

Federal Court



Cour fédérale

Date: 20181204

Docket: IMM-230-18

Citation: 2018 FC 1219

Toronto, Ontario, December 4, 2018

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

GARTH ANTHONY DAVIS

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] Mr. Garth Anthony Davis (the “Applicant”) seeks judicial review of the decision of the Immigration and Refugee Board, Immigration Appeal Division (the “IAD”), dated December 21, 2017. In that decision, the IAD cancelled the stay of the Applicant’s removal and dismissed his appeal against the deportation order made against him on May 29, 2007.

[2] The Applicant is a citizen of Jamaica. He became a permanent resident of Canada in August 1996. In May 2007, a removal order was issued against the Applicant on the grounds of serious criminality, upon his conviction of the offence of unauthorized use of a computer under subsection 342.1(1) of the *Criminal Code*, R.S.C., 1985, c. C-46.

[3] The Applicant appealed to the IAD and in a decision dated November 18, 2008, the removal order was stayed for a period of three years.

[4] On April 25, 2012, the IAD held a hearing to reconsider the stay in favour of the Applicant. The Applicant failed to attend the hearing and on April 25, 2012, the IAD dismissed his appeal. The Applicant successfully applied to re-open his appeal.

[5] In December 2016, the Applicant was convicted of a number of indictable offences, including the offence of credit card fraud, an offence that falls within the scope of paragraph 36(1)(a) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the “Act”).

[6] The Applicant was also convicted of two offences under the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19. Neither the Certified Tribunal Record nor the records filed by the parties to this application for judicial review clearly show if the drug offences fall within the scope of paragraph 36(1)(a) of the Act.

[7] In its decision dated December 21, 2017, the IAD cancelled the stay and said that the “appeal is terminated”. It found that it lacked jurisdiction, pursuant to subsection 68(4) of the Act

to continue the stay of the Applicant's removal, pending his appeal against the recent criminal offences.

[8] The Applicant argues that his rights to procedural fairness were breached because the IAD refused to adjourn its proceedings to await the result of his appeal against certain criminal convictions. He submits that an adjournment was earlier granted to the Minister of Citizenship and Immigration (the "Respondent") and fairness required that an adjournment be given to him.

[9] The Applicant also argues that the IAD erred in saying that he could apply to re-open his appeal should he succeed in the appeal against the criminal conviction.

[10] The Respondent submits that the IAD committed no reviewable error and its mistake about the possibility of re-opening the appeal does not affect its decision.

[11] The within application raises two issues, that is an alleged breach of procedural fairness and the overall reasonableness of the decision of the IAD.

[12] The issue of procedural fairness is reviewable on the standard of correctness; see the decision in *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339.

[13] The merits of the decision involve a question of mixed fact and law; that issue is reviewable on the standard of reasonableness, according to the decision in *Dunsmuir v. New Brunswick*, [2008] S.C.R. 190.

[14] According to the decision in *Dunsmuir, supra*, the reasonableness standard requires that a decision be transparent, justifiable and intelligible, falling within a range of possible, acceptable outcomes that is defensible on the law and the facts.

[15] I have considered the written and oral submissions of the parties, as well as the contents of the Certified Tribunal Record.

[16] I acknowledge that the IAD is master of its own processes, including the grant or denial of an adjournment. However, the IAD is also subject to the common law duty of procedural fairness in discharging its statutory mandate.

[17] In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, Justice L'Heureux-Dubé reviewed the content of the duty of procedural fairness, noting that the content will vary according to the circumstances. She identified a non-exhaustive list of factors to be considered in determining the variable content of the duty of fairness.

[18] One of the factors is the importance of a decision to the individual affected; see paragraph 25 of the decision in *Baker, supra*.

[19] In my opinion, the decision of the IAD does not clearly show that it turned its mind to this aspect of procedural fairness when dismissing the Applicant's request for an adjournment. The consequences to the Applicant of dismissal of his appeal are significant, that is the loss of

his opportunity to remain in Canada. After the IAD denied that request, it decided to terminate the stay and dismiss the Applicant's appeal, as a matter of law.

[20] It is not necessary for me to address the merits of the decision of the IAD since I am satisfied that, upon the facts of this case and considering the written submissions of the Applicant to the IAD in October and December 2017, a breach of procedural fairness occurred. This error is reviewable on the standard of correctness.

[21] In the result, the application for judicial review is allowed, the decision is set aside and the matter remitted to a differently constituted panel of the IAD. There is no question for certification arising.

JUDGMENT in IMM-230-18

THIS COURT'S JUDGMENT is that the application for judicial review is allowed.

The decision is set aside and the matter remitted to a differently constituted panel of the Immigration Appeal Division. There is no question for certification arising.

“E. Heneghan”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-230-18

STYLE OF CAUSE: GARTH ANTHONY DAVIS v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: AUGUST 15, 2018

JUDGMENT AND REASONS: HENEGHAN J.

DATED: DECEMBER 4, 2018

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