Federal Court  Cour fédérale

Date: 20200116

Docket: IMM-589-19

Citation: 2020 FC 58

Ottawa, Ontario, January 16, 2020

PRESENT: The Honourable Justice Elliott

BETWEEN:

ZINA HAMID NAMAN

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT and REASONS

I. Nature of the Application

[1] This is an application for judicial review. The Applicant, who is self-represented, seeks to set aside a decision made on January 3, 2019 by a member of the Immigration Appeal Division [IAD] of the Immigration and Refugee Board of Canada [IRB] that dismissed the Applicant's application to re-open her appeal of a departure order made against her [the Decision].

[2] For the reasons that follow, this application is dismissed.

II. **Background Facts**

A. *The Departure Order*

[3] The departure order was made against the Applicant on June 30, 2014 when she returned to Canada from Iraq via Pierre Elliott Trudeau International Airport. At that time, the Applicant was a permanent resident of Canada and a citizen of Iraq.

[4] The Applicant was found to be inadmissible to Canada because she had failed to comply with the residency obligations set out in section 28 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. Paragraph 41(b) of the *IRPA* provides that failing to comply with section 28 makes a permanent resident inadmissible to Canada.

B. *The Appeal of the Departure Order*

[5] Two weeks later, on July 10, 2014, the Applicant filed a Notice of Appeal against the departure order.

[6] By letter dated July 31, 2014, the IAD acknowledged receipt of the notice of appeal and provided an outline of the process that would ensue. It also enclosed a Notice of Change of Contact Information form and advised the Applicant that she had to notify the IAD of any change to her contact information including her address, telephone number, fax number and any email address.

[7] The letter concluded by advising the Applicant that once the appeal record was received from Respondent's counsel, the IAD would contact the Applicant about the next step to be taken. It referred to fixing a date for the appeal hearing as a possible step. In a footnote marked "**IMPORTANT**" (emphasis in the original), the letter said that if the Applicant failed to appear for a hearing the IAD may determine under subsection 168(1) of the *IRPA* that she had abandoned her appeal.

[8] A few months later, on September 10, 2014, a Notification of Client Contact Information form was submitted to the IRB on behalf of the Applicant. The form contained a new address and telephone number for the Applicant, as well as a fax number.

C. *The Notice to Appear at a Scheduling Conference*

[9] On July 17, 2017, a Notice to Appear at a Scheduling Conference [Notice to Appear] to be held by teleconference on September 13, 2017 was sent by regular mail to the Applicant.

[10] Enclosed with that notice was another Notice of Change of Contact Information form. The letter contained the same warning footnote describing the consequences of failing to appear at the hearing as was contained in the July 31, 2014 letter.

[11] The Notice to Appear was sent to the address provided on behalf of the Applicant on September 10, 2014. In addition, it indicated that the IAD would contact the Applicant at the telephone number she had provided.

D. *The Applicant fails to attend the Scheduling Conference*

[12] The Applicant did not attend the scheduling teleconference on September 13, 2017. She states that she did not receive the Notice to Appear. It transpired that she had moved and failed to advise the IAD of her new address.

[13] On the scheduled teleconference date, the IAD reached a person at the telephone number that the Applicant had provided on September 10, 2014. The person identified themselves as part of the Iraqi Canadian Group Organization that filled out the appeal form for the Applicant. The person indicated that they had not heard from the Applicant and that the last address they had for her was from 2014.

E. *The Appeal is declared Abandoned and the Applicant applies for Citizenship*

[14] On September 25, 2017, the IAD declared that the Applicant had abandoned her appeal. To do so it relied upon subsection 168(1) of the *IRPA*, which indicates that a failure to appear for a hearing is one of the grounds upon which a proceeding may be declared, abandoned. The IAD also considered that no mail had been returned and the Notice to Appear had been sent to the Applicant at her stated address. In addition, she could not be reached by telephone at the contact number she had provided.

[15] The notes from the scheduling conference indicate that no mail had been returned to the IAD and that there were no entries after 2015. The notes state that the Applicant had a valid Permanent Residence card as well as a visa, which she had not used. The notes also indicate that

the Applicant's children are in Canada but the father has full custody. The Respondent's counsel before the IAD requested that the Applicant's appeal be declared abandoned.

[16] The Applicant applied for citizenship on December 1, 2017. Her application was rejected because there was a departure order in place. The Applicant says that at that time, she was not aware that the departure order was still outstanding. She says she was also unaware of the decision by the IAD that she had abandoned her appeal of the departure order.

F. *The Applicant submits another Appeal*

[17] On August 13, 2018, the Applicant filed another Notice of Appeal of her departure order. The IAD responded by advising her that there was no new departure order, there was only the June 30, 2014 order. As a result, the Applicant abandoned her August 13, 2018 appeal and replaced it with an application to re-open her original appeal.

[18] On October 9, 2018, the Applicant wrote to the IRB pointing out that she had not heard anything since the departure order letter that had been sent two years and 10 months previously. She stated that she had left Canada twice in 2017, and on her return, each time, she was not denied re-entry. The Applicant claimed that it was only after she applied for citizenship that she learned of the departure order.

III. **The Decision**

[19] The decision under review is the refusal to re-open the Applicant's appeal.

[20] In the Decision, the IAD reviewed the background facts and submissions contained in an affidavit filed by the Applicant. It then noted information and submissions put forward by a hearings advisor from the Canada Border Services Agency [CBSA]. Those submissions referred to subsection 13(4) of the *Immigration Appeal Division Rules*, SOR/2002-230. The subsection requires that, without delay, a person provide in writing to the IAD and to the Respondent any change to their contact information.

[21] The CBSA also referred to subsection 168(1) of the *IRPA*, noting that it was referred to on the Notice of Appeal form which also contained a warning that her appeal could be abandoned if she failed to appear or provide up-to-date contact information.

[22] The CBSA pointed out that the passage of time since filing an appeal does not affect the enforceability of a removal order. It submitted that the Applicant did not demonstrate that when the IAD made the decision declaring her appeal abandoned it had failed to observe a principle of natural justice as required by section 71 of the *IRPA*.

[23] The Applicant provided reply submissions reiterating the lengthy passage of time since the issuance of the removal order and her ability to leave and re-enter Canada twice without incident.

[24] The IAD found the Applicant lacked credibility because she had paid the Citizenship application fee in May 2017, well before she first returned to Canada in September 2017.

[25] In addition, on her Citizenship application, the Applicant did not truthfully answer whether she was or had ever been under a removal order. The IAD pointed out that in the section

above her signature, the Applicant was warned that if she made a false representation or concealed any material circumstances relevant to her application, she could be charged with an offence and could be prohibited from becoming a citizen for five years.

[26] The IAD found that the Applicant was aware that a removal order had been issued against her but she still provided a false response in her citizenship application. The panel made a negative credibility finding that the Applicant was trying to circumvent contesting the departure order on its merits.

[27] Finding that there had been no failure by the IAD to observe a principle of natural justice, the IAD dismissed the Applicant's application to reopen her appeal.

IV. **Issue and Standard of Review**

[28] The only issue in this matter is whether the Decision was reasonable.

[29] This application was argued shortly before the Supreme Court of Canada released the decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] in which it restated how a reviewing court is to conduct a reasonableness review.

[30] *Vavilov* has done away with the former requirement that, in instances where the standard of review had not already been satisfactorily determined, an analysis of the appropriate standard is to be conducted by the Court. Instead, there is now a clear statement that when the merits of an administrative decision are judicially reviewed, the applicable standard of review is presumed to be reasonableness: *Vavilov* at para 23.

[31] The presumption does not apply to an issue involving a breach of natural justice or the duty of procedural fairness: *Vavilov* at para 23. Nor does it apply if the legislature explicitly states that a different standard of review is to be applied to a particular administrative body, or if it provides for a statutory appeal of an administrative decision maker to a court: *Vavilov* at para 33.

[32] The presumption is also displaced where the rule of law requires correctness review. This includes constitutional questions, general questions of law of central importance to the legal system as a whole, and questions regarding the jurisdictional boundaries between two or more administrative bodies: *Vavilov* at para 53.

[33] None of the circumstances rebutting or displacing the presumption of reasonableness review apply here. Therefore, the standard of review is reasonableness.

[34] This application was argued on the basis that the standard of review is reasonableness. Although the principles set out in *Vavilov* now apply to this application, I find that it is not necessary to receive further submissions from the parties as the result would be the same under the pre-*Vavilov* framework established in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] and its progeny.

[35] *Vavilov* has not changed the focus of previous jurisprudence such as *Dunsmuir*. The well-known administrative law requirement that the reasons demonstrate that a decision is transparent, intelligible and justified remains alive and well: *Vavilov* at para 15. Rather, *Vavilov* has sharpened the focus by confirming that both the reasoning process and the outcome of a decision are to be considered in assessing whether a decision is reasonable: *Vavilov* at para 86.

[36] As set out in the following analysis, I find that the Decision adheres to the *Vavilov* requirement that "a reasonable decision is one that is based on an internally coherent and rational chain of analysis that is justified in relation to the facts and law that constrain the decision maker." When that requirement is met, a reviewing court is required to defer to the decision: *Vavilov* at para 85.

V. **Analysis**

A. *The Applicant failed to keep her contact information current*

[37] The Applicant relies heavily on the fact that she never received the Notice to Appear. There is no dispute as to that fact.

[38] The problem is that the Applicant was the author of her own misfortune. The Applicant was fully aware of the obligation to keep her contact information current. She had previously completed and submitted to the IRB the Notice of Change of Contact Information form. At that time, she supplied new contact information for her address and telephone number. Having done so, she is taken to have been aware of the warnings on the form stating that:

- she must keep her contact information up-to-date; and,
- if she failed to appear for a scheduled hearing she could be found to have abandoned her appeal.

[39] The Notice of Appeal filed by the Applicant on July 25, 2014, contained the same information. It was located almost directly above the Applicant's signature. It is very noticeable. The text is prefaced by the word "important" set out in all uppercase letters, bold typeface and

underlined, as follows: **IMPORTANT.** Yet, the Applicant never updated her contact information after the initial form was provided on September 10, 2014.

[40] The Respondent provided to the IAD a copy of the application for citizenship filed by the Applicant on December 1, 2017. In that application, she declared that she had lived at her current address in Windsor since January 2016. That address is not the same as the one she provided to the IAD in 2014.

[41] For the foregoing reasons, there is no merit to the Applicant's suggestion that failure to receive the Notice to Appear is the fault of the IRB. The IRB properly sent the Notice to Appear to the most current address for the Applicant that was on file.

B. *The Applicant has not shown that section 71 of the IRPA was met*

[42] In declaring the appeal abandoned, the IAD relied upon section 71 of the *IRPA*, which provides that the IAD may reopen an appeal made by a foreign national who has not left Canada if it is satisfied that the IAD failed to observe a principle of natural justice.

[43] Section 71 is of narrow application. When Parliament enacted the section, it extinguished the IAD's "equitable jurisdiction" to reopen an appeal, except where the IAD has failed to observe a principle of natural justice: *Nazifpour v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 35 at paras 78-80 and 83.

[44] The breach of natural justice must be the fault of the IAD and must not be caused by an applicant's wilful choice: *Canada (Minister of Citizenship and Immigration) v Ishmael*, 2007 FC 212 at paras 24-25.

[45] It is a basic principle of natural justice that an applicant has the right to know the case to be met and is to be provided with an opportunity to be heard. It is also basic that the procedure followed by the decision-maker must treat an applicant fairly. Receiving notice of a hearing that may result in serious consequences to an applicant is part and parcel of fair treatment, going hand in hand with the right to be heard.

[46] The Applicant knew the case to be met when she received the scheduling conference correspondence and when she filed the appeal. She was given the opportunity to participate, but as a result of her own misadventure in not updating her contact information, she failed to capitalize on that opportunity. If she had kept the person who helped her complete her forms apprised of her new contact information, there is a chance she would have been able to participate, as that person could have contacted her when they received the call from the IRB.

[47] The Applicant raised no argument before the IAD that the original IAD decision declaring her appeal to be abandoned violated a principle of natural justice. She argued that the passage of time without hearing anything further as to her deportation order misled her when she twice was able to re-enter Canada after being abroad. However, that argument is without merit. The IAD reviewed her citizenship application and noted that she paid the application fee on May 3, 2017, which was before she left Canada on July 1, 2017. Being allowed back into Canada

on September 3, 2017 therefore could not have misled her to believe she could apply for citizenship, as she claimed.

VI. **Conclusion**

[48] The Applicant was clearly advised more than once, in writing, that she was required to keep her contact information up-to-date. By not doing so, she must accept the consequences.

[49] There is no allegation that the Decision was arrived at in a manner that was procedurally unfair to the Applicant or that violated the principles of natural justice. Nor is there any such evidence in the Certified Tribunal Record. The procedures set out in the *IRPA* and the *Immigration and Refugee Protection Regulations*, SOR/2002-227 were followed by the officials in question. There is simply no basis upon which to set the Decision aside.

[50] The Decision is reasonable. It is internally coherent and there is a rational chain of analysis. The outcome is justified in relation to the facts, which are supported by the underlying record and the law, which was clearly identified and applied by the IAD. The reasons provided by the IAD permit the Applicant and this Court to understand both how and why the Decision was made.

[51] The application is dismissed, without costs.

[52] There is no serious question of general importance for certification on these facts.

JUDGMENT in IMM-589-19

THIS COURT'S JUDGMENT is that:

1. The Application is dismissed, without costs.

2. There is no serious question of general importance for certification.

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-589-19
STYLE OF CAUSE:	ZINA HAMID NAMAN v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	DECEMBER 16, 2019
JUDGMENT AND REASONS:	ELLIOTT, J.
DATED:	JANUARY 16, 2020

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