Federal Court  Cour fédérale

Date: 20200922

Docket: IMM-4518-19

Citation: 2020 FC 920

Ottawa, Ontario, September 22, 2020

PRESENT: The Honourable Mr. Justice Pamel

AND BETWEEN:

DEMAR LYNFORD DWYER

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] In the present matter the Applicant, Mr. Demar Lynford Dwyer, is seeking judicial review of a decision dated May 30, 2019 of the Immigration Appeal Division [IAD] denying his second attempt to reopen the appeal of his removal order on the grounds of *res judicata*. Mr. Dwyer's initial appeal of his removal order was determined on November 2, 2015 to be abandoned, and his first attempt at reopening his appeal was dismissed by the IAD on December 6, 2016.

[2] This matter was heard in conjunction with the matter in IMM-2028-19 wherein Mr. Dwyer is seeking judicial review of a decision dated April 4, 2019 of the Canada Border Services Agency [CBSA] denying his request for a deferral of his removal from Canada.

[3] For the reasons that follow, I am dismissing Mr. Dwyer's application for judicial review.

I. Background

A. *Facts*

[4] Mr. Dwyer is a citizen of Jamaica; he arrived in Canada in December 2000 at the age of 14, having been sponsored as a permanent resident by his mother. The facts of this matter were thoroughly set out in IMM-2028-19. I would only highlight the following facts, which are particularly relevant to this matter:

- March 2006 – at the age of 20, Mr. Dwyer was charged with attempted murder and pleaded guilty to the lesser included offence of aggravated assault in October 2006.

- December 2006 – on the basis of his October 2006 conviction, Mr. Dwyer was determined to be inadmissible to Canada for serious criminality and a deportation order was issued for his removal; he was under an obligation to report any change in his residential address. He appealed this decision to the Immigration Appeal Division [IAD].

- October 2014 – following several years during which the appeal of his deportation order was stayed so as to allow Mr. Dwyer to deal with various criminal charges

and pending trials, the IAD again extended Mr. Dwyer's stay of his appeal for an additional year. Mr. Dwyer's address of record with the IAD at the time was 746 Midland Avenue, Apt 115, Toronto.

- March 18, 2015 and September 16, 2015 – Mr. Dwyer reported to the CBSA Bond Reporting Centre as he was required to do under his reporting conditions. He reported his address of residence on both occasions as being 141 Stephenson Ave, Unit 19, Toronto.

- September 18, 2015 – the IAD sent Mr. Dwyer a notice to appear at a hearing scheduled for October 9, 2015 on the issue of the reconsideration of the stay of his appeal. The hearing notice was sent to Mr. Dwyer's last reported home address with the IAD, that is, 746 Midland Avenue, Apt 115, Toronto, and to his counsel. The copy of the notice sent to his home address was returned undelivered.

- October 2, 2015 – counsel for Mr. Dwyer sent a letter to the IAD confirming receipt of the notice to appear, but indicating that he could not contact Mr. Dwyer or his mother through the telephone numbers he, counsel, had on file as the numbers were not "accessible". As I understood during the hearing before me, and unbeknownst to the IAD at the time, Mr. Dwyer was either incarcerated at the time the IAD sent him the notice to appear on October 9, 2015, or in the process of moving, which would account for him having missed the IAD notice.

- November 2, 2015 – in any event, the IAD declared Mr. Dwyer's appeal to be abandoned pursuant to subsection 168(1) of the *Immigration and Refugee*

Protection Act, SC 2001, c 27 [IRPA]. The notice of the decision was sent to Mr. Dwyer at the Midland Avenue address, but was returned undelivered.

- September 30, 2016 – nearly one-year later, Mr. Dwyer applied to reopen his IAD appeal.

- December 6, 2016 – the IAD dismissed Mr. Dwyer's application to reopen his IAD appeal on the basis that he had failed to update his residential address. The IAD also found that it had not breached natural justice in declaring the appeal abandoned, and thus, pursuant to section 71 of the IRPA, there was no basis to reopen the appeal. An application for leave and judicial review of that decision was dismissed by this Court on April 13, 2017.

- April 24, 2019 – two-years later, Mr. Dwyer applied to have his IAD appeal reopened a second time, largely on grounds similar to those raised in his first attempt.

- May 30, 2019 – the IAD dismissed the reopening application on the grounds of *res judicata*. It is that decision [the IAD Decision] that is now under judicial review.

II. The IAD Decision

[5] In the IAD Decision, the IAD provided a short recap of Mr. Dwyer's immigration history and underscored that on September 30, 2016, Mr. Dwyer had applied to reopen his appeal that had been deemed abandoned pursuant to section 71 of the IRPA.

[6] The IAD determined that the decision to dismiss Mr. Dwyer's initial attempt at reopening his appeal was not disturbed by this Court on judicial review, leading the IAD to conclude that there was no reviewable error in that earlier decision.

[7] In his second attempt at reopening his appeal, Mr. Dwyer included an affidavit identical in substance to that filed in support of his earlier attempt to reopen his appeal. The IAD found that as he did not raise any issue that would cause the IAD to believe that the principle of *res judicata* did not apply, the IAD, upon motion by the Minister, dismissed Mr. Dwyer's second application to reopen his appeal on the grounds of *res judicata*.

