

Federal Court of Appeal



Cour d'appel fédérale

Date: 20110209

Docket: A-247-10

Citation: 2011 FCA 51

**CORAM: NOËL J.A.
EVANS J.A.
SHARLOW J.A.**

BETWEEN:

WAYNE ANTHONY HILLARY

Appellant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

Heard at Toronto, Ontario, on February 8, 2011.

Judgment delivered at Toronto, Ontario, on February 9, 2011.

REASONS FOR JUDGMENT BY:

EVANS J.A.

CONCURRED IN BY:

**NOËL J.A.
SHARLOW J.A.**

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REASONS FOR JUDGMENT

EVANS J.A.

Introduction

[1] Wayne Anthony Hillary, a citizen of Jamaica, is in his early 40s. He came to Canada as a permanent resident in 1982 when he was 13 years old and left school after grade 9. He has been ordered deported on the basis of a string of criminal convictions starting in 1987. He has been diagnosed as suffering from schizophrenia, is HIV positive, and has been addicted to crack cocaine.

[2] Mr Hillary says that the decision of the Immigration Appeal Division (IAD) of the Immigration and Refugee Board of Canada (Board) to dismiss his appeal against deportation should

be reopened because the IAD denied him a fair hearing when it failed to inquire whether he appreciated the nature of the proceeding, in order to determine whether he required the assistance of a designated representative.

[3] In my view, the duty of fairness did not oblige the IAD, on the facts of this case, to make this inquiry. The fact that the IAD knew that Mr Hillary was schizophrenic was not in itself sufficient to trigger a duty, on its own initiative, to inquire into the level of his comprehension and, if it found him unable to understand the nature of the proceedings, to advise him that a designated representative would be appointed to assist him.

[4] Mr Hillary appeals from a decision of the Federal Court (2010 FC 638), in which Justice Russell (Judge) dismissed his application for judicial review seeking to set aside a decision by the IAD, dated August 7, 2009. In that decision, the IAD dismissed an application by Mr Hillary to reopen the decision of another panel of the IAD, dated February 21, 2007, holding that the deportation order was valid and that, in all the circumstances, there was no basis for suspending his removal.

[5] The Judge certified the following question under section 79 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA):

When evidence is presented that an appellant is suffering from a mental illness, does a duty arise in the IAD to determine in accordance with s. 167(2), whether or not the appellant is capable of understanding the nature of the appeal proceedings? If so, what formal procedural steps must be taken by the Board to meet this duty?

First Deportation Order

[6] Mr Hillary was first ordered deported in 1991 on the basis of his criminal convictions. However, in a decision dated May 31, 1993, the IAD stayed the deportation order for five years, subject to certain conditions.

[7] In its reasons for decision, the IAD quoted from a report by Dr Bruce Ally, prepared in 1993 while Mr Hillary was serving a sentence of imprisonment. Dr Ally stated that Mr Hillary had “finally received a psychiatric examination which diagnosed schizophrenia.” He went to say that Mr Hillary “needs a supervised treatment setting” because otherwise he was likely to stop taking his medication, and “[a]t such time the disordered thinking begins to reappear and he is unable to control or order his thinking and soon finds himself in conflict with the law once again.” For these reasons, Dr Ally concluded, “to release this client on his own would be unconscionable”.

Second deportation order

[8] In 1998, shortly after the Board cancelled the 1991 deportation order, Mr Hillary resumed his criminal activities and was convicted of several offences. He was again ordered deported and a removal order was made against him by the Immigration Division of the Board on June 5, 2005.

[9] In his appeal against this deportation order Mr Hillary was represented before the IAD by legal counsel, but not the counsel representing him in the present proceeding. In his evidence to the IAD, Mr Hillary denied committing most of the offences of which he had been convicted, accusing the police, witnesses, and victims of lying at his trials, and blaming prosecuting counsel for coercing

him into pleading guilty. On the basis of this testimony, the IAD found that Mr Hillary showed no remorse and was a poor candidate for rehabilitation.

