Date: 20061213

Docket: IMM-1552-06

Citation: 2006 FC 1485

Ottawa, Ontario, December 13, 2006

PRESENT: The Honourable Mr. Justice Blanchard

BETWEEN:

ELUZUR RUMPLER

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

1. Introduction

[1] The Applicant seeks judicial review of the February l0, 2006 decision of the Immigration Appeal Division of the Immigration and Refugee Board (the Appeal Division) wherein the Appeal Division decided it did not have jurisdiction to extend time to file an appeal from a removal order

issued at an examination pursuant to section 63(3) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the IRPA).

2. Factual Background

[2] The Applicant is a citizen of the United States and became a permanent resident of Canada in 1979, when he was 5 years old. He is an ultra-orthodox Jew and understands little English and no French. His first languages are Yiddish and Hebrew.

[3] The Applicant has lived in Canada since his arrival here, with the exception of almost two years spent in Israel between 2001 and 2003 working for a Canadian religious organisation.

[4] He returned from Israel on Friday September 16, 2005, at which time an immigration officer (the officer) determined that he did not meet the residency requirements of section 28 of IRPA and as a result the officer issued a Removal Order against him. The Order was in French and did not specify the time within which to appeal.

[5] The Applicant alleges the officer spoke little English, consulted a translating dictionary frequently, and refused his request for the services of a translator. As a result the Applicant claims that he had difficulty understanding what was taking place. He alleges he understood that, in order to leave Québec City for Montréal, he had to sign a document which gave him 60 days to appeal. Moreover, the Applicant alleges that he signed without taking the time to understand the document because of the approach of the Jewish Sabbath. His religious beliefs prohibit him from traveling after sundown on Fridays.

[6] The deadline to file an appeal expired on October 17, 2005.

[7] Within the 60-day period during which the Applicant mistakenly thought he had to file an appeal, he called a lawyer who informed him that the time limit of 30 days to file an appeal had already expired, and that the 60-day period was actually the period during which the Applicant was to leave Canada.

[8] On November 15, the Applicant voluntarily left Canada for the United States.

[9] An application to extend the deadline to appeal the removal order was filed on November 17, 2005. It was subsequently dismissed by the Board.

3. The Decision under Review

[10] The Board found that it did not have jurisdiction to extend the time to file an appeal under section 63(3) once the prescribed delay had expired because the Applicant was no longer a permanent resident of Canada. The Board reasoned that since no appeal had been filed in the 30-day period pursuant to paragraph 49(1)(*b*) of the IRPA, the removal order came into force the day the appeal period expired, and the Applicant contemporaneously lost his permanent resident status, pursuant to paragraph 46(1)(*c*) of the IRPA. Moreover, pursuant to sections 237 and 240 of the *Immigration and Refugee Protection Regulations*, (the Regulations), SPR/2002-227, June 11, 2002,

Canada Gazette, Part II, June 14, 2002, the order had been enforced by the voluntary departure of the applicant to United States on November 15, 2005. The Board also determined that paragraph 58(*d*) of the *Immigration Appeal Division Rules* (IAD Rules) does not give it the authority to give back a right of appeal which no longer exists.

4. Issues

A. Is the issue of the Board's jurisdiction moot owing to the voluntary departure of the Applicant to the United States?

B. Did the Board err in finding that it had no jurisdiction under IAD Rule 58 to extend the delay prescribed by IAD Rule 7(2)?

C. If the Board has no jurisdiction under IAD Rule 58 to extend the delay prescribed in IAD Rule 7(2), is there a breach the Applicant's rights under section 7 of the Charter?

5. Standard of Review

[11] The central question in this application is whether the Tribunal had jurisdiction to act. This is a question of Law. The Supreme Court of Canada in *Pushpanathan* v. *Canada*, [1998] 1 S.C.R. 982, decided that the standard of review applicable to a decision rendered by the Immigration and Refugee Board, Appeal Division on a question of law is correctness. I am bound by that decision and will apply the correctness standard in reviewing the Board's decision.

6. Analysis

A. *Is the issue of the Board's jurisdiction moot owing to the voluntary departure of the Applicant to the United States?*

[12] At the hearing, the Respondent argued that the question before the Court is moot because the decision has been "enforced" by the voluntary departure of the applicant. The argument is based on the subsection 240(1) of the Regulations which reads as follows:

When removal order is enforced	**Mesure de renvoi exécuté**
240. (1) A removal order against a foreign national, whether it is enforced by voluntary compliance or by the Minister, is enforced when the foreign national	240. (1) Qu'elle soit volontaire ou forcée, l'exécution d'une mesure de renvoi n'est parfaite que si l'étranger, à la fois :
(*a*) appears before an officer at a port of entry to verify their departure from Canada;	*a*) comparaît devant un agent au point d'entrée pour confirmer son départ du Canada;
(*b*) obtains a certificate of departure from the Department;	*b*) a obtenu du ministère l'attestation de départ;
(*c*) departs from Canada; and	*c*) quitte le Canada;
(*d*) is authorized to enter, other than for purposes of transit, their country of destination.	*d*) est autorisé à entrer, à d'autres fins qu'un simple transit, dans son pays de destination.

[13] The Applicant objects to the Court hearing the Respondent on mootness since the issue was not raised in the notice of application or in the Respondent's written submissions. I agree. There was nothing to prevent the Respondent from raising the issue earlier. To allow an issue to be raised for the first time at the hearing is without question prejudicial to the Applicant who has had no

opportunity to prepare a response to the argument. In the result, the issue of mootness will therefore not be considered in this application.

B. *Did the Board err in finding that it has no jurisdiction under IAD Rule 58 to extend the delay prescribed by IAD Rule 7(2)?*

[14] IAD Rule 7(2) prescribes 30 days as the time for filing an appeal of a removal order to the Appeal Division. Paragraph 58(d) of IAD Rules provides as follows:

> **58. Powers of the Division –** The Division may
>
> …
>
> (*d*) extend or shorten a time limit, before or after the time limit has passed.

[15] Subsection 63(3) of the IRPA provides that a permanent resident or a protected person may appeal to the Appeal Division against a decision at an examination or admissibility hearing to make a removal order against them.

[16] Paragraph 49(1)(*b*) of the IRPA establishes that upon the expiration of the delay to file a notice of appeal, a removal order comes into force. Paragraph 46(1)(*e*) provides that a person loses permanent resident status when a removal order comes into force. Here, no notice of appeal was filed by the Applicant before the expiration of the delay to appeal the making of the removal order.

[17] The Applicant submits that the Board erred in determining that it had no jurisdiction under IAD Rule 58 to extend time for filing an appeal when the time for doing so had expired. He relies on *Richardson v. Canada*, [1989] 3 C.F. 47 (F.C.A.), where the Federal Court of Appeal found that

the Board had jurisdiction to extend time for the filing of an appeal. *Richardson* was decided under the *Immigration Act, 1976* (the *Immigration Act*). The Applicant argues that the powers under that Act are similar to those under the current act, the IRPA.

[18] The Respondent submits that a decision on an application for an extension of time in which to file an appeal is a decision ancillary to the decision on the appeal itself and should be subject to the same fate as the main decision. The Respondent contends that the Board has no jurisdiction under the IRPA to hear the Applicant's appeal on the date the notice of appeal was filed because the Applicant was no longer a foreign national holding a permanent resident visa as required pursuant to subsection 63(3) of the IRPA. Consequently, if the Board does not have jurisdiction on the appeal, it does not have the jurisdiction to grant an extension of delay to file a notice of appeal. The Respondent relies on the following decisions also rendered under the *Immigration Act*; *M.C.I.*v. *Jessani*, 2001 FCA 127 and *M.E.I.* v. *Restrepo*, [1989] 8 Imm. L.R. (2d) 161 (F.C.A.) and *Webster* v. *Canada*, [2003] F.C.J. No. 1569 (QL) (F.C.A.).

[19] In *Jessani* and *Restrepo*, the Federal Court of Appeal dealt with the jurisdiction of the Appeal Division in respect to subsection 70(1) of the *Immigration Act*, R.S.C. 1985, c. I-2, which provided as follows:

70.(1) Subject to subsections (4) where a removal order is made against a permanent resident or against a person lawfully in possession of a valid returning resident permit issued to that person pursuant to the regulations, that person may appeal to the Board on either or	70.(1) Sous réserve du paragraphe (4), les résidents permanents et les titulaires de permis de retour en cours de validité et conformes aux règlements peuvent faire appel d'une mesure de renvoi devant la Commission en invoquant les moyens suivants :

both of the following grounds**,** (*a*) on any ground of appeal that involves a question of law or fact, or mixed law and fact; and (*b*) on the ground that, having regard to all the circumstances of the case, the person should not be removed from Canada.	*a*) question de droit, de fait ou mixte; *b*) le fait que, eu égard aux circonstances particulières de l'espèce, ils ne devraient pas être renvoyés du Canada.

[20] The Federal Court of Appeal also dealt with the Appeal Division's jurisdiction in *Canada* (*Minister of Employment and Immigration v. Selby*, [1981] 110 D.L.R. (3) 126 (F.C.A.). In all three decisions, the Court essentially decided that the Appeal Division could not allow an appeal unless the appeal was made by a person entitled by law to appeal before the Board, namely a permanent resident.

[21] Under subsection 24(1) of the *Immigration Act* a person ceases to be a permanent resident in either of the following circumstances: (*a*) that person leaves or remains outside Canada with the intention of abandoning Canada as that person's place of permanent residence; or (*b*) a deportation order has been made against that person and the order is not quashed or the execution thereof is not stayed pursuant to subsection 73(1).

[22] The current legislative framework is different. Subsection 46(1) of the IRPA provides as follows:

46.(1) A person loses permanent resident status (*a*) when they become a Canadian citizen; (*b*) on a final determination of	**46**.(1) Emportent perte du statut de résident permanent les faits suivants : *a*) l'obtention de la citoyenneté canadienne;

a decision made outside of Canada that they have failed to comply with the residency obligation under section 28; (*c*) when a removal order made against them comes into force; or (*d*) on a final determination under section 109 to vacate a decision to allow their claim for refugee protection or a final determination under subsection 114(3) to vacate a decision to allow their application for protection.	*b)* la confirmation en dernier ressort du constat, hors du Canada, de manquement à l'obligation de résidence; *c*) la prise d'effet de la mesure de renvoi; *d*) l'annulation en dernier ressort de la décision ayant accueilli la demande d'asile ou celle d'accorder la demande de protection.

[23] The IRPA expressly provides for a right of appeal against a decision to make a removal order following an examination. There is no such specific provision under the *Immigration Act*. Further, paragraph 24(2((*b*) of the *Immigration Act* provides that permanent resident status is lost upon the making of the removal order "and such order is not quashed". Under the IRPA, permanent resident status is only lost upon the coming into force of the removal order (s. 46(1)(*c*)) which, in the circumstances of this case, would have occurred when the appeal period expired (s.49(1)(*b*)).

[24] The provisions under the IRPA, not found in the Immigration Act, particularly those affecting the loss of permanent residence status and the explicit provisions dealing with the right of appeal to the Appeal Division raise questions as to the applicability of the above discussed jurisprudence cited by the Respondent regarding the Appeal Division's jurisdiction under the IRPA.

[25] In my view, the coming into force of the IRPA calls for the issue to be considered in the context of the current statutory scheme.

[26] The circumstances of this case bring into focus a right of appeal expressly provided for by Parliament in subsections 63(3) of the IRPA, namely the right of a permanent resident to appeal against a decision at an examination to make a removal order. Such orders which provide for the expulsion from Canada of persons who, in certain cases, have resided here for years and who have established substantial ties to Canada, have a dramatic impact on the rights of those persons. The right of appeal expressly provided for in the IRPA is an important guarantee against arbitrary decisions. The Respondent's interpretation of the applicable provisions of the IRPA would in essence deprive the Applicant of his right to appeal in the circumstances. The Respondent contends that the Appeal Division is without jurisdiction to extend time for the Applicant to file his appeal because he is no longer a permanent resident. The Respondent maintains this position even though Rule 58(*d*) of the Immigration Appeal Division Rules ("IAD Rules") expressly provides that the Division may extend or shorten a time limit before or after the time limit has passed.

[27] The Applicant no longer has permanent resident status because of the decision made to issue a removal order against him at the examination, the very decision he wishes to appeal. To narrowly interpret the applicable provisions of the IRPA as does the Respondent, would in my view fail to give effect to Parliament's intention to afford the Applicant a right of Appeal in the circumstances.

[28] The Supreme Court of Canada in *Rizzo and Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, adopted the principle approach to be followed in statutory interpretation set out by Elmer Driedger in

Sullivan and Driedger on the Construction of Statutes, 4th ed., (Markham: Butterworths, 2002). At page 87, the author wrote:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[29] Here the intention of Parliament is to provide a permanent resident with a right of appeal to the Appeal division. The scheme under the IRPA provides for the making of Rules and Regulations to govern how such appeals are to be made. These Rules, passed under legislative authority provide discretion to the Appeal Division to extend time after a time limit has passed.

[30] Further, the Supreme Court in *Rizzo, supra*, was guided by the provisions of the *Interpretation Act*, R.S.O. 1980, c. 219, in construing a statutory provision. Paragraph 22 of the Court's reasons for decision reads as follows:

> I also rely upon s. 10 of the *Interpretation Act*, R.S.O. 1980, c. 219, which provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

[31] Here, it is clear that the scheme of the legislation is to confer a benefit to permanent residents, namely, a right of appeal. Further, the IDA Rules passed under authority of the IRPA expressly provide that the Appeal Division can extend time when time has passed. Interpreting the applicable provisions in a fair, large and liberal manner and in accordance with the above discussed principles, I find that to achieve the object of the Act according to its intent and spirit requires, in the circumstances, that the provisions be interpreted so as to recognize the Appeal Division's

jurisdiction to extend time after the time to appeal has expired. In my view, the narrower and more restrictive interpretation advanced by the Respondent would be inconsistent with the scheme of the Act. Moreover, it would be a denial of justice, in my view, to deprive the Applicant of his right to appeal for failing to strictly comply with the limitation period without at least hearing his explanation for the delay. There may well be instances where an applicant is able to adequately explain the delay. In such cases, it would be inequitable to deprive applicants of a right of appeal provided for in law.

[32] I find that the Appeal Division does have jurisdiction to hear the request to extend time and then decide in the exercise of its discretion if the request is justified. If the extension is granted then the effect of such a determination by the Appeal Division would be to allow the appeal to be made in time and the removal order would be vitiated. As a consequence the Applicant would retain his permanent resident status and the Appeal Division would have jurisdiction to hear the Appeal. Such an interpretation is in my view in keeping with the statutory scheme and the intention of Parliament to provide for a right of appeal, a significant guarantee against arbitrary decisions when important rights are in play. In my view, Parliament could not have intended to deprive a person of his or her right to appeal from a deportation order because of a failure to respect the delay to appeal no matter the circumstances, absent express language to that effect.

[33] I find support for my conclusion in Richardson, relied on by the Applicant. While Richardson was decided under the Immigration Act, in that case the Federal Court of Appeal did determine that the Appeal Division's jurisdiction to extend time included the power to extend time to file a notice of appeal.

[34] In *Richardson* a removal order was issued against Mr. Richardson for reasons of criminality. At the outset he had decided not to appeal the decision to issue the removal order. After the expiration of the delay to appeal, he changed his mind and filed a motion pursuant to Rule 9(2) of the *Immigration Appeal Board Rules* of 1981, to extend the time limitation imposed by Rule 22 of the same Rules. These provisions are similar to Rules 58(d) and 7(2) of the current IAD Rules and the former Rules essentially provided the Appeal Division with the authority to extend time generally. In its reasons the Federal Court of Appeal concluded that the Appeal Division had jurisdiction to extend the delay for filing a notice of appeal. At page 48, the Court reasoned as follows:

> With every defence, we are all of the view that subsection 9(2) of these same Rules does empower the board to grant such an enlargement.
>
> That subsection provides "In the case of an appeal brought pursuant to subsection 72(1) of the Act, the Board may enlarge the time prescribed by these Rules for doing any act or taking any proceeding on such terms, if any, as seem just, although the application for the enlargement is not made until after the expiration of the prescribed or fixed time."
>
> Subsection 72(1) confers upon this applicant, as a permanent resident, the right of appeal to the Board from a removal order made against him, on a question of law, or fact, or mixed law and fact as well as upon equitable grounds.
>
> In our view, an application for extension of the five day period specified in Rule 22 is clearly within the contemplation of the language employed in Rule 9(2). We do not agree with the view of the Trial Division in Kwan that Rule 9(2) "only authorizes the Board to enlarge the time when an appeal has been brought, in other words, when an appeal is already before it." In our opinion, such an interpretation reflects an unduly restricted construction of the words used in Rule 9(2), actually it is hardly possible to visualize a factual scenario where Rule 9(2) could be utilized, given such a

> narrow interpretation. We think that, when someone in the position of this applicant who has been given a right to appeal the exclusion order issued against him, applies to extend the time within which to file that appeal, he is "bringing a proceeding" as that expression is used in Rule 9(2).

[35] Pursuant to paragraph 24(1)(*b*) of the Immigration Act a person ceases to be a permanent resident when a removal order is issued against that person and the order is not quashed or stayed. In *Richardson*, therefore, as is the case here, the applicant was without permanent resident status at the time the request for an extension of time was made to the Appeal Division. In this regard, *Richardson* is not distinguishable for the circumstances of this case.

[36] The Respondent also relies on *Webster* a decision of the Federal Court of Appeal in respect to an income tax matter. In that case, the Court decided that the Federal Court did not have jurisdiction to grant an extension of time in respect to an issue for which it did not have jurisdiction. The Court ruled that the tax reassessment could only be challenged by appeal to the Tax Court. Here, unlike the circumstances in Webster, the Appeal Division had jurisdiction to consider the appeal, arguably until the time the Applicant lost his permanent resident status. In *Webster* the Court never had jurisdiction on the issue to be determined in the first place. On this basis *Webster* is distinguishable.

[37] Given that my findings in regard to the second issue are determinative of this application, it is therefore unnecessary to deal with the third and final issue raised by the Applicant.

[38] Both the Applicant and Respondent have proposed serious questions of general importance for certification. I have considered the proposed questions and the written submissions of the parties. I am of the opinion that the following question proposed by the Respondent transcends the interests of the parties, contemplates issues of broad significance or general application and is a question that is determinative of the appeal. Pursuant to subsection 74(*d*) of the IRPA, I therefore certify and state the question as follows:

> Would it be lawful for the Immigration Appeal Division to entertain an application for an extension of time pursuant to subsection 58(*d*) of the Immigration Appeal Division Rules made by an individual who has no right of appeal through the combined effect of paragraphs 49(1)(*b*) and 46(1)(*c*), sections 2 and 63 of the *Immigration Refugee Protection Act*?

7. Conclusion

[39] For the above reasons the application will be allowed. The Appeal Division's decision will be set aside and the matter remitted for re-determination by a differently constituted panel in accordance with these reasons.

JUDGMENT

THIS COURT ADJUDGES that:

1. The application for judicial review is allowed.

2. The Appeal Division Board's decision is set aside and the matter is remitted for re-determination by a differently constituted panel in accordance with these reasons.

3. The following question is certified:

> Would it be lawful for the Immigration Appeal Division to entertain an application for an extension of time pursuant to subsection 58(*d*) of the Immigration Appeal Division Rules made by an individual who has no right of appeal through the combined effect of paragraphs 49(1)(*b*) and 46(1)(*c*), sections 2 and 63 of the *Immigration Refugee Protection Act*?

"Edmond P. Blanchard"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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