Federal Court  Cour fédérale

Date: 20100409

Docket: IMM-2734-09

Citation: 2010 FC 366

Ottawa, Ontario, April 9, 2010

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

CURTIS LANCELOT SKERRITT

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] Mr. Curtis Lancelot Skerritt wanted to reopen an appeal of a deportation order against him. He says he never received any notices that his appeal was upcoming, but he received a notice that his appeal had been declared abandoned. At that point, he asked the Immigration Appeal Division (IAD) to reopen his appeal, but the IAD turned him down on the ground that he had not shown that there had been any breach of the rules of natural justice.

[2] Mr. Skerritt argues that the IAD erred in its conclusion and asks me to order another member to reconsider his request. I agree with Mr. Skerritt that the Board erred and will allow this application for judicial review.

[3] The only issue is whether the IAD erred in finding that there had been no breach of the rules of natural justice.

II. Analysis

(a) Factual background

[4] Mr. Skerritt came to Canada in 1971 and was granted permanent residence here. In 2004, he was convicted of criminal harassment which, in turn, led to a deportation order being issued against him in 2007. Mr. Skerritt appealed to the IAD.

[5] In 2008, Mr. Skerritt moved his residence and informed the IAD of his new address. On October 15, 2008, the IAD sent Mr. Skerritt, at his new address, a notice to appear at his hearing on November 5, 2008. Mr. Skerritt did not appear. Mr. Skerritt was then sent notices for his “no-show” hearing, scheduled for January 5, 2009. Again, Mr. Skerritt did not appear.

[6] On February 13, 2009, the IAD declared Mr. Skerritt’s appeal abandoned. The panel inferred that, since none of the correspondence to Mr. Skerritt had been returned undelivered, he must have received the notices. The decision was sent to Mr. Skerritt. Right away, Mr. Skerritt

wrote back to the IAD. In his letter, he stated that he had not received any correspondence regarding his appeal and asked the IAD to reopen it.

[7] All the IAD's correspondence with Mr. Skerritt was sent by regular mail.

(b) The IAD's decision

[8] The IAD accepted Mr. Skerritt's letter as an application to reopen an appeal under s. 71 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (relevant enactments are set out in Annex A). Under that provision, the IAD can reopen an appeal "if it is satisfied that it failed to observe a principle of fundamental justice".

[9] The IAD considered whether there had been a breach of the principles of natural justice, in particular, whether the IAD had failed to give Mr. Skerritt notice of his appeal. Under the IAD's Rules, it must give notice of the date, time and location of a hearing (*Immigration Appeal Division Rules*, SOR/2002-230, Rule 23).

[10] The IAD also referred to Rule 36(2), which states that documents sent by regular mail are considered to be received seven days after mailing. It noted that none of the notices to Mr. Skerritt were returned. Therefore, they are considered to have been received. Obviously, the notice of abandonment was received by Mr. Skerritt because it prompted him to request a reopening of his appeal.

[11] Based on these facts and the Rules, the IAD concluded that Mr. Skerritt had failed to show that it had breached a principle of natural justice and dismissed his application.

(c) Did the IAD err?

[12] I can overturn the IAD's decision if it erred in law, if its fact-finding was unreasonable, or if its reasons were inadequate. In this case, one could characterize Mr. Skerritt's arguments in different ways – that the IAD misinterpreted the Rules, that it made an unreasonable finding of fact when it concluded that Mr. Skerritt received the notices, or that its reasons are inadequate because its findings are unclear. I find it most convenient to analyze the IAD's decision in terms of the adequacy of its reasons.

[13] The reasoning of the Board was as follows:

- notices are considered to have been received seven days after being posted by regular mail;
- the correct address was used;
- none of the notices was returned;
- Mr. Skerritt received the notice of abandonment;
- therefore, there was no breach of the principles of natural justice.

[14] Implicit in the IAD's decision is a conclusion that Mr. Skerritt's claim not to have received the notices should not be believed. In addition, the IAD seemed to have used the fact that Mr. Skerritt responded to the notice of abandonment as being evidence that he also received the earlier

notices. The IAD did not seem to consider the other logical possibility – the fact that Mr. Skerritt responded promptly to the notice of abandonment was evidence of his intention to pursue his appeal and, therefore, if he had received the earlier notices, he probably would have attended his hearing. In any case, while the Board did not make any specific credibility finding against Mr. Skerritt, its reasoning depends on that finding.

[15] I have considerable sympathy for the predicament facing the IAD here. It received a nearly illegible hand-written note from Mr. Skerritt alleging a failure to receive notice. To its credit, the IAD characterized the note as an application to reopen the appeal and it seriously considered whether it ought to do so. However, the downside of the IAD's generosity from Mr. Skerritt's point of view is that he never had a chance to put better evidence (*e.g.*, an affidavit) or fuller submissions to the IAD before it dealt with the question whether it should reopen the appeal.

[16] As the IAD's reasons are insufficiently clear, I must allow this application for judicial review.

III. Conclusion and disposition

[17] In my view, the Board's reasons are inadequate because they fail to address explicitly an important component in its line of reasoning – that Mr. Skerritt's assertion that he did not receive notice of his appeal hearing was not to be believed. Accordingly, I will allow this application for judicial review and order another member of the IAD to reconsider Mr. Skerritt's application. The parties requested an opportunity to make submissions regarding a question of general importance for certification. I will consider any submissions filed within ten days of this judgment.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed. The matter is referred back to another officer for reconsideration.

2. No question of general importance is stated.

"James W. O'Reilly"
Judge

Annex “A”

Immigration and Refugee Protection Act, S.C. 2001, c. 27

Reopening appeal

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 principle of natural justice.

Immigration Appeal Division Rules, SOR/2002-230

Notice to appear

23. The Division must notify the parties of the date, time and location of a proceeding.

Loi sur l’immigration et la protection des réfugiés L.C. 2001, ch. 27

Réouverture de l’appel

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 justice naturelle.

Règles de la section d’appel de l’immigration, DORS/2002-230

Avis de convocation

23. La Section avise les parties des date, heure et lieu d’une procédure.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2734-09
STYLE OF CAUSE:	SKERRITT v. MCI
PLACE OF HEARING:	Toronto, ON.
DATE OF HEARING:	January 12, 2010
REASONS FOR JUDGMENT AND JUDGMENT:	O'REILLY J.
DATED:	April 9, 2010

APPEARANCES:

Joshua Lang	FOR THE APPLICANT
Tamrat Gebeyehu	FOR THE RESPONDENT

SOLICITORS OF RECORD:

BELLISSIMO LAW GROUP ORMSTON, BELLISSIMO, ROTENBERG Toronto, ON	FOR THE APPLICANT
JOHN H. SIMS, Q.C. Deputy Attorney General of Canada Toronto, ON.	FOR THE RESPONDENT