[10] The IAD noted that it could not assess the extent to which the medication for HIV and schizophrenia, and the support of community agencies, that Mr Hillary had received in Toronto would be jeopardised by his removal, because counsel had submitted no evidence on the availability of treatment facilities in Jamaica. Neither Mr Hillary's mother, with whom he was living at the time of the hearing, nor his sister who also lived in Toronto, provided evidence on his behalf.

[11] The IAD further observed that Dr Ally's diagnosis of schizophrenia had not been updated, and was then 14 years old. The only other reference in the record to Mr Hillary's mental health was a 1995 medical report stating that Mr Hillary "has a past history of schizophrenia being treated with Zyprexa 10 mg once daily". There was no evidence before the IAD on whether this condition was then under control and what treatment, if any, Mr Hillary was receiving.

[12] Two years after the IAD had dismissed Mr Hillary's appeal against the second deportation order, he applied to the IAD to reopen its decision. The IAD refused to reopen.

Statutory provisions

[13] The following provisions of IRPA are relevant to the IAD's refusal to reopen, which is the subject of this appeal.

71. The Immigration Appeal Division,
on application by a foreign national

71. L'étranger qui n'a pas quitté le
Canada à la suite de la mesure de

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.

renvoi peut demander la réouverture de l'appel sur preuve de manquement à un principe de justice naturelle.

167.

167.

...

[...]

(2) If a person who is the subject of proceedings is under 18 years of age or unable, in the opinion of the applicable division, to appreciate the nature of the proceedings, the Division shall designate a person to represent the person.

(2) Est commis d'office un représentant à l'intéressé qui n'a pas dix-huit ans ou n'est pas, selon la section, en mesure de comprendre la nature de la procédure.

Decision of the IAD under review

[14] In support of his application requesting the IAD to reopen its dismissal of his appeal against the second deportation order on the ground of breach of a principle of natural justice, Mr Hillary swore an affidavit, in which he said:

10. During the IAD hearing I do verily believe that evidence was submitted clearly stating that I was schizophrenic. Throughout the hearing I was extremely confused as to what was happening. I felt that the proceedings were moving extremely quickly and I could not follow them.

11. Given my mental health illness at the time I do believe that I would have benefited by having a designated representative. I did not know that this was an option at the time, and had I known I would have requested one.

[15] In its reasons for dismissing the motion to reopen, the IAD noted that: Mr Hillary had been represented by counsel, who raised no concern over Mr Hillary's ability to instruct him; no request was made for a designated representative; Mr Hillary was familiar with IAD proceedings as a result of his successful appeal against the first deportation order; he testified and produced evidence designed to establish humanitarian and compassionate grounds for a stay of the second deportation

order; nothing in Mr Hillary's behaviour or demeanour at the hearing indicated that he needed a designated representative; and two years had elapsed between the dismissal of the appeal by the IAD and the request to reopen.

[16] In short, the reopening panel concluded, there was no evidence that Mr Hillary had been unable to "tell his story" at his appeal, and no basis for obliging the IAD to raise the possibility of the appointment of a designated representative and to assess his level of comprehension of the nature of the proceeding.

[17] The panel also observed shortcomings in the evidence submitted in the appeal. It noted in particular: the absence of updated evidence on Mr Hillary's schizophrenia and its treatment, and on the availability of treatment facilities in Jamaica; and the failure to adduce evidence from his mother and sister. However, the panel attributed these to the conduct of the appeal by counsel, not to Mr Hillary's inability to provide adequate instructions.

[18] Accordingly, in refusing to reopen the appeal decision, the panel concluded that any inadequacy in counsel's handling of the appeal before the IAD was not the result of a breach of a principle of natural justice by the panel. There was no basis for thinking that a designated representative would have instructed counsel to conduct the case differently and "would have provided a different outcome."

Decision of the Federal Court

[19] The Judge identified as follows the issue raised by the application for judicial review.

Because it knew that Mr Hillary suffered from schizophrenia, was the panel of the IAD that heard his appeal thereby required by the principles of natural justice to advise him that the appointment of a designated representative was a possibility and to assess whether he understood the nature of the proceedings?

[20] The Judge set out (at paras. 26-27), and seems to have accepted counsel for the applicant's explanation of the functions of a designated representative appointed by the Board in the case of a minor or a person unable to understand the nature of a proceeding. They include: instructing counsel and ensuring that they perform their duties; seeing that the necessary evidence is put before the Board; and, when appropriate, testifying. A designated representative may be a family member or friend familiar with Board proceedings, or a lawyer or social worker, for example.

[21] The Judge stated that IRPA, subsection 167(2) requires the appointment of a designated representative when the Board is of the opinion that the person concerned does not appreciate the nature of the proceeding. However, he held, there was no authority for the further proposition that, simply on the basis of its knowledge that the person concerned had a mental illness, the Board must advise the person that a designated representative could be appointed, and inquire into his or her understanding of the nature of the proceeding.

[22] He went on to say that there might be circumstances in which fairness would require the imposition of such a duty. But that would depend on an examination of the entire context of the particular case, and the Judge found nothing in the context of this case to give rise to a duty to advise and inquire.

[23] However, he agreed with counsel for Mr Hillary that, if the Board had been in breach of a principle of natural justice by failing to advise and inquire, the panel should have ordered the decision reopened if the appointment of a designated representative could, not would, have made a difference to the outcome of the appeal.

Analysis

(i) preliminary matters

[24] Two preliminary observations are in order. The first concerns the question certified by the Judge:

When evidence is presented that an appellant is suffering from a mental illness, does a duty arise in the IAD to determine in accordance with s. 167(2), whether or not the appellant is capable of understanding the nature of the appeal proceedings? If so, what formal procedural steps must be taken by the Board to meet this duty?

[25] This question is too general and abstract to admit of a helpful answer. However, I assume that the Judge is in effect asking the following alternative questions. Does a determination of whether the IAD is under a duty to form an opinion of an appellant's understanding of the nature of the proceedings depend on an analysis of the entire factual context? Or, was the IAD's knowledge that Mr Hillary was schizophrenic, in and of itself, sufficient to require it to advise him of the

possibility that it could appoint a designated representative, and to inquire into his ability to understand the nature of the proceedings? I shall approach the certified question on that basis.

[26] Second, the record before us is thin. Thus, for example, it is not apparent from the reasons given by the IAD for dismissing Mr Hillary's appeal whether it considered the issue of his ability to appreciate the nature of the proceedings. The transcript of the hearing was not before either the IAD when it decided to reject Mr Hillary's application to reopen the dismissal of his appeal, or the Judge when he heard the application for judicial review. The IAD had no current evidence about Mr Hillary's mental health and its likely impact on his ability to understand the nature of the proceedings. Neither Mr Hillary nor his counsel at the time indicated to the IAD that he could not understand the nature of the proceedings.

(ii) standard of review and procedural fairness

[27] This is an unusual case in that the decision under review is a decision of an administrative tribunal that another panel of the tribunal had not breached a principle of natural justice in dismissing an appeal. Because section 71 of IRPA only permits the IAD to reopen an appeal for breach of a principle of natural justice, the question before us is whether the panel erred when it found that no breach had occurred at the appeal hearing and therefore refused to reopen the decision.

[28] It is settled law that administrative decision-makers are not entitled to curial deference on whether they afforded an individual a fair opportunity to participate in a proceeding that culminated

in an adverse decision: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para.129; *Khosa v. Canada (Citizenship and Immigration)*, 209 SCC 12, [2009] 1 S.C.R. 339 at para. 43. In my opinion, this principle is equally applicable in the present case, where the IAD was required to rule on whether another panel of the same tribunal had breached a principle of natural justice.

[29] In the absence of independent fact-finding by either the IAD or the Judge, this Court must answer the certified question by deciding for itself whether the IAD panel that dismissed Mr Hillary's appeal breached a principle of natural justice by failing to inquire into his understanding of the nature of the appeal proceedings.

[30] This does not mean, however, that every exercise by the IAD of a procedural discretion, explicitly or implicitly conferred by IRPA, is subject to *de novo* judicial review. The question on judicial review is whether, in all the circumstances, the person concerned was deprived of a reasonable opportunity to tell his or her story and, if relevant, to respond to the case against them?

(iii) IRPA, subsection 167(2)

[31] Subsection 167(2) requires the IAD to appoint a designated representative when it is of the opinion that the appellant does not appreciate the nature of the proceedings. Read literally, it does not apply to the facts of the present case, because the IAD panel that heard Mr Hillary's appeal seems to have formed no opinion on whether he appreciated the nature of the proceedings.

[32] However, the purpose of this subsection is to provide a reasonable opportunity, through the assistance of a designated representative, for a person unable to appreciate the nature of the proceedings to participate in them and to have his or her interests adequately protected. This objective would be frustrated if a panel could avoid subsection 167(2) by simply failing to form an opinion on the person's capacity, or by refusing to appoint a designated representative when it should have been clear in the circumstances that the person did not understand the nature of the proceedings.

[33] Consequently, there must be circumstances in which the IAD is under a duty to form an opinion about a person's level of comprehension. It must also be open to a court on an application for judicial review to determine whether there was a rational basis for the IAD's opinion of the person's capacity to understand the nature of the proceedings.

[34] The only question before the Court in the present case is whether the IAD panel that dismissed Mr Hillary's appeal denied him the benefit of a principle of natural justice. The principle of natural justice relevant to the present case is the right to be represented at an administrative hearing. Without representation, an individual may not be able to participate effectively in the decision-making process, especially when facing a more powerful adversary, such as a government department.

[35] The right to representation in an administrative proceeding normally means the right of a party to appoint someone, often legal counsel, to conduct the case before the tribunal on their

behalf. However, subsection 167(2) of IRPA recognizes that, if their interests are to be adequately protected in a proceeding before the Board, minors, and those unable to appreciate the nature of the proceedings, also require the assistance of a designated representative who is sensitive to the particular needs of the individual concerned and alert to their best interests.

[36] Subsection 167(2) provides specific content to the right to be represented at a hearing before the Board. Thus, a failure by the Board to comply with the express and implied procedural duties imposed by its enabling statute may constitute a breach of a principle of natural justice. The factors listed in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras. 21-28, indicate that the content of the duty of fairness in an appeal to the IAD by a permanent resident against removal is high. Particularly important in this regard are: the nature of the individual interest at stake; the broadly judicial nature of the IAD's decision-making process; and, in the present case, Mr Hillary's particular vulnerability because of his mental illness.

(iv) was the IAD appeal panel in breach of a principle of natural justice?

[37] Counsel does not argue that Mr Hillary was denied a fair hearing because the IAD failed to appoint a designated representative to assist him in the appeal process. Such an argument would be untenable. It cannot be inferred from the fact that Mr Hillary is schizophrenic that he did not appreciate the nature of the proceedings.

[38] Nor is it said that, on the basis of the documentary evidence before it, and of Mr Hillary's behaviour at the hearing, including his responses to the questions put to him by counsel, it should

have been obvious to the IAD that he did not understand the nature of the proceedings and therefore required the appointment of a designated representative.

[39] One can say no more than this: Mr Hillary's schizophrenia may possibly have impaired his ability to appreciate the nature of the proceedings to such an extent that representation by counsel alone was insufficient to enable him to protect his interests and to participate meaningfully in the process. However, this is not enough to establish that the IAD's dismissal of Mr Hillary's appeal was vitiated by a breach of a principle of natural justice.

[40] It is always within the discretion of the IAD to raise the issue itself and to inquire into the appellant's capacity. However, if the IAD makes no such inquiry, the Court should intervene only if satisfied on the basis of an examination of the entire context that the Board's inaction was unreasonable and fairness required the IAD to be proactive.

[41] In my opinion, given the adversarial nature of the IAD's procedure, it will only be in the most unusual circumstances that a panel is obliged to make inquiries in a case where the appellant is represented by counsel who has not raised the issue of the client's ability to understand the nature of the proceedings. Such is not the case here.

[42] That the IAD does not bear primary responsibility for identifying appellants who are especially vulnerable is indicated by subsection 19(1) of the *Immigration Appeal Division Rules*, SOR/2002-230 (Rules), which imposes on counsel for the appellant and for the Minister a duty to

advise the IAD if they believe that a designated representative should be appointed because of the appellant's inability to appreciate the nature of the proceedings.

