

Federal Court



Cour fédérale

**Date: 20241029**

**Docket: IMM-10528-23**

**Citation: 2024 FC 1714**

**Ottawa, Ontario, October 29, 2024**

**PRESENT: Mr. Justice Norris**

**BETWEEN:**

**J ALFREDO NAVA AGUILAR**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

[1] The applicant seeks judicial review of a decision of the Refugee Appeal Division (RAD) of the Immigration and Refugee Board of Canada dismissing his appeal of the decision of the Refugee Protection Division rejecting his application for refugee protection. For the reasons that follow, this application must be dismissed because it is not properly before the Court.

[2] The RAD decision is dated July 14, 2023. Paragraph 72(1)(b) of the *Immigration and Refugee Protection Act, SC 2001, c 27 (IRPA)* provides that, for matters under that Act arising in Canada (which is the case here), the notice of application for leave and for judicial review must be filed with the Registry of the Federal Court within 15 days “after the day on which the applicant is notified of or otherwise becomes aware of the matter.” The applicant’s notice of application for leave and for judicial review was filed on August 21, 2023. It states that the decision in issue was “communicated to the applicant on August 6, 2023.” Thus, on its face, the application was commenced within time.

[3] The affidavit in support of the leave application, which was sworn by an assistant to counsel for the applicant, does not address the question of when the RAD decision was communicated to the applicant.

[4] In its memorandum of argument at the leave stage (filed on October 17, 2023), the respondent pointed out that the statement of service of the RAD decision says that on July 18, 2023, the RAD sent a copy of the decision to the applicant by regular mail and to the applicant’s counsel of record (not Ms. Fung) through the My Case portal (a form of electronic service). (The respondent filed a copy of the statement of service as an exhibit to an affidavit sworn by a paralegal with the Ontario Regional Office of the Department of Justice on October 17, 2023.) The respondent submitted that, given the date the applicant’s counsel was notified of the RAD’s decision, the application for leave and for judicial review had been commenced late and required an extension of time, which the applicant had not requested. The respondent also submitted that,

in any event, leave should be refused because the applicant had not raised any fairly arguable issues.

[5] The applicant did not file a reply or otherwise attempt to address the respondent's submission that the application had been commenced late.

[6] Leave to proceed with the application for judicial review was granted on May 29, 2024. The order granting leave does not address the question of whether the application had been commenced out of time.

[7] The applicant did not file a further affidavit or a further memorandum of argument.

[8] The respondent filed a further memorandum of argument on July 31, 2024. The respondent reiterated the objection that the notice of application for leave was filed out of time and no extension of time had been sought or granted. As at the leave stage, the applicant did not respond in any way to this objection.

[9] The hearing was originally scheduled for August 15, 2024, but was re-scheduled at the respondent's request (with the consent of the applicant) to October 28, 2024.

[10] At the outset of the hearing, I raised the issue of whether the application was properly before the Court. After hearing from the parties on this issue, I concluded that, for reasons to

follow, the application must be dismissed because it was filed out of time. In view of this conclusion, I declined to hear from the parties on the merits of the application.

[11] As noted above, for a matter arising in Canada, the notice of application for leave and for judicial review must be filed within 15 days after the day on which the applicant is notified of or otherwise becomes aware of the matter. Paragraph 72(c) of the *IRPA* provides that a judge of the Court “may, for special reasons, allow an extended time for filing and serving the application or notice.” Subsection 6(1) of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, states that a request to extend the time for filing and serving an application for leave shall be made in the application for leave. Subsection 6(2) of these *Rules* states that a request for an extension of time “shall be determined at the same time, and on the same materials, as the application for leave.”

[12] Occasionally, despite subsection 6(2) of the *Rules*, orders granting leave to proceed with applications that include a request for an extension of time do not expressly address that request. When this happens, judges before whom the application comes for a hearing have dealt with the matter in either of two ways. Sometimes they will be satisfied that an extension of time is implicit in the order granting leave (while also stating that, in the event that they are mistaken in this regard, an extension of time would be granted *nunc pro tunc*): see, for example, *Ogiemwonyi v Canada (Citizenship and Immigration)*, 2021 FC 346 at para 14; *Obasuyi v Canada (Citizenship and Immigration)*, 2022 FC 508 at para 21; and *Chuvashov v Canada (Citizenship and Immigration)*, 2022 FC 1730 at para 6. Other times, where there are good reasons to think that the leave judge overlooked the request for an extension of time, the judge will engage in a

full analysis of the factors identified in *Canada (Attorney General) v Hennelly*, 1999 CanLII 8190, 244 NR 399 (FCA), to determine whether to grant the extension of time, notwithstanding the order granting leave: see, for example, *Pingault v Canada (Citizenship and Immigration)*, 2021 FC 1044 at paras 14-23. In all these cases, the applicants had sought an extension of time at the outset.

[13] That is not the case here, however. As noted above, the notice of application states that the RAD decision was communicated to the applicant on August 6, 2023. If this is correct, the application was filed within time and there was no need to include an extension of time in the notice. This means, however, that since an extension of time was not requested, the order granting leave cannot be taken to have implicitly granted an extension of time.

[14] The respondent has called the correctness of the statement that the decision was communicated to the applicant on August 6, 2023, into question by pointing to the RAD's statement of service, which indicates that the decision was communicated to the applicant's former counsel on July 18, 2023. The respondent submits that, since a client may be presumed to have been notified of a decision when their counsel was (*Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 at paras 66 and 69), it should be presumed that the decision was communicated to the applicant on July 18, 2023, as well. If this is the case, the application was commenced late and required an extension of time.

[15] The date on which the RAD's decision was communicated to the applicant is a question of fact. When this date is a matter of dispute, as is the case here, it must be established by

evidence. The respondent has provided evidence that the decision was communicated to the applicant's former counsel (and, presumably, to the applicant as well) on July 18, 2023, and not August 6, 2023, as stated in the notice of application. The applicant has not provided any evidence to contradict the respondent's evidence; indeed, despite having had several opportunities to do so over the last year, he did not respond in any way to the concern raised by the respondent that the application had been commenced out of time. At the hearing of this application, counsel for the applicant simply maintained the position that the statement in the notice of application that the decision was communicated to the applicant on August 6, 2023, is correct. That statement, however, is not evidence of anything.

[16] On the basis of the evidence before me, I find that the RAD communicated the decision to the applicant's former counsel on July 18, 2023. In the absence of any evidence to the contrary or an allegation of ineffective assistance on the part of former counsel, I find that the decision was also communicated to the applicant on that date. The time for commencing this application for judicial review therefore began to run on July 18, 2023. This means that, by August 21, 2023 (the date the notice was filed), the applicant was out of time and required an extension of time to commence the application.

[17] The applicant has never sought or been granted an extension of time. Even though the extension that would be required appears to be relatively short, the Court cannot ignore the requirements of the law. In the absence of an order extending the time to commence the application for judicial review, this application is not properly before the Court. For this reason alone, it must be dismissed.

**JUDGMENT IN IMM-10528-23**

**THIS COURT'S JUDGMENT is that**

1. The application for judicial review is dismissed.
2. There is no question for certification under paragraph 74(d) of the *IRPA*.

“John Norris”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-10528-23

**STYLE OF CAUSE:** J ALFREDO NAVA AGUILAR v THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** OCTOBER 28, 2024

**JUDGMENT AND REASONS:** NORRIS J.

**DATED:** OCTOBER 29, 2024

**APPEARANCES:**

Stephanie K. Fung FOR THE APPLICANT

Nadine Silverman FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

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