Federal Court  Cour fédérale

Date: 20190207

Docket: IMM-2567-18

Citation: 2019 FC 157

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, February 7, 2019

PRESENT: The Associate Chief Justice

BETWEEN:

RÉMY JOSEPH

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] Mr. Rémy Joseph is a citizen of Haiti and a permanent resident of Canada. He is subject to a deportation order issued by the Immigration Division [ID] since he is inadmissible on grounds of serious criminality within the meaning of paragraph 36(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. He appealed this deportation order to the Immigration Appeal Division [IAD] but, having failed to produce the documentation required by

the IAD, the IAD determined that the appeal had been abandoned. Mr. Joseph seeks judicial review of this latter decision.

I. Facts

[2] Before the ID, the applicant filed a number of documents to demonstrate that there are humanitarian and compassionate grounds for special relief in his case. Although the counsel for the applicant acknowledged that these documents could not be considered by the ID, the ID nevertheless admitted them as part of the record that would eventually be sent to the IAD.

> [TRANSLATION]
>
> **THE MEMBER**
>
> On your side, counsel, there were documents that were sent to me and that I have here, just a moment, that were received yesterday. We are talking about D-1 to D-5. I understand the purpose of the submission. I am not sure it is necessarily going to be relevant to the decision I am going to make today, but I am going to file them anyway because they're going to —
>
> **COUNSEL FOR THE PERSON CONCERNED** (to the Member)
>
> In fact it is a kind of alert.
>
> **THE MEMBER** (to Counsel for the Person Concerned)
>
> Pardon?
>
> **COUNSEL FOR THE PERSON CONCERNED** (to the Member)
>
> It is a kind of alert as to what might be on appeal.
>
> **THE MEMBER** (to Counsel for the Person Concerned)
>
> Yes, but as I told you, we are going to file them anyway because they will be part of the record. Depending on my decision on whether to issue a measure, the whole record will go to the next step, including these documents. So they will have them already.

> **COUNSEL FOR THE PERSON CONCERNED** (to the Member)
>
> That was the intention.
>
> **THE MEMBER** (to Counsel for the Person Concerned)
>
> Okay, perfect.

[3] On March 14, 2018, the IAD forwarded correspondence to the applicant and the applicant's counsel, requesting that they provide, by April 4, 2018, [TRANSLATION] "any document or argument that would enable the IAD to determine whether a stay of removal can . . . be granted". This letter states that [TRANSLATION] "a stay of removal for serious criminality may be granted if there are humanitarian and compassionate grounds to do so". It also informs the applicant that if he does not respond within the time limit, [TRANSLATION] "the IAD may dismiss [the] appeal or declare it abandoned".

[4] Noting that it had not received any response to its letter from March 14 within the time limit, the Appeal Division declared the appeal abandoned on May 11, 2018.

[5] The IAD's reasons are short and may be reproduced in full:

> [TRANSLATION]
>
> Whereas this is an appeal filed on February 23, 2016, by Remy JOSHEPH [*sic*], the appellant, against a removal order issued by the Immigration Division (ID), according to section 36(1)(a) of the Immigration and Refugee Protection Act (IRPA);
>
> Whereas on March 14, 2018, the Immigration Appeal Division (IAD) sent a letter to the appellant at the address he indicated on his Notice of Appeal requesting him to send arguments and documents to support his appeal. The deadline for a response was April 4, 2018;

> Whereas there has been no mail returned;
>
> Whereas the appellant did not respond within the required time limit;
>
> Whereas subsection 168(1) of the Immigration and Refugee Protection Act (the Act) provides that the IAD may, without further notice, determine that the appeal has been abandoned in the event of an appellant's default;
>
> Therefore the tribunal determines that this appeal has been abandoned under subsection 168(1) of the Act because he failed to respond to the IAD's letter as required.

II. Issues and standard of review

[6] This application for judicial review raises the following questions:

A. *Was there a violation of the rules of procedural fairness and natural justice?*

B. *Did the IAD err in concluding that the appeal had been abandoned?*

[7] It is recognized that the Court's intervention is justified when it finds that the rules of procedural fairness and natural justice have not been respected. In the absence of such a finding, the standard of reasonableness is applied to the IAD's decision (*Dunsmuir v New-Brunswick*, 2008 SCC 9).

III. Analysis

[8] The applicant argues that neither he nor his counsel received the March 14, 2018 correspondence from the IAD, although they have always had the same address, and both received the previous correspondence and the May 11, 2018 Notice of Decision.

[9] In addition, he submits that in the March 14, 2018 correspondence, the IAD refers to the submission of documents in support of an application for a stay on humanitarian and compassionate grounds, and that a number of these documents were already on file. The IAD could therefore have decided the appeal on the basis of the documents in its possession, rather than concluding that the case had been abandoned.

[10] Subsection 168(1) of the IRPA provides the following with respect to the powers of the IAD to declare a case abandoned.

Abandonment of proceeding	**Désistement**
168 (1) A Division may determine that a proceeding before it has been abandoned if the 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 Division or to communicate with the Division on being requested to do so.	**168 (1)** Chacune des sections peut prononcer le désistement dans l'affaire dont elle est saisie si elle estime que l'intéressé omet de poursuivre l'affaire, notamment par défaut de comparution, de fournir les renseignements qu'elle peut requérir ou de donner suite à ses demandes de communication.

[11] Although the applicant did not respond to the IAD's letter within the time limit, there are a number of considerations that are, in my opinion, in the applicant's favour:

- In his affidavit, the applicant states that neither he nor his counsel received the letter from the IAD. Although the applicant's counsel did not sign an affidavit, he stated before the Court that he did not receive it;

- In support of Julie Corvec's affidavit, the Minister filed a Statement that a Document was Provided which tends to demonstrate that the letter was indeed

sent to the applicant and his counsel. However, this statement is not signed by S. Colarusso in the space reserved for this purpose;

- Before the correspondence of March 14, 2018, the applicant had always received the correspondence and decisions that were sent to him. It does not appear from the file that he had already attempted to obtain an adjournment or extension of time.

[12] In the specific circumstances of this case, I am of the opinion that the Minister has not met his burden of demonstrating that the March 14 letter from the IAD was indeed sent. It follows that there is no reverse onus on the applicant.

[13] The applicant responded to all other correspondence received from the ID and the IAD, and he and his counsel appeared when summoned to the hearing before the ID.

[14] In addition, since the March 14 letter sought to file documentary evidence in support of a stay of the deportation order on humanitarian and compassionate grounds and since the applicant had already submitted certain documents in this regard to the IAD, the IAD could very well have set a hearing date by proceeding on the basis of the documents in its possession.

[15] I am aware that due to an accumulation of unprocessed appeals, the IAD adopted an administrative policy effective July 2, 2015 to expedite the processing of appeals and to declare abandoned those that are unlikely to proceed. In particular, the IAD changed its practice and eliminated the special sitting stage, which allows an applicant to argue why the IAD should not

find abandonment, when there is no reason to believe that the appeal will proceed. In doing so, the IAD is better able to carry out its functions "informally and quickly", as required by subsection 162(2) or the IRPA.

[16] However, in the circumstances of this case, I am of the opinion that it was unreasonable for the IAD simply to declare the applicant's appeal abandoned when it was validly seized of his appeal and had evidence to consider. I am therefore of the opinion that, in these particular circumstances, the IAD has failed to comply with the rules of procedural fairness and natural justice and that the intervention of the Court is required (*Hung v Canada (Minister of Citizenship and Immigration)*, 2004 FC 966 at paras 6-13).

IV. Conclusion

[17] The applicant's application for judicial review is therefore allowed. The parties have not submitted any questions of general importance for certification, and I am of the opinion that no such questions arise from the facts of this case.

JUDGMENT in docket IMM-2567-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed;

2. No question of general importance is certified.

"Jocelyne Gagné"
Associate Chief Justice

Certified true translation
This 7th day of May, 2019.
Michael Palles, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2567-18
STYLE OF CAUSE:	RÉMY JOSEPH v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	MONTRÉAL, QUEBEC
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APPEARANCES:

Moriba Alain Koné	FOR THE APPLICANT
Lynne Lazaroff	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Moriba Alain Koné Montréal, Quebec	FOR THE APPLICANT
Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT