Date: 20080521

Docket: IMM-4221-07

Citation: 2008 FC 603

BETWEEN:

Qianhui DENG
Administrator on behalf of the
Estate of Shiming Deng (the deceased)

Applicant

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION and
THE MINISTER OF PUBLIC SAFETY
AND EMERGENCY PREPAREDNESS

Respondents

REASONS FOR ORDER

Pinard J.

[1] This is an application for judicial review of the decision made on October 26, 2005 to refer Shiming Deng ("Mr. Deng") to an admissibility hearing under subsection 44(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act"), and to confiscate his passport.

[2] This application for judicial review is brought by Qianhui Deng, the father of Mr. Deng and Administrator on behalf of his Estate (the "applicant").

[3] Mr. Deng came to Canada from China in 1999. He made a refugee claim based on his association with the Falun Gong, which the Field Operation Support System (FOSS) notes indicate was accepted by the Refugee Protection Division on January 31, 2002. Mr. Deng then became a permanent resident of Canada after being sponsored by his wife. The couple has since divorced.

[4] On June 3, 2004, a FOSS entry was created relating to a letter Mr. Deng sent to immigration officials, which stated that he thought he was in the Fraser Correctional Centre, and that he had made a false refugee claim.

[5] On August 3, 2004, Mr. Deng was convicted of aggravated assault under subsection 268(2) of the *Criminal Code*, R.S.C. 1985, c. C-46, an offence punishable by a maximum term of imprisonment of fourteen years. According to the Certificate of Conviction, Mr. Deng's sentence included a three year probation order with the condition that he "take reasonable steps to maintain yourself in a condition that your schizophrenia will not likely cause you to conduct yourself in a manner dangerous to yourself or anyone else and not likely you will commit further offences."

[6] Mr. Deng went to China in November 2004, and returned to Canada in January 2005. Although the port of entry officer noted that Mr. Deng had been convicted of aggravated assault, no further action was taken.

[7] Mr. Deng returned to China shortly thereafter, and came back to Canada on October 26, 2005. The port of entry officer, Kevin Boothroyd ("Mr. Boothroyd"), questioned Mr. Deng concerning his status in Canada, his refugee claim, and his conviction. Concerning his refugee claim, Mr. Deng stated that he had exaggerated his fear of returning to China as he wanted to remain in Canada. Mr. Boothroyd also asked Mr. Deng about the letter he had sent to Canadian immigration officials while he was in detention before his trial:

> Mr. Boothroyd: During that time did you send a letter to Canada immigration regarding your refugee claim?
>
> Mr. Deng: I think so, but I am not very sure, because during that four month period, I was really depressed at that time, honestly, for three months I was put in the mental centre, they said that had to wait for an assessment from a doctor about my physical condition.

Based on the information he had obtained, Mr. Boothroyd made a report to file:

> Subject arrived at VIA on 26OCT2005 and presented a PR card. He made a refugee claim and obtained refugee status, then became a PR when sponsored by his (then) spouse. He was convicted of aggravated assault in 2004 in Vancouver and he has admitted that the substance of his refugee claim is essentially a fabrication. He was reported for 36(1)(a) and convoked to an admissibility hearing. He will also be convoked to a hearing to have his CR status vacated. The subject then stated that he wishes to withdraw his refugee and PR status and return to China. ENF7.10 does not permit the voluntary relinquishment of PR status in these circumstances. The subject has been informed that a hearing will be convoked as soon as possible. He has been informed that if he wishes to leave Canada we will not stop him if he comes to this office with a ticket to depart to China. His passport has been sent to PREC.

[8] Although the report to file is dated October 26, 2005, it also notes the fact that Mr. Deng died on November 22, 2005.

[9] The matter was immediately referred to Gurjit Parhar ("Mr. Parhar"), who describes himself in a declaration included in the Certified Tribunal Record, as a Minister's Delegate employed by the Canada Border Services Agency (CBSA). The respondent has since admitted that Mr. Parhar did not have this delegated authority. Mr. Parhar reviewed Mr. Boothroyd's report, and, after interviewing Mr. Deng, concluded that he would convoke Mr. Deng to a hearing.

[10] A hearing was held by the Immigration Division of the Immigration and Refugee Board (the "ID") on November 14, 2005. However, Mr. Deng was not represented by counsel, and the ID adjourned the matter for one week.

[11] On November 22, 2005, a second hearing was held, at which Mr. Deng was still unrepresented by counsel. The ID concluded that the applicant was inadmissible under paragraph 36(1)(*a*) of the Act, and issued a deportation order against Mr. Deng. Mr. Deng committed suicide that same day.

[12] The applicant in this case affirms that he only heard about his son's death on December 22, 2005. On January 18, 2007, the applicant and his wife came to Canada to find out more about the events that had occurred shortly before Mr. Deng's death. The application for judicial review was filed on October 12, 2007.

[13] An action, in T-2041-07, is stayed pending the disposition of this application.

[14] The respondent has noted that the proper respondent to this application is the Minister of Public Safety and Emergency Preparedness, which became responsible for the relevant portions of the public service on April 5, 2005. I agree.

[15] The respondent raised several preliminary issues in the written submissions contained in his Motion Record, one of them being the necessity to deal with the applicant's request for an extension of time for the filing of this application for judicial review. At the hearing before me, counsel for the parties were heard on this specific preliminary issue only, as its disposition can be dispositive of the whole matter. It was understood that if the requested extension of time is granted, another hearing would be held to deal with the other issues.

[16] Turning now to the applicant's request for an extension of time, I agree with the respondent that the fact that leave to apply for judicial review has been granted in this case is not determinative of the issue of an extension of time as the leave order is silent on that issue. Indeed, in *Deepak Nayyar v. The Minister of Citizenship and Immigration*, 2007 FC 199, my colleague Mr. Justice Frederick E. Gibson stated the following:

> [6] In *Khalife v. Canada (Minister of Citizenship and Immigration)[1]*, my colleague Justice Mosley dealt with the issue of extension of time to file in paragraphs 12 to 16 of his reasons. He wrote:
>
> But whether the applicant was aware of the decision and made a timely decision to seek judicial review was now moot, counsel argued, as a judge of this Court had granted leave for the application for judicial review to be heard. While the order granting leave is silent on the question of delay, the applicant submits that the court hearing the application should assume that the judge who granted leave also granted an extension of time for

the application to be filed, pursuant to paragraph 72(2)(*c*) of the Act, as that is what is required by the rules.

Subsection 6(2)...of the *Federal Court Immigration and Refugee Protection Rules*...(The Rules) provides 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. Moreover, the applicant submits, the respondent's memorandum of fact and law submitted in response to the leave application, had expressly objected to the late filing. The judge granting leave must be presumed to have directed his or her mind to that objection and decided not to accept it, or so it is argued.

While this argument is inventive, I cannot agree that the question is moot in this case. Subsection 6(1)...of the Rules requires that a request for an extension of time shall be made in the application for leave in accordance with Form IR-1 set out in the Schedule...to the Rules. No such request was made by the applicant in his application for leave. In my view, even if leave has been granted, delay in bringing the application remains a live issue to be dealt with by the judge hearing the matter and may be dispositive of the application. There will be circumstances in which a decision as to whether an extension should be granted can only be determined at a hearing. The limited amount of time available to a judge considering whether to grant or deny leave does not permit a thorough examination of the reasons why an extension may be justified. I am not prepared to conclude that silence on the matter in the leave order should be taken as acquiescence to an extension, particularly where the applicant has not made the request in his application.

In any event, the Court retains the discretion throughout the consideration of an application to grant an extension of time where it deems it necessary in order to do justice between the parties:... . In the particular circumstances of this case, I do not consider that it would do justice to the application to dispose of it without consideration of the merits. Accordingly, I will grant the extension the applicant should have requested and treat the application as having been made within the time limit.

[citations omitted, emphasis added]

[7] In this matter, a request for an extension of time to file was included in the application for leave and judicial review. It was not dealt with in the order granting leave. I adopt Justice Mosley's

> conclusion that this Court retains discretion throughout the consideration of an application for judicial review to grant an extension of time where it deems it necessary in order to do justice between the parties. Like Justice Mosley, I am satisfied that, in the particular circumstances of this case, it would not do justice to the application to dispose of it without consideration on the merits. Once again like Justice Mosley, I will grant an extension of time to file to the date of actual filing. Neither counsel before me took exception to this course of action.

[17] In order to obtain an extension for time, an applicant must meet four criteria:

(a) the applicant must have demonstrated a continuing intention to pursue the application;
(b) the application must have some merit;
(c) there must be a reasonable explanation for the delay; and
(d) the extension of time must not cause prejudice to the respondent.

[18] In the case at bar, the decision in question was made on October 26, 2005. According to paragraph 72(2)(*b*) of the Act, Mr. Deng had fifteen days to file an application for judicial review. There is no evidence that Mr. Deng ever had any intention of doing so. To the contrary, he appeared at two ID hearings, on November 14 and 22, 2005, the transcripts of which reveal that Mr. Deng never raised any issue with regard to the validity of the decisions leading up to the ID hearings.

[19] Furthermore, assuming, without deciding, that the application for judicial review has some merit, the applicant has failed to provide a reasonable explanation for the delay. The applicant has tried to explain the delay in bringing this application by arguing that an application for judicial review would not have been appropriate until the applicant had received more details about Mr. Deng's immigration file, on October 11, 2007, pursuant to an Access to Information request. However, the evidence demonstrates that the applicant learned of Mr. Deng's death on

December 22, 2005, but did not begin investigating Mr. Deng's immigration situation until early 2007. In my opinion, although the applicant's circumstances warrant sympathy, the applicant has not provided a reasonable explanation for a two year delay, when the Act requires that an application be filed within fifteen days.

[20] Finally, as the applicant has pointed out, the key facts in this application are essentially uncontested, with the question being primarily about whether the Officers lived up to their duty in taking the actions that they did. Therefore, I do not find the respondent's submission concerning the difficulty of defending such an application to be convincing.

[21] More convincing, however, is the respondent's submission concerning the finality of administrative decisions. In this case, there is a delay of two years between the Officers' decisions and the filing of the application. In my opinion, the importance of the finality of administrative decisions is not outweighed in the circumstances of this case. (On the importance of the finality of administrative decisions, see *e.g. Berhad v. Canada*, 2005 FCA 267, at paragraph 60, [2005] F.C.J. No. 1302 (C.A.) (QL).)

[22] For all the above reasons, after consideration of the above relevant factors, I conclude that it would not be appropriate to grant the requested extension of time in the particular circumstances of this case. Accordingly, given that this conclusion is, in itself, dispositive of the whole matter, the application for judicial review must be dismissed.

[23] The applicant has proposed several questions for certification, all of which are essentially related to the same question, namely whether this Court must infer that a Judge granted an extension of time to file a leave application if the Judge granted leave, even though the Order granting leave was silent on the question of an extension of time.

[24] As pointed out by counsel for the respondent, this Court has already considered this question in several recent decisions and has held that silence on the matter of an extension of time in a leave order should not be taken as acquiescence to an extension and that even if leave has been granted, delay in bringing an application remains a live issue to be dealt with by the judge hearing the judicial review application and may be dispositive of the application (see *Khalife v. Canada (M.C.I.)*, 2006 FC 221, [2006] 4 F.C.R. 437, *Nayyar v. Minister of Citizenship and Immigration*, 2007 FC 199, [2007] F.C.J. No. 342 (T.D.) (QL), and *Minister of Human Resources Development v. Eason*, 2005 FC 1698, 286 F.T.R. 14).

[25] The applicant has not provided any decisions that conflict with this Court's decisions in *Khalife* and *Nayyar*, above. The decision in *Mutti v. Minister of Citizenship and Immigration*, 2006 FC 97, [2006] F.C.J. No. 143 (T.D.) (QL), referred to by the applicant, did not address the issue that is currently before this Court. In that case, the Court explicitly considered in the context of a stay application whether it should grant the applicant an extension of time to file an application for leave and denied the extension of time.

[26] Consequently, the questions proposed for certification by the applicant do not raise a question of general importance and there will be no certification.

"Yvon Pinard"
Judge

Ottawa, Ontario
May 21, 2008

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-4221-07
STYLE OF CAUSE:	Qianhui DENG, Administrator on behalf of the Estate of Shiming Deng (the deceased) v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
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