[43] Similarly, the Board's Guideline 8, *Guidelines on Procedures with Respect to Vulnerable Persons Appearing Before the IRB*, effective date December 15, 2006, states (at section 7.3) that counsel is best placed to bring to the Board's attention the special vulnerability of a person who may require some kind of procedural accommodation. However, the Board may also act on its own initiative (section 7.4).

[44] I agree substantially with the reasons given by the Judge for concluding that, on the basis of the record before it, the mere fact that the panel of the IAD that heard his appeal knew that Mr Hillary was schizophrenic was not sufficient to oblige it to inquire into whether to appoint a designated representative under IRPA, subsection 167(2). There was no evidence in the IAD's record about the current state of his mental health, its treatment, and the extent to which it was likely to impair his understanding of the nature of the proceedings.

[45] True, Mr Hillary's denial of responsibility at the IAD appeal hearing for any of the approximately twenty offences of which he had been convicted was, to say the least, unlikely to assist him in winning his appeal. Nonetheless, it could not be inferred from his testimony that his understanding of the nature of the proceedings was sufficiently impaired to oblige the IAD to make further inquiries into his mental capacity, even though the issue had not been raised by his counsel.

[46] Indeed, even the affidavit sworn by Mr Hillary in support of his application for judicial review, two years after the IAD dismissed his appeal, falls short of asserting that he could not instruct counsel and did not appreciate that the appeal gave him an opportunity to explain why he should not be deported. He stated only that he found that the proceedings “were moving extremely quickly” and that he “could not follow them”, and that he was “extremely confused as to what was happening”. He did not attribute his confusion to his mental illness.

[47] In most cases, as the Rules and Guideline 8 indicate, the IAD should be able to rely on counsel to raise any concerns on the issue, and to bring into question the appropriateness, in a given case, of the normal assumption that appellants understand the nature of Board’s proceedings.

[48] Moreover, Mr Hillary was represented by counsel whose competence has not been directly impugned in this proceeding, although, as the IAD noted, the manner in which he handled the appeal may seem questionable. His counsel at the IAD appeal hearing did not suggest that Mr Hillary required further assistance. This Court is in no position to second guess counsel’s strategy and to conclude that Mr Hillary was, in effect, unrepresented.

[49] I would add only this. If procedural fairness had required the IAD to inquire on its own initiative whether Mr Hillary appreciated the nature of the proceedings, I agree with Judge’s view that the failure to inquire would have constituted a breach of a principle of natural justice, unless the appointment of a designated representative could, not would, have made no difference to the outcome of the appeal. See also *Stumpf v. Canada (Minister of Citizenship and Immigration)*, 2002

FCA 148 at para. 5; *Duale v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 150 at paras. 20-21.

Conclusions

[50] For these reasons, and despite counsel's able submissions, I would dismiss the appeal and answer the certified question as follows.

Question: When evidence is presented that an appellant is suffering from a mental illness, does a duty arise in the IAD to determine in accordance with s. 167(2), whether or not the appellant is capable of understanding the nature of the appeal proceedings? If so, what formal procedural steps must be taken by the Board to meet this duty?

Answer: Whether the principles of natural justice require the IAD to initiate inquiries to enable it to form an opinion on whether an appellant who is suffering from a mental illness appreciates the nature of the proceedings depends on an examination of all the circumstances of the case. Since no such duty arose in the present case, it is not necessary to address the hypothetical question of the procedural steps that would have been necessary to discharge the duty.

“John M. Evans”

J.A.

“I agree.
Marc Noël J.A.”

“I agree.
K. Sharlow J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-247-10

**(APPEAL FROM THE JUDGMENT OF THE HONOURABLE MR. JUSTICE RUSSELL
OF THE FEDERAL COURT DATED JUNE 11, 2010, DOCKET NO. IMM-4357-09)**

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PLACE OF HEARING: Toronto, Ontario

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SHARLOW J.A.

DATED: February 9, 2011

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