Date: 20080304

Docket: IMM-1859-07

Citation: 2008 FC 293

Ottawa, Ontario, March 4, 2008

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

JUNIOR CHRISTOPHER WEEKES
By his litigation guardian John Norquay

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) for judicial review of the decision of the Immigration Appeal Division (IAD) dated April 3, 2007, wherein the board member determined that the applicant would not be permitted an extension of time in which to appeal his removal order.

[2] The applicant requested an order quashing the decision not to allow the applicant's application for an extension of time to file his notice of appeal of the removal order.

Background

[3] Junior Christopher Weekes (the applicant) is a citizen of Guyana. He became a permanent resident of Canada on June 2, 1995 having been sponsored by his father.

[4] In 1997 and 1998, the applicant was arrested and charged with a number of criminal offences including cocaine possession, failure to attend Court, obstructing a peace officer, failure to comply with a probation order, uttering forged documents and possession of stolen property exceeding $5000. On October 23, 1998, a deportation order was issued against the applicant who was being detained at Maplehurst Detention Centre.

[5] The applicant alleges that on November 3, 1999, a previous immigration counsel filed an application with the IAD for an extension of time within which to appeal the deportation order (the first application). The applicant alleges that his previous counsel never received a response to this application. The respondent claims that this application was never received by the appropriate department.

[6] From the time when the deportation order was issued on October 23, 1998 to his scheduled removal on October 26, 2006, the applicant appears to have been detained and released on bond

twice. On September 8, 2006, the applicant was informed of his removal date. He attended his pre-removal interview on October 12, 2006. On October 16, 2006, the applicant submitted an application to extend the time to file a notice of appeal of the deportation order issued on October 23, 1998 (the second application). In a decision dated April 3, 2007, the IAD denied the application. This is the judicial review of the IAD's decision.

Board's Decision

[7] The entirety of the IAD's decision reads as follows:

> The application for the late filing of Notice of Appeal of deportation order issued over 8 years ago is denied. The appellant failed to establish as to why he had to wait so long before filing an appeal against his deportation.
>
> I certify that this is the decision and reasons of the member in this appeal.

Issues

[8] The applicant submitted the following issues for consideration:

1. Are the reasons for this decision inadequate and hence a breach of procedural fairness?

2. Did the IAD come to its decision without regard to the evidence before it, contrary to paragraph 18.1(4)(d) of the *Federal Courts Act*?

3. What is the standard of review for this decision?

4. Was this decision an unreasonable (or patently unreasonable) one?

[9] I would rephrase the issues as follows:

1. What is the appropriate standard of review?

2. Did the IAD breach procedural fairness in failing to provide the applicant with adequate reasons for its decision?

3. Did the IAD commit an error of fact in finding that the applicant had failed to establish why he had to wait so long before filing an appeal against his deportation?

4. Did the IAD err in denying the application?

Applicant's Submissions

[10] The applicant submitted that the appropriate standard of review was one of reasonableness (*Khosa* v. *Canda (Minister of Citizenship and Immigration)*, 2007 FCA 24). In applying the pragmatic and functional approach, the applicant submitted: (1) the decision was not protected by a full privative clause, (2) the IAD has expertise on fact finding, but not procedural protections for vulnerable parties, (3) a fundamental purpose of IRPA and the IAD Rules is to protect vulnerable persons, and (4) the question was one of mixed law and fact.

[11] The applicant submitted that the IAD breached procedural fairness in failing to provide adequate reasons for their decision. Adequate reasons are those that serve the functions for which the duty to provide them was imposed. The decision maker's reasons must be set out and reflect consideration of the main relevant factors (*Via Rail Canada Inc.* v. *National Transportation Agency*, [2001] 2 F.C. 25 (C.A.) at paragraph 22). The applicant submitted that the application was based on

two important issues. Firstly, that the applicant had, through his previous lawyer, filed a similar application in 1999. And secondly, that the applicant was a vulnerable person not capable of appreciating that he had to appeal the decision within a certain time period. The applicant submitted that the IAD's reasons did not refer to either of these issues and thus they do not meet the necessary standard. In situations where a decision is subject to a deferential standard of review, knowing and understanding the rational behind a decision is particularly important (*Via Rail Canada Inc.* above at paragraph 19).

[12] The applicant also submitted that the IAD made its decision without regard to the evidence before it and thus contrary to paragraph 18.1(4)(d) of the *Federal Courts Act*, R.S.C. 1985, c. F-7. The applicant submitted that there was no mention in the IAD's brief decision of the procedural fairness breach from the Department's apparent misplacement of the first application in 1999, nor was there an appreciation of the applicant's vulnerabilities as a mentally ill man. The applicant submitted that the IAD's use of the phrase "waiting so long before filing an appeal" demonstrates a failure to appreciate the significant problems and particular circumstances faced by the applicant and is not in the spirit of *Guidelines 8 on Procedures with Respect to Vulnerable Persons Appearing Before the IRB.*

[13] And finally, the applicant submitted that the IAD's decision is reviewable on its substance. The applicant submitted that given the minimum reasons provided, the decision cannot stand up to even a somewhat probing examination.

Respondent's Submissions

[14] The respondent submitted that section 169 of IRPA provides that reasons are to be given in three circumstances: (1) with respect to final decision of any division of the Immigration and Refugee Board, (2) where the Refugee Division rejects a claimant's claim for refugee protection, and (3) where the person concerned or the Minister requests written reasons for the final decision. The respondent submitted that as the decision in question was an interlocutory one, the IAD was not required to give written reasons for its decision (*Faghihi* v. *Canada (Minister of Citizenship and Immigration)*, [2000] 1 F.C. 249 (T.D.), upheld on appeal in 2001 FCA 163; *Ali* v. *Canada (Minister of Citizenship and Immigration)*, 2004 FC 1153). In the alternative, the respondent submitted that the reasons provided by the IAD were adequate as they set out the rationale for the IAD's decision (*Rahman* v. *Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 487 (F.C.A.) at paragraphs 3 to 4).

[15] The respondent also submitted that the IAD is presumed to have considered the totality of the evidence. The respondent submitted that the applicant's submission that the IAD failed to consider the medical or psychiatric evidence cannot succeed. The IAD has no obligation to list each and every piece of evidence brought before it (*Hassan* v. *Canada (Minister of Employment and Immigration)* (1992), 147 N.R. 317 (F.C.A.)). The respondent noted that the only medical evidence was a letter from Dr. Jerry Cooper, who speculatively concluded that the applicant may have schizophrenia, but that he was not certain. The respondent noted that Dr. Cooper's letter further stated that he found the applicant to be of low average to average intelligence, oriented in all spheres

with social judgment superficially intact. The respondent submitted that there was also evidence before the IAD showing that the applicant was capable of, in the past and currently, appointing a lawyer to represent him in immigration and criminal matters.

[16] And finally, the respondent submitted that the applicant waived his opportunity to raise an objection to the appeal process on the basis of his alleged mental condition at the time of his appeal or in the eight years following it. Inadequate representation from counsel does not entitle the applicant to have a decision set aside (*Jagessar* v. *Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 6 (F.C.A.)).

Analysis and Decision

[17] **Issue 1**

What is the appropriate standard of review?

The requirement of reasons is normally a matter of procedural fairness reviewable on a standard of correctness; however, section 169 of IRPA mandates when reasons are necessary in the immigration process. Nevertheless, interpreting section 169 of IRPA is a question of law and is also reviewable on a standard of correctness. The adequacy of the IAD's reasons is a question of procedural fairness and is viewable on a standard of correctness (*C.U.P.E.* v. *Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539). Errors of fact are reviewable on a standard of patently unreasonable. The overall decision of the IAD is a question of mixed law and fact, reviewable on a standard of reasonableness.

[18] **Issue 2**

Did the IAD breach procedural fairness in failing to provide the applicant with adequate reasons for its decision?

The applicant submitted that the IAD breached procedural fairness in failing to provide adequate reasons for its decision. The respondent submitted that the decision was interlocutory in nature and thus no reasons were required as per section 169 of IRPA. In the alternative, the respondent submitted that if reasons were required, those provided by the IAD were adequate.

[19] Subsection169(b) of IRPA reads as follows:

> 169. In the case of a decision of a Division, other than an interlocutory decision:
>
> […]
>
> (b) reasons for the decision must be given;
>
> […]

Subsection 169(b) requires that upon rendering a decision, the IAD must provide reasons unless the decision in question is an interlocutory one.

[20] The respondent has submitted that the decision presently under review was an interlocutory one. In making this argument, the respondent relied on the cases of *Faghihi* above, and *Ali* above. These cases dealt with applications to reopen decisions on the claimants' refugee applications and held that decisions denying the request to reopen were interlocutory in nature and thus no reasons were required under section 169 of IRPA.

[21] More recently in *Shahid* v. *Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 1954, Justice Simpson of this Court reviewed *Faghihi* above and *Ali* above. The case of *Shahid* above, also dealt with the judicial review of a decision of the Immigration and Refugee Board that dismissed the applicant's application to reopen his refugee claim. Similarly to the present case, in *Shahid* above, the respondent also relied on *Faghihi* above and *Ali* above to support the argument that the decision was an interlocutory one. At paragraphs 8 to 10 of *Shahid* above, Justice Simpson commented on these cases:

> In my view, the respondent's cases are not helpful because it is clear that, both Justice Evans and Justice Mosley were considering the nature of the motion rather than the decision.
>
> In *Reebok Canada* v. *Canada (Deputy Minister of National Revenue, Customs and Excise)* (1995), 179 N.R. 300, [1995- F.C.J. No. 220], the Federal Court of Appeal considered whether a decision was final or interlocutory. The decision was made by a judge of the Federal Court Trial Division who granted leave to appeal to the Court of Appeal from a decision of the Canadian International Trade Tribunal. The Court held that the decision granting leave was interlocutory because it did not determine substantive rights but merely enabled the appellant to have its substantive rights determined by the Court of Appeal.
>
> Against this background, the question is how to characterize a decision not to re-open a refugee claim. Such a decision means that a refugee claimant's substantive rights will never be determined and that the proceedings are at an end. For these reasons, I have concluded that a negative decision on a motion to re-open is a final decision and that reasons are required by subsection 169(b) of the IRPA.

[22] My understanding of *Shahid* above, is that the cases of *Faghihi* above, and *Ali* above, are not helpful because they dealt with interlocutory "matters" and not final "decisions". I note that the exception for providing reasons in section 169 of IRPA is for interlocutory "decisions".

[23] Based on the reasoning in *Shahid* above, I find that the decision in the present case is a final decision, not an interlocutory one. I am of this opinion because the IAD's decision has the effect of denying the applicant the opportunity to have his substantive rights determined; the decision essentially terminated any further action on the issue. If the decision had been a positive decision, it would have been comparable to the situation in *Reebok Canada* v. *Canada (Deputy Minister of National Revenue, Customs and Excise)* (1995), 179 N.R. 300, and interlocutory in nature as it would have enabled the appellant to have his substantive rights determined. As such, I find that section 169 of IRPA required the IAD to provide the applicant with reasons for its decision.

[24] As reasons were required, I must now consider whether those provided by the IAD were adequate. The leading case on the adequacy of reasons is *VIA Rail Canada Inc.* above, within which the Federal Court of Appeal at paragraphs 21 and 22 articulated that:

> The duty to give reasons is only fulfilled if the reasons provided are adequate. What constitutes adequate reasons is a matter to be determined in light of the particular circumstances of each case. However, as a general rule, adequate reasons are those that serve the functions for which the duty to provide them was imposed. In the words of my learned colleague Evans J.A., "Any attempt to formulate a standard of adequacy that must be met before a tribunal can be said to have discharged its duty to give reasons must ultimately reflect the purposes served by a duty to give reasons." (J.M. Evans et al., Administrative Law (4th ed.) (Toronto: Emond Montgomery, 1995) at 507.
>
> The obligation to provide adequate reasons is not satisfied by merely reciting the submissions and evidence of the parties and stating a conclusion. (*Northwestern Utilities Ltd.* v. *Edmonton (City)*, [1979] 1 S.C.R. 684 at 706, 89 D.L.R. (3d) 161.) Rather, the decision-maker must set out its findings of fact and the principal evidence upon which those findings were based. (*Desai* v. *Brantford General Hospital* (1991), 87 D.L.R. (4th) 140 (Ont. Div. Ct.) at 148.) The reasons must address the major points in issue. The reasoning

> process followed by the decision-maker must be set out (*Northwestern Utilities, supra* at 707) and must reflect consideration of the main relevant factors. (*Suresh* v. *Canada (Minister of Citizenship and Immigration)*, [2000] 2 F.C. 592 at 637 and 687-688, 183 D.L.R. (4th) 629 (C.A.)).

[25] The reasons provided by the IAD for its decision in the present case read as follows:

> The appellant failed to establish as to why he had to wait so long before filing an appeal against his deportation.

[26] In my opinion, these reasons are inadequate. They fail to address the main issues raised by the applicant in his application, to provide insight as to the reasoning process and to reflect consideration of the main relevant factors.

[27] I am of the opinion that the result is a breach of the duty of procedural fairness.

[28] Because of my finding on this issue, I need not deal with the remaining issues.

[29] The application for judicial review is therefore allowed and the matter is referred to a different panel of the IAD for redetermination.

[30] The respondent submitted the following proposed serious questions of general importance for my consideration for certification:

> 1. What is the standard for adequate reasons for a decision of the IAD on a motion for an extension of time to commence an appeal?

> 2. What is the standard of review on a judicial review of a decision of the IAD on a motion for an extension of time to commence an appeal?

[31] I am not prepared to certify either of these questions. In *Via Rail Canada Inc.* v. *National Transportation Agency*, [2000] F.C.J. No. 1685, the Federal Court of Appeal reviewed the appropriate standard at paragraph 22:

> The obligation to provide adequate reasons is not satisfied by merely reciting the submissions and evidence of the parties and stating a conclusion. Rather, the decision-maker must set out its findings of fact and the principal evidence upon which those findings were based. The reasons must address the major points in issue. The reasoning process followed by the decision-maker must be set out and must reflect consideration of the main relevant factors.

This determines that the first question should not be certified.

[32] As to the second proposed question, I am of the view that previous case law has established that the overall decision of the IAD should be reviewed on a standard of reasonableness *simpliciter*. In any event, the standard can be determined by applying a pragmatic and functional analysis.

JUDGMENT

[33] **IT IS ORDERED that** the application for judicial review is allowed and the matter is referred to a different panel of the IAD for redetermination.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

The relevant statutory provisions are set out in this section.

The *Federal Courts Act*, R.S.C. 1985, c. F-7:

18.1(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal	18.1(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas:
(a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;	a) a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer;
(b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;	b) n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter;
(c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;	c) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;
(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;	d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;
(e) acted, or failed to act, by reason of fraud or perjured evidence; or	e) a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;
(f) acted in any other way that was contrary to law.	f) a agi de toute autre façon contraire à la loi.

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

169. In the case of a decision of a Division, other than an interlocutory decision:	169. Les dispositions qui suivent s'appliquent aux décisions, autres qu'interlocutoires, des sections:
(a) the decision takes effect in accordance with the rules;	a) elles prennent effet conformément aux règles;
(b) reasons for the decision must be given;	b) elles sont motivées;
(c) the decision may be rendered orally or in writing, except a decision of the Refugee Appeal Division, which must be rendered in writing;	c) elles sont rendues oralement ou par écrit, celles de la Section d'appel des réfugiés devant toutefois être rendues par écrit;
(d) if the Refugee Protection Division rejects a claim, written reasons must be provided to the claimant and the Minister;	d) le rejet de la demande d'asile par la Section de la protection des réfugiés est motivé par écrit et les motifs sont transmis au demandeur et au ministre;
(e) if the person who is the subject of proceedings before the Board or the Minister requests reasons for a decision within 10 days of notification of the decision, or in circumstances set out in the rules of the Board, the Division must provide written reasons; and	e) les motifs écrits sont transmis à la personne en cause et au ministre sur demande faite dans les dix jours suivant la notification ou dans les cas prévus par les règles de la Commission;
(f) the period in which to apply for judicial review with respect to a decision of the Board is calculated from the giving of notice of the decision or from the sending of written reasons, whichever is later.	f) les délais de contrôle judiciaire courent à compter du dernier en date des faits suivants : notification de la décision et transmission des motifs écrits.

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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