Federal Court Cour fédérale

Date: 20230620

Docket: IMM-8559-21

Citation: 2023 FC 861

[ENGLISH TRANSLATION]

Ottawa, Ontario, June 20, 2023

PRESENT: Mr. Justice Pentney

BETWEEN:

MARIUS IONUT STOICA

Applicant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

ORDER AND REASONS

I. Background

[1] This is a motion brought by the Minister of Public Safety and Emergency Preparedness [the respondent] for an order denying the request of Marius Ionut Stoica [the applicant] for an extension of time to apply for leave and for judicial review, and striking the application for leave and for judicial review.

[2] The key events in the history of this case are as follows. On July 15, 2011, a report under subsection 44(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA) [44(1) report] was prepared regarding the applicant, which concluded on reasonable grounds that the applicant was inadmissible on grounds of serious criminality within the meaning of paragraph 36(1)(a) of the IRPA.

[3] On August 16, 2011, the 44(1) report was referred to the Immigration Division [ID] for an admissibility hearing, in accordance with subsection 44(2) of the IRPA. On November 1, 2011, the ID made a removal order against the applicant, finding him to be inadmissible under paragraph 36(1)(a) of the IRPA.

[4] On November 1, 2011, the applicant appealed the decision of the ID. An appeal hearing before the Immigration Appeal Division [IAD] began in 2014, but there was insufficient time to complete it. The hearing was adjourned, and counsel for the applicant then withdrew the appeal. In March 2015, the applicant applied to reinstate the appeal. However, the application was rejected by the IAD on May 19, 2015.

[5] On November 23, 2021, the applicant made a request under paragraph 72(2)(c) of the IRPA for an extended time to file and serve an application for leave and for judicial review of the decision rendered on August 16, 2011, that referred his case to the ID for an admissibility hearing.

[6] On February 25, 2022, the respondent brought a motion in writing under Rule 369 to deny the applicant's request for an extension of time to apply for leave and for judicial review and to strike the application for leave and for judicial review. On March 7, 2022, the applicant responded to the motion.

II. Issues

[7] The sole issue before the Court is whether the respondent's motion should be granted. It should be noted that the motion has two parts: denying the request for an extension of time and striking the application for leave and for judicial review.

III. Legal framework

[8] The debate in this case is not about which principles apply, but about how they are applied.

[9] Regarding the request for an extension of time, the guiding principles were recently summarized in *Harless v Canada (Fisheries, Oceans and Coast Guard)*, 2022 FC 369:

> [52] The Federal Court of Appeal has repeatedly held that the overriding consideration that governs the granting of extensions of time under subsection 18.1(2) of the *Federal Courts Act* is that the interests of justice be served (*Larkman* at paras 62, 85 and 90; *Wenham v Canada (Attorney General)*, 2018 FCA 199 [*Wenham*] at paras 42, 47, and 48). As set out in *Larkman* at paragraph 61, four questions guide this inquiry:

> (1) Did the moving party demonstrate a continuing intention to pursue the application?
>
> (2) Is there some potential merit to the application?
>
> (3) Has the Crown been prejudiced from the delay?
>
> (4) Does the moving party have a reasonable explanation for the delay?

[10] It is not necessary that the answers to all four questions favour the applicant; what matters is that the extension of time be made in the interests of justice.

[11] The case law affirms that these legal principles apply to requests for an extension of time under paragraph 72(2)(c) of IRPA: *Singh v Canada (Citizenship and Immigration)*, 2021 FC 1445; *Kiflom v Canada (Citizenship and Immigration)*, 2020 FC 205.

[12] In the initial analysis of motions to strike, strict requirements must be met, making such motions an exceptional remedy. The determinative issue is whether, in the Court's opinion, the application for judicial review is doomed to fail.

