

Federal Court



Cour fédérale

Date: 20160422

Docket: IMM-4745-15

Citation: 2016 FC 459

Ottawa, Ontario, April 22, 2016

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

OGUZHAN KORKMAZ

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The applicant failed to perfect his appeal to the Refugee Appeal Division of the Immigration and Refugee Board [RAD] within the time limits set out in the *Refugee Appeal Division Rules*, SOR/2012-257 [the RAD Rules]. He sought an extension of time which was refused. He submits that this decision is unreasonable and he asks that it be set aside and that his application for an extension of time be determined anew by the RAD.

Background

[2] The applicant sought refugee protection, claiming persecution in Turkey because of his Kurdish ethnicity, his Alevi identity, and his imputed political opinion. On June 4, 2015, the applicant's refugee claim was denied by the Refugee Protection Division of the Immigration and Refugee Board [RPD].

[3] Despite living in Edmonton, the applicant made his refugee claim in Toronto. He did so on the advice of his brother-in-law, and because there was no Turkish interpreter available in Edmonton. The applicant was assisted by an interpreter [the Interpreter] in Toronto, who had previously assisted his brother-in-law in filing his own refugee claim. The applicant lived in Toronto while his claim was being heard and then returned to Edmonton, where he awaited a decision.

[4] The decision was sent to the applicant by mail on June 8, 2015, and is deemed to have been received by him on June 15, 2015. The applicant in fact received the RPD's decision on June 18, 2015. At around this time, he was informed by his counsel that she could not continue to represent him on his appeal. She provided him with a list of six experienced immigration lawyers in Toronto and a copy of the CD of the RPD hearing.

[5] On June 24, 2015, the applicant flew to Toronto to meet with the Interpreter and to find new counsel. He was assisted in his search by the Interpreter, who attests to that fact and that his current counsel was retained on June 30, 2015, "after contacting several people." The Interpreter

also assisted the applicant in filing out the Notice of Appeal and an application for an extension of time as it was expected that one would be needed.

[6] The Notice of Appeal was filed on July 3, 2015. On July 14, 2015, the applicant's current counsel received his file from his former counsel. On July 16, 2015, the applicant filed an Application for an Extension of Time to File or Perfect an Appeal, requesting an extension to perfect his appeal by August 3, 2015. Upon receiving the application, the RAD informed counsel that a request for an extension must be accompanied by the applicant's entire RAD record, pursuant to Rule 6 of the RAD Rules. Nonetheless, the Board granted an extension until July 27, 2015.

[7] On August 8, 2015, current counsel received the RPD hearing transcripts. In an affidavit of counsel's "part-time legal assistant" it is attested that she received the CD on July 23, 2015, but due to the recent death of her father and additional time off work, she only completed the transcription on August 8, 2015.

[8] On August 11, 2015, counsel sent an affidavit for the Application Record, with attached exhibits, to the applicant, to be commissioned and returned. Unfortunately, when the documents were returned, counsel noticed that the exhibits had not been commissioned. With the Interpreter's assistance, the applicant communicated that he would not be able to have the exhibits commissioned and return them to his counsel until the following week. The applicant explained that he "faces various barriers in communication, transportation and with his work schedule that prohibit being able to find access a lawyer on an urgent basis." The applicant

stated that he is “willing and able to re-commission the exhibits and send them to the RAD as soon as reasonably practicable.”

[9] On August 20, 2015, the applicant filed a second Application for an Extension of Time to File or Perfect an Appeal, along with the complete RAD record. Because of the aforementioned problems with commissioning the exhibits, and because the RAD record was already considerably late, the exhibits were filed as part of the record, without being commissioned. The applicant requested 25 days from the previous deadline of July 27, 2015, to perfect his appeal.

[10] On September 29, 2015, the RAD denied the applicant’s application.

[11] Subsection 159.91(2) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, provides that if an appeal cannot be filed or perfected within the time limit set by the Regulations, the RAD “may, for reasons of fairness and natural justice, extend each of those time limits by the number of days that is necessary in the circumstances.”

[12] In considering whether to grant the applicant’s request for an extension, the RAD considered the four-part test set out by this Court in *Canada (Attorney General) v Pentney*, 2008 FC 96, [2008] 4 FCR 265 [*Pentney*] at para 38, of “(1) a continuing intention to bring the ... proceeding; (2) any prejudice to the parties opposite; (3) a reasonable explanation for the delay; and, (4) whether the application has merit.”

[13] The RAD went on to state:

These factors are not exhaustive, and other factors may be considered... All of the factors do not have to be met. The appropriate weight must be assigned to each factor in the context of a particular case. The four factors are being applied to determine whether fairness and natural justice in the circumstances require an extension of time for a particular number of days.

[14] Upon applying these factors to the applicant's case, the RAD concluded that he had met factors (1), (2), and (4) as he had a continuing intention to appeal, an arguable case, and there would be no prejudice to the respondent, if an extension was granted.

[15] However, the RAD found that the applicant had not met factor (3) as he did not have a reasonable explanation for his delay. In particular, the applicant did not have a reasonable explanation for the delay arising from his decision to file his appeal in Toronto, as he had his refugee claim, despite residing in Edmonton. The RAD held that:

The Immigration and Refugee Board (IRB) regularly holds hearings in Edmonton. There are Turkish interpreters working in Edmonton who support the Turkish claimants as well as experienced counsel. The RAD finds that the Appellant needlessly travelled and delayed his appeal resulting in a failure to comply with the timeframes provided for in the Regulations. His RAD appeal should have normally been decided by the Western region where the resources are available to meet the needs of Appellants in Alberta. The RAD finds that the Appellant has not provided a reasonable justification for the 25-day delay in perfecting the appeal. The RAD further finds that fairness and natural justice in the circumstances do not require an extension of time because adequate resources would have been available to the Appellant. If he had relied upon the resources available to him in Alberta, no extension of time would be necessary.

The Appellant has not satisfied the requirements for an extension of time. The application for extension of time is therefore dismissed.

Issue

[16] There is one issue in this application: Is the RAD's decision to refuse the applicant's request for an extension of time to perfect his appeal unreasonable?

[17] The applicant submits that the RAD's consideration of factor (3), whether he had a reasonable explanation for the delay, was "unreasonable, is not grounded on the evidence and does not appropriately consider the 'interests of justice' as required by the jurisprudence."

[18] In analyzing the submissions of the parties, I agree with the respondent that deference is owed to the RAD in making a decision involving its own process. I also agree with the submission of the applicant that because the refusal of the extension may put him at risk, a full and considered analysis of the request by the RAD is required.

A. *Decision not Based on the Evidence*

[19] The applicant submits that the RAD ignored evidence that the applicant's delay was caused by several factors, including, but not limited to, his decision to file his appeal in Toronto. He submits that it was therefore unreasonable for the RAD to find that "if [the applicant] had relied upon the resources available to him in Alberta, no extension of time would be necessary."

[20] It is clear from the RAD's summary of the facts that it was alive to the applicant's various explanations for his delay, including that he needed to retain a new lawyer, the delay in the transmission of his file to that lawyer, the delay in transcribing the recording of the RPD

hearing, and the delay in swearing the supporting affidavit. It was open to the RAD to conclude that the applicant's decision to file in Toronto was a primary source of delay such that, but for this decision, he would not have needed an extension.

[21] On my reading of the RAD's decision, its focus was not that the applicant would not have needed an extension had he filed in Edmonton. Rather, its focus was that the applicant had caused delay by filing in Toronto, and that this delay was not justified. In other words, the question is not 'Would there have been delay even if the applicant had filed in Edmonton?'. The proper question to ask is 'Were the delays caused by his filing in Toronto justified?'. It is the answer to the latter question that matters in this case.

[22] The RAD found that the delays resulting from filing in Toronto were not justified because the resources he required (a lawyer and a Turkish translator) were available in Edmonton, and he had no need to retain them in Toronto:

The Immigration and Refugee Board (IRB) regularly holds hearings in Edmonton. There are Turkish interpreters working in Edmonton who support the Turkish claimants as well as experienced counsel.

[23] There is no question that there are counsel in Edmonton who could have been retained by the applicant. The relevant consideration is the availability of an access to interpreters. The RAD's statement that there are Turkish interpreters in Edmonton is presumably based on the Member's personal knowledge (although she does not say so) because there is nothing in the record to support that finding. Importantly, there is evidence in the record that there are no such interpreters in Edmonton. The Interpreter in her affidavit attests that "there were no Turkish

interpreters available there.” It is unclear on what basis the Interpreter makes this statement and accordingly, one could assess this evidence as having little weight. Nonetheless, it has some weight and cannot be rejected out of hand. The RAD’s contrary finding that there are Turkish interpreters in Edmonton is reasonable only if it explains the evidence supporting its finding and the weight given it. This was not done.

[24] In the absence of any evidence that a Turkish interpreter was available in Edmonton, and in the presence of evidence to the contrary, the RAD’s decision is unreasonable.

[25] Moreover, in assessing the applicant’s decision to file his appeal in Toronto, the RAD ought to have considered his unique circumstances. He is unable to communicate in either English or French. The Interpreter had done more than assist the applicant in filling out the refugee claim forms and interpreting for him. She attests that: “I helped him to find a place to stay [in Toronto], and I assisted the Appellant to prepare all his BOC forms, to file his claim at CIC Etobicoke, and to find a lawyer for him.” This past relationship with this Interpreter, most particularly her assistance in retaining his initial lawyer, should have been considered by the RAD when examining whether it was reasonable for the applicant to again approach the Interpreter to retain a new lawyer and file his appeal in Toronto rather than in Edmonton.

B. *Right to Choose Counsel and Location of Hearing*

[26] The applicant submits that he had a right to choose his counsel and that the RAD unreasonably interfered with that right when it held that he should have selected from among the “experienced counsel” in Edmonton. The applicant also submits that there are no residence-

based restrictions on where a refugee claim may be filed or heard, and that the RAD unreasonably interfered with his decision to file his claim in Toronto when it held that he should have filed it in Edmonton.

[27] Subject to the comments above as to factors which ought to have weighed in the RAD's consideration of the applicant's decisions, I agree with the respondent that "[w]hile the Applicant is entitled to an interpreter, counsel of his choice, and is free to pursue a refugee claim anywhere in Canada, this does not permit him to ignore the prescribed timelines set out in the Regulations, with the hope that another extension would be allowed."

C. *Application of the Pentney Factors*

[28] In assessing the applicant's request for an extension, the RAD relied on the test set out in *Pentney*. This test was recently affirmed in the context of an application to the RAD in *Ekwoke v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1083, [2014] FCJ No 1190. The applicant does not take issue with the RAD's statement of the test, but with its application. He submits that, despite acknowledging that the *Pentney* factors are not conjunctive, the RAD failed to balance these factors against one another but, instead, regarded his failure to meet one of the factors as fatal. I agree.

[29] Although the RAD stated the correct test, it did not apply it correctly, or reasonably. In particular, the RAD appears to have regarded the applicant's failure to adequately explain his delay as fatal, because it provided no analysis or discussion of whether or how it was that this factor outweighed the other three factors, which favoured granting an extension. Absent such

analysis and discussion, it is impossible to ascertain how the RPD arrived at its conclusion, and the decision thus fails to meet the test of justification, transparency and intelligibility set out in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at para 47. For this reason alone, the RAD's decision must be set aside.

Conclusion

[30] The applicant's request for an extension of time to perfect his appeal must be reconsidered by the RAD in keeping with these reasons.

[31] No question was proposed for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the decision is set aside, the applicant's request for an extension of time to perfect his appeal to the RAD must be considered by a different Member, and no question is certified.

"Russel W. Zinn"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4745-15

STYLE OF CAUSE: OGUZHAN KORKMAZ v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

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