III. Relevant Statutory Framework

[8] Section 71 and subsection 168(1) are relevant provisions of the IRPA in this matter:

Reopening appeal	**Réouverture de l'appel**
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.	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.
[…]	[…]
Abandonment of proceeding	**Désistement**
168(1) A Division 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	168(1) Chacune des sections peut prononcer le désistement dans l'affaire dont elle est saisie si elle estime que l'intéressé omet de poursuivre l'affaire, notamment par défaut de comparution, de

for a hearing, to provide information required by the Division or to communicate with the Division on being requested to do so. [Emphasis added.]	fournir les renseignements qu'elle peut requérir ou de donner suite à ses demandes de communication. [Je souligne.]

IV. Issues

[9] Mr. Dwyer submits the following issues to be argued before this Court:

- Did the IAD breach his right to procedural fairness?
- Did the IAD improperly assess the documents before it?
- Did the IAD fail to conduct an analysis under section 97 of the IRPA?

V. Standard of Review

[10] Whether the principle of *res judicata* applies to an application to reopen an IAD appeal, whether the preconditions to the operation of *res judicata* and issue estoppel are met, and whether there was a breach of a principle of natural justice are all issues to be determined on the standard of correctness (*Canada (Public Safety and Emergency Preparedness) v Philistin*, 2014 FC 762 at paras 15–16; *Ratnasingam v Canada (Public Safety and Emergency Preparedness)*, 2007 FC 1096 at paras 12–13 [*Ratnasingam*]).

[11] On the other hand, the issue of whether there exist special circumstances that warrant the non-application of *res judicata* and issue estoppel does involve some discretion, and is reviewable on the standard of reasonableness (*Ratnasingam* at para 13).

VI. Analysis

[12] *Res judicata* prevents parties from relitigating an issue where a final determination has been made between them (*Régie des rentes du Québec v Canada Bread Company Ltd*, 2013 SCC 46, [2013] 3 SCR 125 at para 24). The underlying reasoning for the doctrine of *res judicata* and issue estoppel is set out in *Danyluk v Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 SCR 460 at paras 18, 21 and 25 [*Danyluk*]. Primary amongst them is that "the law rightly seeks a finality to litigation" (*Danyluk* at para 18).

[13] The three-preconditions to the operation of issue estoppel, a branch of *res judicata*, are set out at paragraph 25 of *Danyluk*:

i. that the same question has been decided;

ii. that the judicial decision which is said to create the estoppel is final; and,

iii. that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[14] In order to determine whether issue estoppel applies, a two-step analysis must be carried out (*Danyluk* at para 33):

> The rules governing issue estoppel should not be mechanically applied. The underlying purpose is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case … The first step is to determine whether the moving party … has established the preconditions to the operation of issue estoppel set out by Dickson J. in *Angle, supra*. If successful, the court must still determine whether, as a matter of discretion, issue estoppel *ought* to be applied …

[15] Mr. Dwyer argues that the IAD ignored the evidence in rendering the IAD Decision. However, no new clear and persuasive evidence that could have been ignored by the IAD was put before it.

[16] The Minister argues that, regardless of the reason, Mr. Dwyer simply failed to update the IAD with his change in location, which resulted in him possibly not having seen the notice to appear sent by the IAD. I agree.

[17] Having considered the matter, I find that the same issue that was raised in the first attempt to reopen the IAD appeal was raised again in Mr. Dwyer's second attempt. The first reopening decision was a final decision, with leave to apply for judicial review being denied. The same parties were represented in both reopening applications. Since the preconditions to the application of the principle of *res judicata* were met, the principle presumptively applies in this case.

[18] As the IAD determined during Mr. Dwyer's first attempt at reopening his appeal that it had not breached procedural fairness in rendering its decision to dismiss Mr. Dwyer's application, and as this Court denied Mr. Dwyer leave to proceed with the judicial review of that decision, it must be taken as given that the IAD did not breach natural justice in declaring Mr. Dwyer's appeal abandoned.

[19] Any attempt now to have that issue reopened on the strength of the same documentation and arguments similar to those that were made in the first attempt should be summarily

dismissed on the principle of *res judicata* as an attempt by Mr. Dwyer to relitigate an issue that has already been fully decided by the IAD and upheld by this Court in a previous application.

[20] In addition, I find that Mr. Dwyer has not provided me with any special circumstances which would indicate why the doctrine of *res judicata* should not be applied to the second application to reopen his IAD appeal.

VII. Conclusion

[21] I have not been convinced that the IAD made a reviewable error in the IAD Decision. The present application should therefore be dismissed.

JUDGMENT in IMM-4518-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There are no questions for certification.

"Peter G. Pamel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

AND DOCKET:	IMM-4518-19
STYLE OF CAUSE:	DEMAR LYNFORD DWYER v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE BETWEEN MONTREAL, QUEBEC AND TORONTO, ONTARIO
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JUDGMENT AND REASONS:	PAMEL J.
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APPEARANCES:

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