Federal Court		Cour fédérale

Date: 20081205

Docket: IMM-1633-08

Citation: 2008 FC 1354

Ottawa, Ontario, December 5, 2008

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

ABDUL GHANI ABDULLA ALI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] This is an application for judicial review of a decision of the Immigration Appeal Division of the Immigration and Refugee Board (Appeal Division) dated March 25, 2008, wherein it was determined that the applicant had abandoned his appeal by reason of his failure to appear at the hearing and provide his contact information.

FACTS

[2] The applicant, a citizen of Yemen who was born in Kuwait on July 4, 1976, came to Canada in May 2002 as a permanent resident with a conditional residence visa in the entrepreneur class.

[3] On April 5, 2005, the Immigration Division of the Immigration and Refugee Board found that the applicant was inadmissible pursuant to paragraph 41(*b*) of the *Immigration and Refugee Protection* Act (IRPA) because he had not complied with the conditions for an entrepreneur. The applicant appealed from that decision.

[4] On August 3, 2006, the applicant obtained a stay of the removal order issued against him by the Immigration Division of the Immigration and Refugee Board, with conditions. One of the conditions set by the Appeal Division is explicitly set out in paragraph 251(*a*) of the *Immigration and Refugee Protection Regulations*:

> 251. **Conditions** – If the Immigration Appeal Division stays a removal order under paragraph 66(*b*) of the Act, that Division shall impose the following conditions on the person against whom the order was made:
> (a) to inform the Department and the Immigration Appeal Division in writing in advance of any change in the person's address;

[5] The Appeal Division was even more explicit when it added the following condition:

> 10. The appellant will report any change of address in writing to the CIC and to the Immigration and Refugee Board, Appeal Division located at 1010, Saint-Antoine Street West, 2nd floor, Montreal (Quebec) H3C 1B2, within 5 days of making such a change of address.

[6] This decision dated August 3, 2006, provided that an interim review of the stay was to be scheduled by the Appeal Division on or around August 30, 2007. However, on September 12, 2007, the applicant received a notice to appear at a hearing to be held on October 16, 2007, in order to review the stay. This notice to appear set out the warning contained in subsection 168(1) of the

IRPA, which provided that an Appeal Division member may determine that a proceeding has been abandoned if the Appeal 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 Appeal Division or to communicate with the Appeal Division on being requested to do so.

[7] At the hearing of October 16, 2007, counsel for the applicant requested an adjournment because he wanted to call the Minister's counsel as a witness.

[8] On December 4, 2007, counsel for the applicant was advised that the date of the hearing had been set for March 4, 2008.

[9] On December 19, 2007, the applicant submitted an application to renew his permanent resident card, which expired on January 21, 2008. This application was received by the Case Processing Centre in Sydney on December 24, 2007.

[10] On December 20, 2007, the date of the hearing before the Appeal Division was again postponed to March 25, 2007, with the consent of counsel for the applicant.

[11] On January 28, 2008, the Appeal Division sent the applicant a notice to appear confirming the date of the hearing previously scheduled for March 25, 2008. The notice informed the applicant that he was to provide the Appeal Division and the Minister with a written statement of whether he had complied with the conditions of the stay in accordance with section 26 of the *Immigration Appeal Division Rules*. Like the notice dated September 12, 2007, the notice to appear also included the following warning based on subsection 168(1) of the IRPA:

IMPORTANT Under section 168(1) of the *Immigration and Refugee Protection Act*, if you fail to appear for a hearing, or fail to communicate with the IAD when requested, or fail to provide information required by the IAD (such as your most recent address), the IAD may determine that you have abandoned the appeal.

[12] On January 31, 2008, the Case Processing Centre in Sydney advised the applicant that the application to renew his permanent resident card was incomplete, and required additional information. However, it was not until the end of February that this letter was allegedly brought to the attention of counsel for the applicant. Despite this letter, no notice was sent to the Appeal Division.

[13] On March 4, 2008, the applicant sought a postponement of the hearing scheduled for March 25 in order to allow enough time for his permanent resident card to be renewed and so that he could thus attend the hearing. This application was dismissed by the Appeal Division on March 17, 2008, on the ground that the hearing date had been set since December 20, 2007, with the consent of counsel for the applicant. It was therefore decided that the matter would proceed as planned on March 25, 2008, and that the applicant could be heard by teleconference.

[14] Counsel for the applicant was informed of this decision on March 18, 2008. He was also asked to forward to the Appeal Division the applicant's telephone number and calling cards. No application for leave and judicial review of this decision was filed.

[15] On March 20, 2008, counsel for the applicant informed the Appeal Division that he had only the applicant's e-mail address, and that he had informed his client that the request for postponement had been denied.

[16] On March 25, 2008, the applicant did not appear before the Appeal Division, either in person or by telephone, although his counsel was present. The latter repeated his request for a postponement, given that the applicant could not be reached and could not appear in Canada as long as his permanent resident card had not been renewed. The Minister's counsel argued that the applicant's behaviour warranted a determination of abandonment.

THE IMPUGNED DECISION

[17] The Appeal Division determined that the applicant's appeal was abandoned under subsection 168(1) of the IRPA because of his failure to appear at the hearing and provide his contact information as required. The Appeal Division noted that it was up to the applicant to ensure that the documents necessary for his application for renewal of permanent residence had been submitted in due form, and that, in addition, it had not been informed of the fact that his file was considered incomplete.

[18] The Appeal Division also mentioned that the applicant could have been heard by telephone. If the applicant had not received the notice to appear, he had only himself to blame. It was up to him to notify the Appeal Division of any change of address. Even though he had submitted a request to have the hearing postponed, he could not presume what the outcome of this request would be, and he was responsible for finding out what the decision was. For all of these reasons, the Appeal

Division dismissed the new request for postponement made by counsel for the applicant and determined that the appeal had been abandoned.

ANALYSIS

[19] The only issue in this matter is whether the determination by the Appeal Division that the applicant had abandoned his appeal is reasonable. Only the decision dated March 25, 2008, is at issue here; the applicant could not indirectly challenge the decision not to grant the postponement made on March 17, 2008, and he did not attempt to do so.

[20] Counsel for the parties did not make any submissions concerning the appropriate standard of review. They seemed to take for granted that the decision was to be reviewed according to the standard of reasonableness, and they were correct to do so. The decision made by the Appeal Division relies on the application of subsection 168(1) of the IRPA to the facts in evidence. It is therefore a question of mixed fact and law. Consequently, this Court will intervene only if the decision of the Appeal Division does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir* v. *Nouveau-Brunswick*, 2008 SCC 9, at para. 49).

[21] The respondent was correct to point out that neither the IRPA nor the *Immigration Appeal Division Rules* provide that the respondent has the obligation to hold a show cause hearing when deciding on the advisability of determining whether a claim has been abandoned, contrary to the situation in the Refugee Protection Division (see Rule 58 of the *Refugee Protection Division Rules*). In that regard, this Court stated the following:

> Furthermore, giving the person who fails to appear the opportunity to explain the reasons for his default

> in all cases would render subsection 168(1) IRPA meaningless.
>
> (…)
>
> If the applicant's reasoning were followed, it would imply that each time a person is absent, lacks diligence or acts in such a way that clearly suggests that the appeal has been abandoned, the IAD would be bound to investigate to find those persons, to remind them of their obligations and to summon them to a new hearing before deciding that the proceedings are abandoned. I cannot accept such an interpretation, especially because in this case the applicant did not advise the IAD of the change in his contact information, so that in any event the IAD would not have been able to contact him to summon him to a new hearing if it had had such an obligation. The IAD was not bound to act as the applicant's legal counsel, or to remind him of the seriousness of the proceedings in which he was involved, or to ensure that he properly understood that he had to show up at his scheduling conference or that he was bound to advise the IAD of his change of address….
> *Dubrézil* v. *Canada (Minister of Citizenship and Immigration*), 2006 FC 142, paras. 10, 12; see also *Canada (Minister of Citizenship and Immigration) v. Ishmael*, 2007 FC 212.

[22] In this case, the applicant was advised on September 12, 2007, that he should appear before the Appeal Division on October 16, 2007, for a review of the stay that was granted to him on August 3, 2006. During that hearing, he sought an initial adjournment in order to call a witness. This adjournment was granted; it is interesting to note that this witness was never subsequently called.

[23] On December 4, 2007, counsel for the applicant was advised that the date of the hearing had been set for March 4, 2008; it was subsequently postponed to March 25, with the consent of counsel for the applicant. However, it was not until December 19 that the applicant initiated proceedings to have his permanent resident card renewed, three months after the first notice to appear. What is

more, the record shows that his renewal application was incomplete in many respects. Since the applicant had not informed the Case Processing Centre in Sydney of his new contact information, it was counsel for the applicant who finally received the letter requesting additional information at the end of February 2008.

[24] It is true that counsel for the applicant submitted a request for postponement on March 4, 2008, when he realized that his client would probably not have his permanent resident card renewed in time for the hearing set for March 25. However, this request was submitted late because of the applicant's negligence. The applicant could not presume that this request would be granted, and it was up to him to be diligent in finding out what decision had been made. The applicant gave his counsel his e-mail address only, and went to China for business reasons. He cannot now blame the Appeal Division for not having given him the opportunity to be heard.

[25] The applicant is now arguing that the determination that he had abandoned his appeal has caused him irreparable harm. However, he has only himself to blame. Not only was the hearing scheduled several months in advance, but the Appeal Division also gave him the opportunity to make submissions through a telephone call. If he was unable to take this opportunity, it is only because he did not take the most basic steps to ensure that he could be reached by the Appeal Division itself or by his counsel.

[26] Given all of these circumstances, the Appeal Division was correct to determine that the applicant had abandoned his appeal. The applicant had every opportunity to be heard, but he did not take this opportunity because of his own negligence. It was up to him to be diligent; he cannot now blame the Appeal Division, arguing that the principles of procedural fairness have been breached.

The panel had discharged its responsibilities, postponing the hearing more than once to accommodate the applicant, and even gave him the opportunity to make his arguments by telephone. The situation in which the applicant now finds himself is entirely his own fault, and he must therefore suffer the consequences.

[27] For all these reasons, the application for judicial review of the decision made by the Immigration Appeal Division dated March 25, 2007, is dismissed. The parties did not propose any question to be certified, and none was certified.

ORDER

THE COURT ORDERS that the application for judicial review is dismissed. No question is certified.

"Yves de Montigny"
Judge

Certified true translation
Susan Deichert, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**IMM-1633-08**
STYLE OF CAUSE:	**ABDUL GHANI ABDULLA ALI** **v.** **MCI**
PLACE OF HEARING:	**Montréal, Quebec**
DATE OF HEARING:	**December 2, 2008**
REASONS FOR ORDER AND ORDER:	**DE MONTIGNY J.**
DATED:	**December 5, 2008**

APPEARANCES:

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