Federal Court  Cour fédérale

Date: 20171208

Docket: IMM-1305-17

Citation: 2017 FC 1129

Ottawa, Ontario, December 8, 2017

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

COSTEL SLATINEANU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] On March 22, 2017, Costel Slatineanu [the Applicant] filed for judicial review of an Immigration and Refugee Board, Immigration Appeal Division [IAD] decision that declared his appeal abandoned. Within days, the Applicant also applied to the IAD to reopen his appeal on the same grounds pursuant to section 71 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. Because judicial review is prohibited until any right of appeal that may be

provided by the IRPA is exhausted, I will dismiss this appeal for being pre-mature for the reasons that follow.

II. Background

[2] The Applicant left Romania and came to Canada where he obtained refugee status in 2005. He and his daughter became permanent residents on December 9, 2010. He now also has three children who were born in Canada.

[3] On December 10, 2012, the Applicant pled guilty to break and enter of a commercial building. He indicates in his material that he "received a 3- month discontinued sentence, which [he] served over 45 weekends. [He] was also given 1 year of probation." I assume that the sentence he was rendered was an intermittent sentence and not a discontinued sentence as he called it. But nothing rides on what the correct nomenclature was for the sentence.

[4] As a result, an Admissibility hearing took place on June 3, 2014. The hearing determined the Applicant was inadmissible, and he was issued a deportation order. On that same date, the Applicant (through his counsel, Ethan Friedman) filed an appeal of this decision.

[5] On November 22, 2016, over two years after the Applicant filed the appeal, the IAD sent a Notice of Intent [NOI] to Mr. Friedman and the Applicant. The NOI asked the Applicant to confirm his intent to proceed with the appeal by December 20, 2016. Although the IAD says the letter was never returned in the mail, the Applicant says he did not receive his copy. According to the Applicant, his legal counsel, Mr. Friedman, says he tried to contact him by using his

correct phone number, but never reached him. The Applicant's position is that he did not receive an update regarding the NOI. As a result, nothing was ever filed and the IAD was not contacted.

[6] In a decision dated January 10, 2017, the IAD declared the Applicant's appeal abandoned without inviting the Applicant to participate in a show-cause hearing. The IAD sent a notice of abandonment to both the Applicant at the same address as the previous notice was sent as well as to Mr. Friedman. The Applicant received this notice on March 7, 2017, at his residential address. The Applicant then retained the new counsel who represents him in this judicial review.

[7] The Applicant says he filed for judicial review of the abandonment decision on March 22, 2017, to preserve his right to have the Federal Court review this decision. Six days later, the Applicant applied to the IAD to reopen his appeal pursuant to section 71 of the IPRA. Leave was granted in the Federal Court on July 21, 2017.

A. *Preliminary*

[8] The parties by consent requested, and I granted, that the Certified Tribunal Record [CTR] be amended to reflect what was before the decision maker.

III. Issues

[9] The issues are:

A. Is this judicial review premature because the Applicant did not exhaust all of his appeal rights as statutorily required under section 72(2)(a) of the IRPA?;

B. Did the IAD breach the Applicant's right to procedural fairness by failing to provide him with a show-cause hearing?

[10] Below are the relevant provisions of the IRPA:

Reopening appeal	**Réouverture de l'appel**
71 The Immigration Appeal Division, on application by a foreign national 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.**	**71** L'étranger qui n'a pas quitté le Canada à la suite de la mesure de renvoi peut demander **la réouverture de l'appel sur preuve de manquement à un principe de justice naturelle.**
Application for judicial review	**Demande d'autorisation**
72 (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is, subject to section 86.1, commenced by making an application for leave to the Court.	**72 (1)** Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est, sous réserve de l'article 86.1, subordonné au dépôt d'une demande d'autorisation.
Application	**Application**
(2) The following provisions govern an application under subsection (1):	(2) Les dispositions suivantes s'appliquent à la demande d'autorisation :
(a) the application may not be made until any right of appeal that may be provided by this Act is exhausted;	**a) elle ne peut être présentée tant que les voies d'appel ne sont pas épuisées;**
Emphasis added	Mon soulignement

IV. Analysis

[11] The Applicant argued that section 72(2)(a) of the IRPA, which says an application for judicial review "may not be made until any right of appeal that may be provided by this Act is exhausted," does not cover this situation. He submits his application to reopen the appeal pursuant to section 71 of the IRPA is not a right of appeal because it is limited to breaches of natural justice, and therefore it is not a *de novo* appeal. The Applicant argued that section

72(2)(a) does not apply to him and that this judicial review application can proceed on the merits.

[12] The Applicant presented argument on the merits that there had been procedural unfairness as the IAD did not provide him a show-cause hearing before declaring his application abandoned. In addition, the Applicant argues the IAD breached his right to procedural fairness when it declared his appeal abandoned although he had not received the NOI through the mail or his lawyer. Both of these arguments are directly within the wheelhouse of section 71 of the IRPA.

[13] In this situation the Applicant had two matters proceed at the same time on the same procedural fairness grounds—an application for the Federal Court to judicially review the abandonment decision, and an application for the IAD to reopen his appeal. This gave the Applicant the ability to then judicially review the application to reopen the appeal if the instant judicial review is not decided as he wishes.