[13] As stated in *Wenham v Canada (Attorney General)*, 2018 FCA 199 at paragraphs 33 and 34,

> [33] . . . Taking the facts pleaded as true, the Court examines whether the application:
>
> > . . . is "so clearly improper as to be bereft of any possibility of success": *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, 1994 CanLII 3529 (FCA), [1995] 1 F.C. 588 at page 600 (C.A.). There

> must be a "show stopper" or a "knockout punch"—an obvious, fatal flaw striking at the root of this Court's power to entertain the application: *Rahman v. Public Service Labour Relations Board*, 2013 FCA 117 at paragraph 7; *Donaldson v. Western Grain Storage By-Products*, 2012 FCA 286 at paragraph 6; *cf. Hunt v. Carey Canada Inc.*, 1990 CanLII 90 (SCC), [1990] 2 S.C.R. 959.
>
> (*Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, [2014] 2 F.C.R. 557 at para. 47.)
>
> [34] To determine whether an application for judicial review discloses a cause of action, the Court must first read the notice of application to get at its "real essence" and "essential character" by "reading it holistically and practically without fastening onto matters of form": *JP Morgan* at paras. 49-50.

(see also *Bernard v Canada (Attorney General)*, 2019 FCA 144 at para 33).

IV. Parties' positions

[14] The respondent submits that the criteria for both parts are satisfied. The respondent states that the applicant is challenging a moot decision that he has known about for more than 10 years. The decision referring the 44(1) report became moot because the applicant decided to appear at the hearings before the ID and then the IAD. Therefore, he cannot ignore the history of the case and attempt to challenge the decision of August 16, 2011, referring the 44(1) report for an admissibility hearing.

[15] As the respondent noted, however, the decision referring the report is part of a continuum:

- The applicant did not challenge the 44(1) report.

- When the applicant was informed that the 44(1) report would be referred to the ID for an admissibility hearing under subsection 44(2), he did not challenge the decision.

- Instead, he appeared before the ID with his counsel and admitted that the facts giving rise to the 44(1) report were true.

- When the ID made a removal order against him, the applicant did not challenge it before the Federal Court.

- He filed an appeal with the IAD but later withdrew it. He then tried to reinstate the appeal but was unsuccessful.

[16] The respondent states that the applicant meets none of the conditions required to obtain an extension of time. The respondent submits the following:

- The applicant never demonstrated an intention to pursue his application to challenge the decision of August 16, 2011; on the contrary, he submitted to the jurisdiction of the ID and appealed that decision to the IAD.

- His application is without merit because the decision to refer the 44(1) report became moot when the ID made the removal order. The application amounts to a collateral attack on the removal order.

- There is no reasonable justification for the delay; the applicant never demonstrated an intention to pursue his application; the only justification provided by the applicant for the delay relies on his argument that the time limit should be calculated from the point at which he was made aware of his right to challenge the order; however, ignorance of the law does not justify a request for an extension of time.

- The respondent will be prejudiced from the delay: [TRANSLATION] "Simply coming back 10 years later to challenge a moot decision will cause prejudice to the respondent."

[17] Meanwhile, the applicant submits that his request for an extension should be allowed because he acted promptly, as soon as he was made aware that he could challenge the referral.

[18] The applicant states that he cannot be criticized for having appeared at a hearing before the ID, since this was necessary under the IRPA. Moreover, he points out that the ID's role was limited to determining whether the 44(1) report was well founded and not whether the Minister's delegate acted correctly in referring the report rather than issuing the applicant a warning letter.

[19] Regarding the appeal to the IAD, the applicant submits that the IAD had jurisdiction to review the decision of the ID but not the decision of the Minister's delegate. In his memorandum, the applicant claims that the IAD did not render a decision on the merits because it had rejected his application to reinstate his appeal. The applicant therefore submits that he is challenging this application for the first time before this Court. He states that, since the ID and IAD had no jurisdiction to rule on the decision of the Minister's delegate not to issue him a warning letter, his conduct should be examined from the point at which he was first made aware that he could challenge that decision.

[20] The applicant also notes that consideration must be given to the fact that the Minister's delegate was supposed to inform him of his right to challenge the referral before the Federal Court, but the delegate failed to do so. Lastly, he states that he will be prejudiced if the Court refuses to consider the merits of his application for leave and for judicial review. In effect, he is claiming that the impugned decision did not become moot because the effects of the removal order continue to apply to him.

V. Analysis

[21] Given the circumstances of this case, I am of the opinion that the respondent's motion should be granted. The applicant has failed to meet the criteria for an extension of time, and it is not in the interests of justice for the proceedings to continue.

