeal Division Introduces Administrative Changes to Appeal Process*, Procedures and practice notices, November 7, 2018, <https://irb-cisr.gc.ca/en/legal-policy/procedures/Pages/NotAviAdmCha.aspx>).

[20] The second IAD member determined that this factor did not entitle the applicant to notice that his appeal was at risk of being abandoned. In my view, this conclusion is not reasonably supported by the record.

[21] The second IAD member appears to have determined that the applicant's failure to confirm to the IAD that he intended to proceed with his appeal was consistent with how the applicant had pursued the appeal to date. On this basis, she found that the first member "reasonably concluded that s. 168 [of the IRPA] should be applied in this case without a show cause hearing." However, apart from the single mistake that lies at the heart of this matter, the applicant had done everything that was expected of him. The only thing that was out of

character was his apparent failure to respond to the request for confirmation of his intention to proceed. In such circumstances, a two-step abandonment process should have been followed. It was unreasonable for the second member to have concluded otherwise.

[22] Section 71 of the *IRPA* provides a single specific basis upon which an appeal may be reopened. At the same time, it serves as an important safeguard for ensuring that the requirements of natural justice and procedural fairness are met. The first IAD member dismissed the appeal as abandoned without realizing that the applicant had submitted confirmation of his intent to proceed. Had the decision-maker known this, there would have been no basis to dismiss the appeal as abandoned. The second IAD member had the benefit of knowing the true state of affairs concerning the applicant's actions and intentions. It was unreasonable for her to conclude that the requirements of natural justice were met despite the fact that the applicant's apparent failure to respond to the IAD was out of character compared to how the appeal had been pursued to date. The member's reliance on *Guo v Canada (Citizenship and Immigration)*, 2018 FC 15, is entirely misplaced given the differences between the conduct of the present applicant and the applicant in that case.

[23] Regrettably, the applicant (who appears to have been assisted in this respect by his criminal lawyer) focused his submissions in support of his request to reopen his appeal on the merits of the appeal – in particular, the humanitarian and compassionate considerations that, in his submission, warranted setting aside or staying the deportation order. However, this neither explains nor excuses the IAD's unreasonable determination under section 71 of the *IRPA*.

[24] For these reasons, the decision of the IAD refusing to reopen the applicant's appeal cannot stand. The matter must be reconsidered by a differently constituted panel.

[25] The parties did not suggest any serious questions of general importance for certification under section 74(d) of the *IRPA*. I agree that none arise.

JUDGMENT IN IMM-2792-18

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed.
2. The decision of the Immigration Appeal Division dated May 23, 2018, is set aside and the matter is remitted for reconsideration by a differently constituted panel.
3. No question of general importance is stated.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2792-18
STYLE OF CAUSE:	MOHSEN DEHGHANI v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	DECEMBER 19, 2018
JUDGMENT AND REASONS:	NORRIS J.
DATED:	JUNE 27, 2019

APPEARANCES:

Jessica Norman	FOR THE APPLICANT
David Joseph	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Jessica Norman Barrister & Solicitor Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT