Federal Court  Cour fédérale

Date: 20221110

File: IMM-8650-21

Citation: 2022 FC 1533

[ENGLISH TRANSLATION]

Montréal (Quebec), November 10, 2022

PRESENT: Mr. Justice Gascon

BETWEEN:

KEVIN OMAREA LEVY

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant is a citizen of Jamaica and has been a permanent resident of Canada since 1987. In June 2017, the Immigration Appeal Division [IAD] of the Immigration and Refugee Board [IRB] granted Mr. Levy a three-year stay of a removal order issued against him following criminal convictions. In December 2020, the IAD declared that Mr. Levy's appeal against his

removal order was abandoned because he did not appear at the show cause hearing and never responded to the notices to appear sent by the IAD in this regard. In a decision rendered on October 13, 2021 [Decision], the IAD dismissed Mr. Levy's application to reopen his appeal, which he had made under section 71 of *the Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. Mr. Levy argued that in declaring his appeal abandoned, the IAD breached a principle of natural justice because of a clerical error in transcribing his email address.

[2] Mr. Levy is now seeking judicial review of the IAD's Decision. He is asking the Court to refer his file to the IAD for a new hearing and specifically order the appeal to be reopened before another IAD member. Mr. Levy submits that the IAD's decision to deny him the reopening of his appeal on the ground that the IAD's conduct did not violate the principles of natural justice is unreasonable. He also asks the Court to refer this matter directly to the IAD for the continuation of the appeal on the merits, and not for a mere reconsideration of his application to reopen. Moreover, he maintains that special reasons justify an award of costs in his favor.

[3] For the following reasons, Mr. Levy's application for judicial review is dismissed. After reviewing the IAD's reasons, the evidence on file and the applicable law, I am of the view that, in the circumstances, the IAD reasonably concluded that no breach of natural justice was committed when it declared Mr. Levy's appeal abandoned.

II. Background

A. *Facts*

[4] Mr. Levy has been a permanent resident of Canada since February 1987. In 2012, he was convicted of drug possession and trafficking offenses. In February 2013, a removal order for serious criminality was issued against him. Mr. Levy appealed this removal order, as authorized by subsection 63(3) of the IRPA, in order to remain in Canada. In May 2017, the IAD granted him a temporary stay of removal for three years, subject to certain conditions. For example, Mr. Levy is required to notify the Canada Border Services Agency [CBSA] and the IAD of any change of address. In addition, Mr. Levy was informed at that time that his appeal from the removal order would be reconsidered on or about June 1, 2020.

[5] Between 2017 and 2020, Mr. Levy moved several times and changed his contact information. He only notified the CBSA, not the IAD, believing—wrongly—that this was sufficient.

[6] Between June and October 2020, the IAD tried to reach Mr. Levy several times by mail to advise him that there would be a reconsideration of the temporary stay of the removal order against him. Since the IAD no longer had Mr. Levy's updated contact information, mail communications were returned to the IAD with notes stating [TRANSLATION] "Moved/Unknown". Mr. Levy therefore did not file his submissions on time and did not appear at the show cause hearing held on October 28, 2020, to reconsider the stay of the removal order. At that hearing, however, the CBSA representative shared with the IAD the new contact information that Mr. Levy had provided to the CBSA.

[7] Given the absence of answers from Mr. Levy, the mail returns for non-delivery and the new contact information obtained from the CBSA, the IAD decided not to immediately declare the appeal abandoned—as it could have— but instead ordered a new date, November 20, 2020, to allow submissions to be made on the reconsideration of the stay of removal. In order to inform Mr. Levy of this new hearing date, the IAD sent a new notice to appear to Mr. Levy, by mail and email, on October 30, 2020, to the new addresses provided by the CBSA. By mistake, Mr. Levy's email address was not correctly noted by the IAD, so the email sent to Mr. Levy at that time never reached him. The IAD received notifications about the failure to send the email. However, the IAD did not receive any return mail in respect of the notice sent by mail to Mr. Levy's new mailing address.

[8] By November 20, 2020, the IAD still had not received any documents from Mr. Levy. At that time, there was no indication of a problem with the notice to appear sent by mail. On December 15, 2020, the IAD attempted one last time to reach Mr. Levy by telephone, but without success, as the telephone number was no longer in service.

[9] Following Mr. Levy's further failure to file his submissions and to appear, the IAD therefore declared Mr. Levy's appeal abandoned on December 18, 2020, in accordance with subsection 168(1) of the IRPA. This provision authorizes sections of the IRB, including the IAD, to "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". In early January 2021, the IAD sent its December 18, 2020 decision to Mr.

Levy. It was not until April 22, 2021—well after the IAD declared the abandonment—that the IAD received return mail with the note [TRANSLATION] “Moved/Unknown”, informing it that its December 18, 2020 decision could not be sent to Mr. Levy’s mailing address.

[10] In May 2021, the CBSA contacted Mr. Levy by email. It was following this communication that Mr. Levy learned that the IAD had declared his appeal abandoned in December 2020.

[11] During the month of June 2021, Mr. Levy took various steps to investigate the abandonment of the appeal by the IAD. Finally, on July 13, 2021, Mr. Levy requested that the IAD’s decision on the abandonment of his appeal be reopened, pursuant to section 71 of the IRPA.

B. *IAD Decision*

[12] In the Decision, the IAD found that Mr. Levy had a duty to notify the IAD of his changes in contact information, but failed to do so. It also stated that it was of the opinion that no error had been made in the processing of Mr. Levy’s file that resulted in a breach of natural justice.

[13] The IAD first noted that Mr. Levy had a legal obligation to notify it of the change in his contact information in writing under subsection 13(4) of the *Immigration Appeal Division Rules*, SOR/2002-230 [Rules]. Also, the IAD’s decision in 2017 regarding the stay of Mr. Levy’s removal order included, in clear and precise terms, this obligation that he had to notify both the CBSA and the IAD of any change in contact information. However, despite the legal obligation

he had, Mr. Levy did not notify the IAD of his changes of address more than three years after he moved twice.

[14] The IAD submitted that the failure to update contact information explains why Mr. Levy was unable to respond to the notices sent, did not file submissions, and did not attend the show cause hearing. The IAD submits that, in accordance with *Jones v Canada (Citizenship and Immigration)*, 2011 FC 84 [*Jones*], after sending a notice to appear at the last known address of an appellant, it is not required to carry out additional checks. However, the IAD member still attempted to call Mr. Levy at the last known telephone number, but without success. Given the repeated difficulties to contact Mr. Levy, the IAD even ordered a new date for the final reconsideration of the stay of his removal order.

[15] Although it erred in noting the email address given to it by the CBSA representative at the hearing on October 28, 2020, the IAD also sent a notice by mail to Mr. Levy's last known address, which he had given to the CBSA. The IAD therefore determined that it was diligent because it was not required to take additional steps to try to reach Mr. Levy, who had the initial obligation to update his contact information. The IAD noted that as of December 18, 2020, the IAD had attempted to contact Mr. Levy more than six times by letter, email and telephone, but in vain.

[16] For these reasons, the IAD dismissed the application to reopen the appeal on the basis that Mr. Levy had not demonstrated, on a balance of probabilities, that the IAD had breached the principles of natural justice by declaring his appeal abandoned.

C. *Standard of review*

[17] Mr. Levy and the respondent, the Minister of Public Safety and Emergency Preparedness [Minister], are both of the view that the standard of reasonableness applies to decisions re-opening appeals to the IAD (*Canada (Citizenship and Immigration) v Liu*, 2021 FC 306 at paras 16–17; *Naman v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 58 [*Naman*] at paras 28–36). I also agree. Indeed, the standard of reasonableness is presumed to apply whenever a court has to decide an application for judicial review of the merits of an administrative decision (*Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]).

[18] The standard of reasonableness focuses on the decision made by the decision maker, including both the rationale for the decision and the outcome (*Vavilov* at paras 83 and 87). Where the applicable standard of review is reasonableness, the role of a reviewing court is to examine the reasons given by the administrative decision maker and determine whether the decision is based on "an internally consistent and rational chain of analysis" and is "justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85). A reviewing court must therefore ask itself whether "the decision bears the hallmarks of reasonableness—justification, transparency and intelligibility" (Vavilov at para 99, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 [Dunsmuir] at paras 47, 74). It is up to the party challenging an administrative decision to demonstrate its unreasonableness.

[19] A reasonableness review must include a rigorous evaluation of administrative decisions. However, as part of its analysis of the reasonableness of a decision, the reviewing court must

examine the reasons provided with “respectful attention,” and seek to understand the reasoning process followed by the decision maker to arrive at its conclusion (*Vavilov* at para 84). The reviewing court must adopt an attitude of restraint and intervene “only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process” (*Vavilov* at para 13). The standard of reasonableness is rooted in the principle of judicial restraint and deference, and requires reviewing courts to show respect for the distinct role that Parliament has chosen to confer on administrative decision makers rather than on courts (*Vavilov* at paras 13, 46, 75). An administrative decision will not be overturned on the basis of mere superficial or incidental errors. Rather, the impugned decision must have serious shortcomings, such as internally inconsistent reasoning (*Vavilov* at paras 100–101).

III. Analysis

[20] Mr. Levy submits that the IAD did not fulfill its obligation to provide proper notice given the error it made in transcribing his email address. According to Mr. Levy, this constitutes a breach of the principles of natural justice since this error prevented him from being heard. Mr. Levy also argues that the numerous returned letters and emails received by the IAD clearly indicated that his notices to appear were not being received, and that the IAD was then obliged to make additional efforts to send them to him. Moreover, Mr. Levy maintains that he believed that compliance with his obligations with the CBSA also applied to the IAD, and that compliance with all of his other obligations demonstrates his good faith. Finally, Mr. Levy argues that the inability of the IAD to locate the audio recording of the first show cause hearing on October 28, 2020 prevents it from properly reviewing the decision, which is contrary to the rules of procedural fairness and the principles of natural justice.

[21] I do not agree with Mr. Levy's position and am rather of the view that the IAD rendered a completely reasonable decision in concluding that Mr. Levy was not entitled to reopen his appeal given his failure to demonstrate a breach of natural justice, as required by section 71 of the IRPA. Given this conclusion, it is not necessary to address the other issues raised by Mr. Levy in his application for judicial review, namely the nature of the remedies that the Court may impose and his request for costs.

[22] It must first be noted that the IAD's jurisdiction to reopen an appeal under section 71 of the IRPA is limited (*Naman* at para 43). This jurisdiction is limited to proceedings where the IAD is responsible for a breach of a principle of natural justice (*Naman* at para 44). Here, the alleged error by the IAD occurred only in the additional efforts the IAD made to try to reach Mr. Levy, and not in its initial communications, which complied with its obligation under the IRPA and the Rules. Admittedly, there was an error in the transcription of Mr. Levy's email address, but there was no error in sending the second notice to appear by mail to the last mailing address that Mr. Levy had given the CBSA. Moreover, the record contains no evidence that the mail was not received by Mr. Levy.

[23] There is no breach of the principles of natural justice when the IAD declares an appeal abandoned after sending a notice of hearing to the last address provided by the appellant, which it did in this case (*Jones* at para 20; *Wilks v Canada Immigration and Refugee Board*, 2009 FC 306 [*Wilks*] at paras 41–43). Moreover, the case law is clear that it is not for the IAD, when its mail is returned to it because of a wrong address, to investigate to find and locate the person concerned *(Guo v Canada (Citizenship and Immigration)*, 2018 FC 15 at paras 31–32).

[24] In Mr. Levy's case, the voluntary steps taken by the IAD following the cancellation of the first hearing went beyond its obligations under the principles of natural justice, while it was authorized to declare Mr. Levy's appeal abandoned as soon as he failed to appear at this first hearing.

[25] In short, I am not convinced that it was unreasonable for the IAD to reject Mr. Levy's application to open an appeal. Rather, it is Mr. Levy's repeated failure to comply with his obligation to update his contact information, not the IAD's error in spelling his email address, that is the issue preventing him from receiving information which would allow him to participate in the hearing of his appeal on the removal order.

[26] It is worth noting the words of this Court in *Jones*, at paragraph 21:

> It may well be that in some cases, the IAD goes out of its way to make an inquiry, either by contacting the CBSA or by using the telephone numbers provided in the Notices of Appeal or subsequent notices change of contact information to try to make direct contact with an appellant. But the IAD cannot be faulted for not having done so here, particularly when there is nothing in the file to indicate that a change of address was reported to the CBSA. The IAD is rightly entitled to declare an appeal abandoned in the case of returned mail, and is not required to investigate with a view to determining if a change of address has been filed with CBSA or other government departments.

[27] Mr. Levy's arguments ignore his own initial failure to provide his updated contact information to the IAD. It is difficult to blame the IAD for making a mistake in trying to help Mr. Levy and provide him with an additional chance to be heard, despite his own carelessness. Had it not been for Mr. Levy's failure to provide his new contact information, he would have received the notices to appear that the IAD duly sent him. Moreover, I note that there was

nothing in the evidence before the IAD that would allow it to conclude that Mr. Levy had not received the second notice to appear sent by mail on October 30, 2020. I note that, even in his affidavit in support of his application for judicial review, Mr. Levy does not specify where he lived between October 2020 and April 2021; he also did not state that he was not residing at his address on Rousseau Street in Lasalle at the time of the second notice to appear on October 30, 2020. I add that his affidavit states that the first notice to appear, sent on September 21, 2020 to his address on Stirling Street in Lasalle, and the December 18, 2020 decision, sent on January 7, 2021 to his address on Rousseau Street in Lasalle, were both returned to the IAD by Canada Post marked [TRANSLATION] "Moved/Unknown". However, Mr. Levy's affidavit is silent on the fate of the second notice to appear, sent by mail on October 30, 2020, and for which there is no evidence on the record of returned mail marked undelivered by Canada Post.

[28] It is true that the IAD may be required to take additional steps when it has knowledge that an address provided is not valid (*Wilks* at para 42). In fact, it did so by obtaining Mr. Levy's contact information from the CBSA, ordering a second date for filing submissions, and then sending a new notice to appear to Mr. Levy by email and by mail. It is also true that following this second attempt, the IAD was aware that its email had not been received, given the failure-to-send notification that it received. However, the postal notice sent on October 30, 2020 was not returned marked as undeliverable. Only the mail sending the December 18, 2020 decision was returned to the IAD marked "Moved/Unknown" in April 2021. Consequently, it is clear that the IAD was not aware that Mr. Levy's last mailing address was incorrect at the time of his second notice in October 2020 or even of its decision of December 18, 2020. The IAD could therefore reasonably conclude that the notice had indeed been received by Mr. Levy (*Wilks* at para 43).

[29] This is far from being a situation where the IAD maintains a removal order and declares an appeal abandoned without allowing the relevant party to make his or her arguments. Here, the IAD took the necessary steps to notify Mr. Levy and he did not fulfill his obligations. It was therefore entirely open to the IAD to conclude that no breach of a principle of natural justice compromised its decision to dismiss Mr. Levy's appeal and declare it abandoned.

[30] In *Osegueda v Canada (Public Safety and Emergency Preparedness)*, 2009 CanLII 79213 (CA IRB) at paras 29 and 30, the IAD acknowledged that many appellants believe that the IAD and CBSA are one and the same thing. However, the IAD explained the importance of distinguishing the two entities, given the IAD's independence from the Minister and the CBSA. This is why the obligation to send a notice of change of contact information to both the IAD and the CBSA is clearly stated on the IAD's mailouts. In addition, in Mr. Levy's case, the terms and conditions of the stay of the removal order against him clearly stated his obligation to send a notice of change of address to both entities. Mr. Levy's argument that he believed that the fulfillment of his obligations with the CBSA also applied to the IAD certainly cannot render the IAD's decision unreasonable.

[31] In sum, I am satisfied that the reasons provided by the IAD justify the decision in a transparent and intelligible manner. The reasons allow the Court to understand the reasoning on which the IAD decision is based and confirm that no relevant facts have been omitted. I find no serious flaw in the decision or on the record that would render the decision unreasonable in light of the facts (*Vavilov* at para 100).

[32] In her submissions to the Court, counsel for Mr. Levy insisted that in deciding to give Mr. Levy a second chance and by sending him a new notice to appear at the end of October 2020, the IAD revived a new obligation toward Mr. Levy, which essentially erased Mr. Levy's failures to inform the IAD of any change of address. I do not accept these arguments. The IAD's decision to re-send by email and mail did not result in the IAD having a new responsibility for the transmission of its communications. It is also incorrect to claim that email was the preferred means of communicating with Mr. Levy. The IAD sent its second notice to appear both by email and by mail, and there is no indication that the mail was not received.

[33] In such circumstances, it is reasonable for the IAD to conclude that Mr. Levy failed to demonstrate a breach of a principle of natural justice in the processing of his appeal and in the conclusion on abandonment that followed.

[34] I will add a remark echoing a comment made by counsel for the Minister at the hearing before this Court. Permanent resident status has a number of obligations, and this is especially the case when a permanent resident is subject to a removal order which the CBSA agrees to stay. Mr. Levy was well aware and duly informed of the conditions of his stay, and it was his responsibility to comply. He certainly cannot blame the IAD for his own negligence and failure to provide the required changes of address, which are the first cause of the IAD declaring the appeal abandoned.

[35] In closing, I note that Mr. Levy's arguments about the absence of the audio recording of the October 28, 2020 hearing are also unsuccessful. In *Aliai v Canada (Citizenship and*

Immigration), 2017 FC 82 at para 22, the Court noted that the absence of audio recordings or transcripts is an important factor only if it is shown that there is a "serious possibility that a ground of judicial review cannot be presented without the transcript". However, Mr. Levy did not submit any evidence or arguments that would allow the Court to conclude in his favour in this case. Moreover, no one disputes that the IAD erred in transcribing Mr. Levy's email address. Obtaining the audio recording of the October 2020 hearing would not change the situation or the arguments that Mr. Levy could make in the course of his motion.

IV. Conclusion

[36] For these reasons, Mr. Levy's application for judicial review is dismissed. I do not find anything irrational in the IAD's decision-making process or in its conclusions to the effect that, in declaring Mr. Levy's appeal abandoned, the IAD had not committed any breach of the principles of natural justice that could allow the appeal to be reopened. I find that the IAD's analysis has all the required attributes of transparency, justification and intelligibility, and that there is no reviewable error in the Decision. According to the standard of reasonableness, it is sufficient that the Decision be based on an internally coherent and rational chain of analysis and that be justified in the light of the facts and law that constrain the decision maker. That is clearly the case here.

[37] No question of general importance was proposed for certification and I agree that none arise.

JUDGMENT in IMM-8650-21

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed without costs.

2. No question of general importance is certified;

"Denis Gascon"
Judge

Certified true translation
Janna Balkwill

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-8650-21
STYLE OF CAUSE:	KEVIN OMAREA LEVY v MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	HELD VIA VIDEOCONFERENCE
DATE OF HEARING:	OCTOBER 27, 2022
JUDGMENT AND REASONS:	GASCON J.
DATED:	NOVEMBER 10, 2022

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