Federal Court  Cour fédérale

Date: 20140730

Docket: IMM-4080-13

Citation: 2014 FC 762

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, July 30, 2014

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

EDGARD PHILISTIN

Respondent

JUDGMENT AND REASONS

[1] This is an application by the Minister of Public Safety and Emergency Preparedness [the Minister] for judicial review of a decision by the Immigration Appeal Division [IAD] to reopen a case that had been heard and determined. Indeed, this case was already the subject of a judicial review. The application for judicial review is brought pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act].

[2] It is section 71 of the Act that permits an appeal to be reopened on one specific condition. It reads as follows:

Reopening appeal 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.	**Réouverture de l'appel** 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.

I. Facts

[3] Mr. Philistin is a citizen of Haiti who has been a permanent resident since 1994.

[4] Following a conviction for criminal harassment, an offence punishable by a maximum term of imprisonment of 10 years, he was found to be inadmissible under paragraph 36(1)(a) of the Act. A deportation order was issued on March 10, 2010.

[5] The IAD heard an appeal from the removal order on November 29, 2010. A request for an adjournment was denied at that time. Counsel for Mr. Philistin wanted a psychological assessment of the respondent to be conducted, and the request was denied because it was late and also because that evidence was irrelevant. The appeal was dismissed on January 14, 2011.

[6] An application for judicial review was dismissed on November 22, 2011 (2011 FC 1333). Two arguments were submitted to the Court: was the IAD's decision unreasonable and did the refusal to grant an adjournment constitute a breach of procedural fairness? Mr. Philistin failed on

both arguments, but only the one pertaining to the refusal to grant the adjournment is relevant in this case.

[7] At the hearing before the IAD, the respondent's mother testified that Mr. Philistin presented behavioural symptoms similar to those of his son, the witnesses' grandson, who had been diagnosed as suffering from dysphasia. The adjournment would have permitted a psychological assessment to be done. It appears that the IAD did not note any language problems on the part of Mr. Philistin.

[8] Moreover, counsel for Mr. Philistin, who signed the respondent's memorandum in our matter but did not argue the case before this Court, stated that she "never doubted the problems brought to light by the mother's testimony" (*Philistin v Canada (Public Safety and Emergency Preparedness*), 2011 FC 1333 [*Philistin*], at para 11).

[9] This lack of a psychological assessment will not permit the respondent to avail himself of the assistance of a designated representative. After the hearing before the IAD but prior to the hearing before our Court on the first judicial review in November 2011, a report was prepared by a psychologist who concluded that the respondent had poor comprehension skills similar to an intellectual disability.

[10] The need for the assistance of a designated representative was a new argument before the Court in November 2011. The Crown objected on the basis that it was a new argument, and the Court agreed. The Court noted that Mr. Philistin's counsel had not requested a designated

representative before the IAD. No allegation was made that he suffered from an intellectual disability that prevented him from appreciating the nature of the criminal acts he committed. Even though his counsel now argues that she noted the respondent's confusion at the hearing before the IAD, this was not mentioned before the IAD; at that point, she spoke only about the same speech disorder that affected Mr. Philistin's son. Therefore, the well-known rule that a judicial review can only deal with the matter that was before the administrative tribunal means that the new argument could not be heard.

[11] As a result, the argument regarding the refusal to grant an adjournment was rejected. The Court found that Mr. Philistin had been able to make representations on his appeal based on humanitarian and compassionate considerations. The Court concluded on this argument with the following sentence at the end of paragraph 15: "Moreover, the applicant's testimony at the hearing was clear and there was no evidence before me that his ability to communicate was compromised."

[12] A year later, on December 14, 2012, an application to reopen the file was presented. It seems that the one-year delay can be explained by the fact that Mr. Philistin had been unable to obtain a new psychological assessment until December 2012 because of a lack of financial resources. In any event, the report was obtained on December 12 and relied upon to have the appeal reopened.

II. Decision

[13] The application to reopen the appeal was the subject of a short decision on May 31, 2013. The decision under review is very brief. It refers to the report of the psychological assessment of

December 12, which had found a mild intellectual disability that the IAD described as [TRANSLATION] "making it difficult for him to appreciate the nature of the proceedings, the language used and the relevant concepts." The IAD also noted what can only be the [TRANSLATION] "testimony" of his counsel, who admitted that the nature of Mr. Philistin's mental condition was not known at the hearing before the IAD and that the IAD also had no reason to doubt the ability to appreciate. Finally, the IAD saw a new fact in the psychological assessment report that would justify the presence of a designated representative at the hearing of his appeal but did not explain why the presence of Mr. Philistin's counsel was not sufficient for this purpose.

[14] The IAD's analysis is also short. It noted that its ability to reopen an appeal is very limited because once a decision is rendered, it is *functus officio* and could only render a second decision if there had been a breach of the rules of natural justice. Without much explanation, it concluded that natural justice required that the appeal be reopened because a designated representative should have been provided to him given [TRANSLATION] "that the appellant was unable to appreciate the nature of the proceedings at his appeal hearing".

III. Arguments and standard of review

[15] The Minister offers two arguments in support of his application for judicial review:

1. the principles of *res judicata* and *stare decisis* should have prevented the IAD from reopening this case, which had been heard and determined by the IAD and confirmed by the Federal Court;
2. there was no breach of a principle of natural justice.

[16] The parties agree that the standard of review applicable to both issues is correctness. The Federal Court of Appeal decision in *Hillary v Canada (Citizenship and Immigration)*, 2011 FCA 51 [*Hillary*] appears to me to dispose of the issue as the parties propose.

[17] Obviously, the result is that the IAD decision does not benefit from the deference that other decisions are entitled to where the standard of review is reasonableness. As stated in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*], at paragraph 50:

> [50] …When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

IV. Analysis

[18] The Minister contends that the IAD erred because the issue in the application to reopen was already determined by the Federal Court in its 2011 decision. Thus, the Court already decided that the IAD did not breach the principles of natural justice: the issue is *res judicata* or *stare decisis*.

[19] The difference between *res judicata* and *stare decisis* seems to be that, in the case of *res judicata*, the parties must be the same while that is not the case for the doctrine of *stare decisis*. What is important is that the issues being raised are the same and that they "have already been answered by a higher court whose judgment has the authority of *res judicata* " (*Canada (Attorney General) v Confédération des syndicats nationaux*, 2014 SCC 49, para 25). Here, the

applicant submits that he can rely on *res judicata* since we are dealing with the same parties and in addition, of course, he argues that the same issue decided judicially and in a final manner is being relitigated (*Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44, [2001] 2 SCR 460).

[20] To dispose of this issue, it is not necessary to consider the three branches of the principle of *res judicata* (or estoppel). In my view, the matter is resolved when the issue that was determined is examined more closely. The Minister simply states that the Federal Court, in 2011, found that there had not been a breach of the principles of natural justice at that time and that, therefore, a natural justice issue cannot be raised now.

[21] With respect, I do not believe that the Federal Court decision dealt with the same issue. The alleged breach of natural justice was not the same as the one at issue here. In 2011, the Court declined to consider the argument that a designated representative should have been appointed. Indeed, the Crown explicitly asked the Court to do so. Moreover, the narrow question that the Court answered was to determine whether the refusal to grant an adjournment breached the principles of natural justice. The issue of the ability to appreciate the nature of the proceedings was not addressed. As the Court said at the end of paragraph 14 of the reasons for judgment: "Today the grounds should be limited to those specifically argued by the applicant to obtain a postponement of his appeal hearing before the IAD."

[22] It appears to me that it is inappropriate for the applicant to argue *res judicata* when he successfully objected to the new argument submitted on judicial review that a designated representative should have been appointed because of his alleged confusion. That was the issue

on the application to reopen the appeal, an issue that is different from the one the Court disposed of with finality on the previous judicial review.

[23] The issue of whether there was a breach of natural justice, as section 71 of the Act requires to permit an appeal to be reopened, seems more difficult to me.

[24] It is not particularly clear from the IAD's reasons what the principle of natural justice is that was allegedly breached. In his application to reopen, Mr. Philistin submits [TRANSLATION] "that a breach of natural justice resulted from the fact that the applicant did not benefit from the designation of a representative in the proceedings heard before the IAD" (para 43). The same type of argument was submitted on this judicial review. The IAD failed to articulate the principle of natural justice at issue. The only indication I could find is at paragraph 24 of the respondent's memorandum where he states that [TRANSLATION] "having the opportunity to 'put forward his rights and his arguments' is an essential component of the right to be heard."

[25] In my view, that must be what the IAD had in mind when it concluded that there had been a breach of a principle of natural justice. The Federal Court of Appeal also articulated the concept in *Hillary* (above):

> [34] … 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 able to participate effectively in the decision-making process, especially when facing a more powerful adversary, such as a government department.

[26] But the respondent was represented before the IAD. The judge of this Court, at the first judicial review, noted that "[i]t is also obvious that the applicant did have the opportunity to be

heard and to present his arguments. … Moreover, the applicant's testimony at the hearing was clear and there was no evidence before me that his ability to communicate was compromised (*Philistin*, above, para 15). I cannot find any reasons that could cause even a suspicion that Mr. Philistin did not have adequate representation. Therefore, I cannot see how the representation referred to in section 167 of the Act was not ensured. This section reads as follows:

Right to counsel 167. (1) A person who is the subject of proceedings before any Division of the Board and the Minister may, at their own expense, be represented by legal or other counsel.	**Conseil** 167. (1) L'intéressé qui fait l'objet de procédures devant une section de la Commission ainsi que le ministre peuvent se faire représenter, à leurs frais, par un conseiller juridique ou un autre conseil.
Representation (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.	**Représentation** (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.

[27] I am not suggesting that additional representation, apart from that of counsel, could not be appropriate in some cases. But again, it would be necessary to establish the need for it for this effective participation in the decision-making process that natural justice requires.

[28] But there is more. The test set out at subsection 167(2) of the Act provides for the designation of a representative only where the person is unable to appreciate the nature of the proceedings. As noted, the IAD did not articulate how the test was met. At best, it stated that [TRANSLATION] "the appellant suffers from a mild intellectual disability, making it difficult for him to appreciate the nature of the proceedings, the language used and the relevant concepts".

[29] I was unable to find the source of these findings in either of the two psychological assessments, in particular the second one, which the IAD relied on. The respondent is considered to be affected by a mild intellectual disability. The assessment states that [TRANSLATION] "[it] is quite easy to understand that for a person with a disability, with a marked deficiency in vocabulary and in understanding abstract language, *perfect* appreciation of legal proceedings remains obscure. It is difficult enough for a person who is better equipped than he really is." The conclusion of the report states [TRANSLATION] "The measures of intelligence and adaptive behaviours place Mr. Philistin at the level of mild intellectual disability, more pronounced again in the language sphere, while the perceptive sphere is slightly better". I could not find anywhere in the two reports the suggestion that the respondent was unable to appreciate the nature of the proceedings, a high standard. At best, he did not have a perfect appreciation of the legal proceedings. And who could blame him. Indeed, if he could not appreciate the nature of the proceedings, neither the member of the IAD nor the Federal Court judge nor even his counsel were able to detect it.

[30] The respondent is also faced with jurisprudence from this Court stating that the failure to observe a principle of natural justice comes from the IAD itself. Accordingly, not only does new evidence not give rise to a remedy under section 71 of the Act (*Nazifpour v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 35, [2007] 4 FCR 515 [*Nazifpour*]) but the failure to observe a principle of natural justice must come from the IAD itself, which will then want to correct the error (*Canada (Citizenship and Immigration) v Ishmael*, 2007 FC 212; *Canada (Citizenship and Immigration) v Kang*, 2009 FC 941; *Wilks v Canada Immigration and Refugee Board*, 2009 FC 306). This approach seems to flow naturally from the English version of

section 71, which speaks in terms of "may reopen an appeal if it is satisfied that it failed to observe a principle of natural justice". The failure to observe must be the IAD's.

[31] This reading of the section, which is clear in English, is indeed consistent with the rule that an administrative tribunal can rehear a matter where there has been a finding that the initial decision contained an error vitiating it, such as a case where the principles of natural justice were not observed (*Chandler v Alberta association of architects*, [1989] 2 SCR 848).

[32] As is now established, the common meaning between the versions of the texts that were adopted in both official languages must be ascertained. In my view, the English version is unequivocal and contains the common meaning. It is that version that prevails (*Schreiber v Canada (Attorney General)*, 2002 SCC 62, [2002] 3 SCR 269). If instead the conclusion was that neither of the two versions is ambiguous, the narrower version will generally be favoured (*R v Daoust*, 2004 SCC 6, [2004] 1 SCR 217). There again, the English version will prevail because it is the narrower one.

[33] Thus, in this case, the IAD's decision is deficient in two respects. First, in order to apply section 71 of the Act, the IAD would have had to find that it failed to observe a principle of natural justice. This was not done. The IAD even found specifically that it had not [TRANSLATION] "breached a principle of natural justice" in the decision where it reopened the appeal in the course of which no breach was committed. The other difficulty is the application of subsection 167(2) of the Act, which the IAD invoked in its decision. I cannot see how that subsection can be relied on in light of the available evidence.

[34] When looked at more closely, the respondent's argument is presented as an attempt to circumvent the reach of section 71 of the Act. This section eliminated the IAD's jurisdiction to reopen an appeal on the basis of new evidence (*Nazifpour*, above). Here, new evidence is being introduced, and a breach of a principle of natural justice is alleged. If the principle of natural justice is that the IAD did not designate a representative because the person was unable to appreciate the nature of the proceedings, I have attempted to show that this could not be the case here simply because the new evidence does not establish that the applicant was unable to appreciate the nature of the proceedings. In any event, one cannot understand merely from reading the IAD decision under review what representation was involved because the respondent was already represented by counsel whose role, *inter alia*, was to explain the nature of the proceedings to her client.

[35] If section 167 of the Act is excluded from the equation, the respondent's situation does not improve. There is no indication in the record that the IAD breached a rule of natural justice. As indicated above, the only attempt at articulation was that a breach of natural justice, without naming it or even describing it, resulted from the fact that no representative was designated, even though nobody had asked for this. No authority was provided, and the Court is not aware of any, that supports the proposition that the failure to designate a representative where the person is represented by counsel could constitute a breach of a principle of natural justice. Simply stating that there was a breach of a principle of natural justice is not sufficient. Again, it must be identified and demonstrated. Nothing of the kind was done in this case.

V. Conclusion

[36] Since the IAD decision must be reviewed on a correctness standard, no deference is owed. The Court concludes that the IAD decision issued on May 31, 2013, should be quashed. No failure to observe a principle of natural justice was established, which is required under section 71 of the Act, which was relied on to reopen the appeal. Moreover, the wording of section 71 requires that the IAD must have failed to observe a principle of natural justice in order for section 71 to be applied. The decision under review specifically denies that there was such a failure. If, as the IAD did, one must use subsection 167(2) of the Act in the hope of defining a breach of the principles of natural justice, this demonstration could not be supported by the evidence because it does not establish that the respondent did not appreciate the nature of the proceedings based solely on the psychological assessment report.

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JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review is allowed. The decision of the Immigration Appeal Division to reopen the appeal is set aside. The case is referred for judgment in accordance with this decision by a differently constituted panel of the Immigration Appeal Division. There is no serious question of general importance.

"Yvan Roy"
Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

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