Date: 20071016

Docket: IMM-1190-07

Citation: 2007 FC 1047

Ottawa, Ontario, October 16, 2007

Present: The Honourable Mr. Justice Shore

BETWEEN:

MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

PALUMBO, Vincenzo

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

SUMMARY

[1] The decision of the Immigration Appeal Division (IAD) of the Immigration and Refugee Board was made without complying with subsection 26(3) of the *Immigration Appeal Division Rules*, SOR-2002-230 (IAD Rules), which requires that the parties must be notified if the Division reconsiders an appeal on its own initiative. In addition to being a violation of its own rules, this non-compliance constitutes a breach of the rules of procedural fairness and natural justice.

[2] It is important to point out that in *Canada (Minister of Citizenship and Immigration) v. Charabi*, 2006 FC 996, [2006] F.C.J. No. 1272 (QL), Mr. Justice Pierre Blais set aside a similar decision by the same member.

[3] In that case, despite notifying the parties that it was planning to conduct an interim reconsideration of the stay, the IAD deprived the applicant of the right to be heard because the notice that was given did not constitute sufficient notice of the nature of the hearing before the member, who ultimately set aside the stay of the applicant's removal order and allowed his appeal.

[4] In this case, the violation of the parties' rights is even more flagrant in that the IAD did not even notify them that it was planning to conduct an interim reconsideration of the stay.

INTRODUCTION

[5] This is an application for leave and judicial review of a decision of IAD member Robert Néron, dated February 21, 2007, in file MA5-02237, in which he reconsidered and amended the terms and conditions of the stay of the removal order that had been granted to the respondent on May 31, 2006.

[6] The applicant challenges this decision because member Néron opened the file on his own initiative and unilaterally reconsidered it without notifying the parties. This was a breach of the rules of natural justice and procedural fairness.

[7] [17] I will refer to some doctrine and jurisprudence. Referring to *Administrative Law*, Third Edition, David J. Mullan cites at page 240, paragraph 111:

> Adequate notice requires that the decision-maker supply persons who are entitled to notice with sufficient information on the nature of the proceedings and sufficient warning of the intention to make a decision as will enable them to prepare their proofs and arguments for presentation and to respond to the proofs and arguments anticipated from those maintaining a contrary position, and to appear and participate effectively at any oral hearings. In proceedings where there are contesting parties, this obligation may extend as far as requiring that each side reveal to the other matters that it intends to put in issue at the hearing.

[18] Also, the Supreme Court of Canada in *Confederation Broadcasting (Ottawa) Ltd. v. Canada (Canadian Radio-Television Commission)*, [1971] S.C.R. 906 held:

> It is quite plain that the requirements of natural justice demand that a person have full and complete notice of the charges against him and an opportunity to reply thereto. It has been said in this Court in two recent decisions: *Regina v. Quebec Labour Relations Board, ex parte Komo Construction Inc.*, [1968] S.C.R. 172, 1 D.L.R. (3d) 125] and *Quebec Labour Relations Board v. Canadian Ingersoll Rand Co. Ltd. et al.*, [1998] S.C.R. 695, 1 D.L.R. (3d) 417], that the requirement of natural justice did not extend to demanding that a hearing policy be had. These cases cited by counsel for the respondent on the present appeal are not, in my opinion, important on the present issue because here there was a hearing but in both judgments it is said plainly that "each party be given the opportunity to put its arguments" (*Komo* case) and "what is required is that the parties be given the opportunity to put forward their arguments" (*Canadian Ingersoll Rand* case).
>
> In the present case, the complaint is not that there was not a hearing but that the respondent failed to indicate in any fashion whatsoever what issue would be considered on that hearing.

[19] In *Stocking*, above, Justice Nadon stated at paragraph 16:

> The Appeal Division's letter of August 21, 1997, which I reproduced in full earlier, does not constitute adequate or reasonable notice to the applicant. If the Appeal Division intended to review the applicant's

> file to determine whether the stay should be continued, as it was entitled to under subsection 74(3) of the Act, it could and should have given the applicant notice of its intention to do so. What the applicant was informed of was that the Appeal Division would inquire whether he had complied with the terms of the stay. The evidence, as found by the presiding member, was that the applicant had complied with the terms imposed upon him. That, in my view, should have been sufficient to dispose of the issue before the Appeal Division on October 20, 1997. In the circumstances, I am therefore of the view that the rules of natural justice require that the decision of the Appeal Division be set aside. If the Board wishes to review the original stay it has the jurisdiction to do so, however, the rules of natural justice require that the applicant be notified of the Board's intent and be given the opportunity to respond.

(*Charabi*, above)

FACTS

[8] As for the facts of the case, the applicant relies completely on, and refers the Court to, the affidavit of Ms. Nathalie Bélanger, senior advisor for the Canada Border Services Agency.

[9] The respondent, Mr. Vincenzo Palumbo, is an Italian citizen. He arrived in Canada on April 11, 1981, and became a permanent resident the same day.

[10] On November 22, 2004, he was convicted of two offences under the *Criminal Code*, R.S.C. 1985, c. C-46, and the *Controlled Drugs and Substances Act*, 1996, c. 19, and sentenced to a term of nine months in prison for conspiracy to traffic in cocaine and possession of cocaine for the purpose of trafficking.

[11] On March 22, 2006, he was the subject of an inadmissibility report under section 44 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) on grounds of serious criminality under paragraph 36(1)(*a*) of the Act. The Minister of Citizenship and Immigration referred the matter to the Immigration Division (ID) of the Immigration and Refugee Board for investigation.

[12] On May 18, 2005, the ID ordered that the respondent be deported from Canada.

[13] The respondent appealed this decision to the IAD based on humanitarian and compassionate grounds.

[14] On May 31, 2006, IAD member Mr. Tony Manglaviti ordered that the removal order be stayed for seven years, subject to certain conditions, as set out in exhibit B to the affidavit of Ms. Bélanger.

[15] The IAD's decision also provided that an interim review of the applicant's case could, if necessary, occur on or about August 2, 2007.

[16] On February 21, 2007, member Néron reviewed the case and ordered that the stay continue on the same conditions as in the order of May 31, 2006, but reduced the stay by three years.

[17] The IAD Registry confirmed that the file did not contain a request by the applicant to reconsider or revise the stay, and that the parties were never informed of the panel's intention to reconsider or amend the stay.

ISSUE

[18] Did the IAD comply with the rules of natural justice and procedural fairness?

ANALYSIS

[19] There is no doubt in this case that the IAD failed to comply with the rules of natural justice and procedural fairness.

[20] The appeal process before the IAD is governed by sections 62 to 71 of the IRPA and sections 26 and 27 of the IAD Rules.

[21] Section 68 of the IRPA provides, *inter alia*, that the IAD may, on application or on its own initiative, cancel, vary or review a stay:

Removal order stayed	**Sursis**
68. (1) To stay a removal order, the Immigration Appeal Division must be satisfied, taking into account the best interests of a child directly affected by the decision, that sufficient humanitarian and compassionate considerations	**68.** (1) Il est sursis à la mesure de renvoi sur preuve qu'il y a — compte tenu de l'intérêt supérieur de l'enfant directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la

warrant special relief in light of all the circumstances of the case.

prise de mesures spéciales.

Effect

(2) Where the Immigration Appeal Division stays the removal order

(*a*) it shall impose any condition that is prescribed and may impose any condition that it considers necessary;

(*b*) all conditions imposed by the Immigration Division are cancelled;

(*c*) it may vary or cancel any non-prescribed condition imposed under paragraph (*a*); and

(*d*) it may cancel the stay, on application or on its own initiative.

Effet

(2) La section impose les conditions prévues par règlement et celles qu'elle estime indiquées, celles imposées par la Section de l'immigration étant alors annulées; les conditions non réglementaires peuvent être modifiées ou levées; le sursis est révocable d'office ou sur demande.

Reconsideration

(3) If the Immigration Appeal Division has stayed a removal order, it may at any time, on application or on its own initiative, reconsider the appeal under this Division.

Suivi

(3) Par la suite, l'appel peut, sur demande ou d'office, être repris et il en est disposé au titre de la présente section.

Termination and cancellation

(4) If the Immigration Appeal Division has stayed a

Classement et annulation

(4) Le sursis de la mesure de renvoi pour

removal order against a permanent resident or a foreign national who was found inadmissible on grounds of serious criminality or criminality, and they are convicted of another offence referred to in subsection 36(1), the stay is cancelled by operation of law and the appeal is terminated.	interdiction de territoire pour grande criminalité ou criminalité est révoqué de plein droit si le résident permanent ou l'étranger est reconnu coupable d'une autre infraction mentionnée au paragraphe 36(1), l'appel étant dès lors classé.

[22] The IAD's decision does not comply with subsection 26(3) of the IAD Rules, which requires that the parties must be notified if the panel reconsiders an appeal on its own initiative. In addition to being a violation of its own rules, this non-compliance constitutes a breach of the rules of procedural fairness and natural justice:

26. …	**26.** [...]
Reconsideration on Division's own initiative	**Reprise de l'appel par la Section de sa propre initiative**
(3) If the Division reconsiders an appeal on its own initiative, the Division must notify the parties. The parties must provide to the Division and each other, within the time period specified by the Division, a written statement of whether the subject of the appeal has complied with the conditions of the stay.	(3) Dans le cas où la Section reprend l'appel de sa propre initiative, elle en avise les parties. Chaque partie transmet, à la Section et à l'autre partie, dans le délai fixé par la Section, une déclaration écrite portant sur le respect ou non, par la personne en cause, des conditions du sursis.

[23] It is important to point out that in *Charabi*, above, Blais J. set aside a similar decision by the same member in 2006.

[24] In that case, despite notifying the parties that it was planning to conduct an interim reconsideration of the stay, the IAD deprived the applicant of the right to be heard because the notice that was given did not constitute sufficient notice of the nature of the hearing before the member, who ultimately set aside the stay of the applicant's removal order and allowed his appeal.

[25] In this case, the violation of the parties' rights is even more flagrant in that the IAD did not even notify them that it was planning to conduct an interim reconsideration of the stay.

[26] The failure to notify the parties invalidates the IAD's decision.

CONCLUSION

[27] This Court summarizes the comments of Blais J. in *Charabi*, above, and states that if the IAD intended to review or amend the stay, all it had to do was simply provide the parties with appropriate notice of this intention.

[28] The failure to do so constitutes a breach of the rules of natural justice and procedural fairness, which requires the intervention of this Court.

JUDGMENT

Considering that a serious question has been raised and that the situation demonstrates that this is a reasonable and defendable case,

THE COURT ORDERS that the application for judicial review of the decision by the Immigration Appeal Division of the Immigration and Refugee Board be allowed and that the matter be remitted for redetermination by a differently constituted panel.

"Michel M.J. Shore"
Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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