[14] The Federal Court of Appeal [FCA] looked at the prohibition of premature applications in *Somodi v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 288 [*Somodi*]. While *Somodi* took place in the context of a spousal sponsorship application, the principles discussed by Justice Letourneau apply generally in the IRPA. At paragraphs 21-23, he explains that "any" right of appeal, (not just a *de novo* appeal), must be exhausted prior to a judicial review:

> In the IRPA, Parliament has established a comprehensive, self-contained process with specific rules to deal with the admission of foreign nationals as members of the family class. The right of appeal given to the sponsor to challenge the visa officer's decision

> on his or her behalf to the benefit of the foreign national, as well as the statute bar against judicial review until any right of appeal has been exhausted, are distinguishing features of this new process. They make the earlier jurisprudence relied upon by the appellant obsolete.
>
> Parliament has prescribed a route through which the family sponsorship applications must be processed, culminating, after an appeal, with a possibility for the sponsor to seek relief in the Federal Court. Parliament's intent to enact a comprehensive set of rules in the IRPA governing family class sponsorship applications is evidenced both by paragraph 72(2)(*a*) and subsection 75(2).
>
> **The broad prohibition in paragraph 72(2)(*a*) to resort to judicial review until "any" right of appeal has been exhausted is now provided for in the enabling statute** as opposed to the more limited statutory bar provided by section 18.5 of the *Federal Courts Act*.
>
> [Emphasis added]

[15] Section 18.5 of the *Federal Courts Act,* RSC, 1985, c F-7 is a prohibition; an applicant must exhaust all rights of appeal before being able to bring a judicial review. Moreover, the IRPA has a comprehensive scheme that specifically bars a judicial review until all rights of appeal are exhausted. The FCA has confirmed that *Somodi* stands for the principle that a right to appeal is an adequate alternative remedy, and section 72(2)(a) of the IRPA bars this Court from judicial review until that right is exhausted (*Habtenkiel v Canada (Minister of Citizenship and Immigration)*, 2014 FCA 180 at paras 35-36). There can be no doubt that Parliament intended for this comprehensive scheme to avoid multiplicity of decision making processes.

[16] To proceed to make a determination on the merits of this case and at the same time have an application before the IAD on the same grounds would be exactly what Parliament strived to prevent in this legislation.

[17] I find that the Applicant had a right of appeal as described in section 72(2)(a) of the IRPA that he is required to exhaust before he applies for judicial review. I do not agree that because the re-opened appeal (section 71 of the IRPA) is narrower, and only exercised if there is a failure to observe a principle of natural justice, that it is still not a right of appeal as per section 72(2)(a) of the IRPA.

[18] There is no doubt in my mind that section 72(2)(a) does apply in this case because the argument on the merits in this judicial review are in fact based on procedural unfairness grounds. So the re-opening application is not prejudiced as it is also on the same procedural unfairness grounds and this right must be exhausted before it can be judicially reviewed.

[19] Because the Applicant did not exhaust his right of appeal, I am dismissing this application as being pre-mature.

[20] The Applicant submitted his understanding was that the application was not premature because leave was granted. Again I do not agree. Leave being granted does not mean that all prematurity, jurisdictional, or mootness arguments (to name a few) are no longer in issue. I suspect that leave was granted for a judge on a judicial review to make this exact determination regarding prematurity, but given there are never any reasons for granting leave I am only speculating.

[21] I will dismiss this application as I find that section 71 of the IRPA—with the heading "Reopening Appeal"—must be exhausted before an application for judicial review pursuant to section 72(2)(a) of the IRPA proceeds in this Court.

[22] As I find this matter was premature, I am not commenting on the arguments related to the merits.

[23] The Court was informed the IAD made a decision regarding the appeal to re-open on July 7, 2017, but this decision was not before the Court in this judicial review. In fairness, I will grant the Applicant an extension of time to bring a judicial review of the July 7, 2017 decision.

V. Certified Question

[24] The Applicant proposed the following Certified Question:

> Does section 72(2)(a) of the *Immigration and Refugee Protection Act*, which precludes an Application for Leave and Judicial Review from being commenced until any right of appeal that is provided by the Act is exhausted, include an application to re-open an appeal pursuant to section 71 of the *Immigration and Refugee Protection Act* that has been determined to be abandoned by the Immigration and Refugee Protection Board, Appeal Division.

[25] The Respondent opposed and argued that the Court should not certify this question.

[26] A Certified Question must be a question of general importance. This means the question "transcends the interests of the immediate parties to the litigation and contemplates issues of broad significance or general application" (*Liyanagamage v Canada (Minister of Citizenship and*

Immigration) (1994), 176 NR 4 at para 4 (FCA)). The question must also be dispositive of the appeal (*Zazai v Canada (Minister of Citizenship and Immigration*), 2004 FCA 89 at para 11).

[27] I will not certify the question as it is not a question of general importance given that the FCA in *Somodi* had a similar question before them.

JUDGMENT in IMM-1305-17

THIS COURT'S JUDGMENT is that:

1. The style of cause is amended to remove "The Minister of Citizenship, Refugee and Immigration" as a Respondent and replace it with "The Minister of Citizenship and Immigration";
2. An extension of time of 10 days from this decision is granted for the Applicant to file an application for leave regarding the decision dated July 7, 2017 regarding the re-opening application;
3. The application is dismissed;
4. The Applicant's Certified Question is dismissed.

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1305-17
STYLE OF CAUSE:	COSTEL SLATINEANU v THE MINISTER OF IMMIGRATION, REFUGEE AND CITIZENSHIP
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 19, 2017
JUDGMENT AND REASONS:	MCVEIGH J.
DATED:	DECEMBER 8, 2017

APPEARANCES:

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Laoura Christodoulides	FOR THE RESPONDENT

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