[22] I would emphasize from the outset that the respondent's motion, in particular the motion to strike, is an exceptional measure. This is especially true in the context of an application for leave under the IRPA; such applications should normally be dealt with in the context of an application for leave and for judicial review under subsection 72(1) of the IRPA. Nevertheless, the Court considers that it is in the interests of justice to deal with the issue before it now rather than deferring it to the leave stage.

[23] The applicant's position consists of three key points: that his conduct should be analyzed from the point at which he was made aware that he could challenge the decision of the Minister's delegate; that it is in the interests of justice to grant the extension, since the proceedings before the ID and the IAD did not deal with the substance of his challenge of the decision of the Minister's delegate; and that that decision did not become moot because the effects of the removal order continue to apply to him.

[24] Applying the criteria specific to the procedure for extensions of time, I agree that the following elements are determinative.

[25] I am not persuaded that the delay should be assessed from the point at which the applicant was made aware that he could challenge the decision of the Minister's delegate. Under paragraph 72(2)(b) of the IRPA, the applicable time limit begins "after the day on which the applicant is notified of or otherwise becomes aware of" the impugned decision. Moreover, the courts have consistently held that ignorance of the law is not a justification for extensions of

time: *Yee Tam v Canada (Transport)*, 2016 FC 105 at para 16, and the decisions discussed therein.

[26] The applicant did not demonstrate a continuing intention to pursue the application. On the contrary, he appeared at the hearing before the ID and then appealed to the IAD. He was assisted by counsel at each stage.

[27] Moreover, there is no reasonable explanation for the delay. The continuing impact of the removal order is the consequence of the applicant's decisions, starting with the crimes that rendered him inadmissible, followed by his decision not to challenge the decision of August 16, 2011, and then by the withdrawal of his appeal before the IAD. There is no evidence in the record to justify the 10-year delay.

[28] Finally, the applicant failed to demonstrate the merits of his application. The officer's decision to refer the 44(1) report for an admissibility hearing is discretionary and, even though the applicant believes instead that his case should merely be the subject of a "warning letter", this in itself does not suggest that the decision is unreasonable.

[29] I accept the respondent's argument that, in the absence of evidence to the contrary, it can be presumed that the respondent will be prejudiced from the fact that 10 years have elapsed since the decision that the applicant is challenging. I am of the opinion that the respondent would be prejudiced if he had to devote the resources necessary to gather the evidence required to defend the officer's decision to refer the report.

[30] Ultimately, the Court must step back and consider whether it is in the interests of justice to grant the request for an extension of time or whether, on the contrary, the circumstances warrant striking the application for judicial review. As the Federal Court of Appeal noted in *Canada v Berhad*, 2005 FCA 267 at paragraph 60, statutory time limits reflect an important public interest:

> The importance of that public interest is reflected in the relatively short time limits for the commencement of challenges to administrative decisions—within 30 days from the date on which the decision is communicated, or such further time as the Court may allow on a motion for an extension of time. That time limit is not whimsical. It exists in the public interest, in order to bring finality to administrative decisions so as to ensure their effective implementation without delay and to provide security to those who comply with the decision or enforce compliance with it, often at considerable expense.

[31] In this case, 10 years have elapsed since the decision that the applicant wishes to challenge, and the applicant, with his counsel, has since been involved in proceedings before the ID and the IAD. He never demonstrated an intention to challenge the decision of August 16, 2011, nor did he provide a reasonable justification for the delay in challenging the decision. There is no other exceptional factor that would justify granting an extension of time in this case.

[32] For all these reasons, the applicant's request is granted. The request for an extension of time is denied, and the motion to strike the application for leave and for judicial review is granted.

[33] Without costs.

JUDGMENT in IMM-8559-21

THIS COURT'S JUDGMENT is as follows:

1. The respondent's motion is granted.

2. The applicant's request for an extension of time is denied.

3. The motion to strike the application for leave and for judicial review is granted.

4. Without costs.

"William F. Pentney"
Judge

Certified true translation
Vincent Mar

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-8559-21
STYLE OF CAUSE:	MARIUS IONUT STOICA v MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	IN WRITING
REASONS FOR ORDER AND ORDER:	PENTNEY J
DATED:	JUNE 20, 2023

SOLICITORS OF RECORD:

Said Le Ber-Assiani Montréal, Quebec	FOR THE APPLICANT MARIUS IONUT STOICA
Marc Gauthier Montréal, Quebec	FOR THE RESPONDENT MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS