Federal Court  Cour fédérale

Date: 20100629

Docket: IMM-6202-09

Citation: 2010 FC 705

Ottawa, Ontario, June 29, 2010

PRESENT: The Honourable Mr. Justice Mainville

BETWEEN:

NORA MARINA GUEVARA VILLATORO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] This is an application for judicial review of a decision by the Immigration Appeal Division of the Immigration and Refugee Board, bearing the number MA8-01194, and dated June 15, 2009; the application was filed under sections 72 and following of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), by Nora Marina Guevara Villatoro (the applicant). This judgment is issued by the undersigned as *ex officio* judge of the Federal Court as provided for in subsection 5.1(4) of the *Federal Courts Act*, R.S.C. (1985), c. F-7.

[2] The application for judicial review will be dismissed for non-observance of time limits.

Facts and proceedings

[3] The applicant, a citizen of Honduras, was born on April 24, 1964. She has several children from three different relationships. From her first relationship, she has an adult son who lives in Montréal. From her second relationship, she has seven children who live with their paternal grandmother in Honduras. And from her third relationship, she has three minor children, all of whom were born in Canada and are Canadian citizens.

[4] The applicant arrived in Canada in 1995 with her third spouse. Her spouse's claim for refugee protection was accepted, and as a result of this she was able to obtain permanent resident status in Canada.

[5] However, she left Canada in 2001 in order to stay in the United States for a few years so that, according to her, she could undergo treatment for cancer and join her spouse, who had found work there. However, the conjugal relationship with her third spouse began to deteriorate and, in 2003, the applicant decided to return to Honduras via Mexico.

[6] In 2006, the applicant applied for travel documents from the Canadian embassy in Guatemala, which also served Honduras at the time. This application was refused and the refusal was not contested.

[7] The applicant then resided in Mexico from September 2006 until June 2007 and tried unsuccessfully to get into the United States. She returned to Honduras in June 2007.

[8] On December 19, 2007, she went to the Canadian embassy in Honduras in order to submit a new application for travel documents as a permanent resident of Canada. This application was again refused in a letter dated January 14, 2008, chiefly on the ground that the applicant had not met the residency obligation set out in section 28 of the Act; more specifically, she had not been physically present in Canada for at least 730 days during the five-year period immediately before the examination. She was therefore refused travel documents once again pursuant to subsection 31(3) of the Act.

[9] On January 25, 2008, the applicant brought an appeal before the Immigration Appeal Division of the Immigration and Refugee Board, as she was entitled to do under subsection 64(4) of the Act. This appeal was dismissed in a decision dated June 15, 2009, the reasons for which were sent on July 13, 2009. On December 7, 2009 the applicant filed an application for leave and judicial review of that decision.

[10] It should be noted that the applicant entered Canada in December 2009 and has been living here ever since. The circumstances under which she was able to enter Canada have not been made clear to the Court. It should also be noted that a proceeding to revoke status as a refugee or a person in need of protection has recently been undertaken against her, although no formal decision has been made in that regard.

The Immigration Appeal Division's decision

[11] The hearing of the appeal brought by the applicant was held before the Immigration Appeal Division on June 15, 2009. The applicant was represented by counsel and participated via teleconference with the help of an interpreter.

[12] The applicant is not challenging the legality of the decision that found she had not met the residency obligation imposed under section 28 of the Act. Humanitarian and compassionate considerations constitute the sole ground in her appeal; thus, she is exercising the recourse available to her under paragraph 67(1)(*c*) of the Act.

[13] The Immigration Appeal Division found the applicant's testimony to be ''more or less credible'' (at paragraph 4 of the decision). It found that the applicant's degree of establishment in Canada was low, that she had left Canada many years ago, and that the best interests of the children called for the presence of their parents and their extended family in Honduras. It gave little weight to the applicant's allegations about a recent attempted kidnapping of her children.

The request for an extension of time and the objection with regard to the late filing of the application

[14] On December 7, 2009, the applicant filed an application for leave and judicial review of that decision on several grounds, including the failure to adhere to the rules of natural justice and procedural fairness, and errors in fact and law.

[15] In that application, the applicant requested for an extension of time under paragraph 72(2)(*c*) of the Act. The grounds she raised with regard to this in her application are as follows:

> [TRANSLATION]
>
> The applicant received the administrative tribunal's written reasons on or about December 5, 2009, upon her arrival in Canada.
>
> Given the circumstances, the applicant is also requesting that the Court grant an extension of time, under paragraph 72(2)(*c*) of the *Immigration and Refugee Protection Act*, for the following reason: ''Reason… ''The applicant was heard by the Immigration Appeal Division via teleconference on June 15, 2009. When the decision was rendered later that day, the applicant was no longer in contact by telephone and did not hear the issuing of the decision. The written decision was sent to a relative who forwarded it to Honduras shortly thereafter. However, when it arrived in Honduras, the applicant and her 3 children had already left Honduras for Canada, so it was only on or about December 5, 2009, after she arrived in Canada, that the applicant became aware of the terms of the negative decision refusing to grant her permanent residence.
>
> It was only when she became aware of these terms that the applicant consulted counsel on December 6, 2009, and filed this application that very same day considering that it was at that time that the applicant became aware that the panel had not refuted the alleged attempted kidnapping of her daughter, born in Canada, nor had it denied that there may be some risk in Honduras, but had nevertheless found that ''the best interests of the children dictate that they have the benefit of the presence of both of their parents, of which they can be assured in Honduras''.

[16] During the arguments on the issue of the application for leave, the respondent argued that the applicant had failed to file her application for leave and judicial review within the prescribed time limits, and in this regard, cited paragraphs 72(2)(*b*) and 169(*f*) of the Act as well as sections 13 and 36 of the *Immigration Appeal Division Rules*, SOR/2002-230. According to the

respondent, the applicant failed to show that the reason for her delay was beyond her control as she was required to do and that, in this case, her request for an extension of time should be dismissed.

[17] As part of the arguments with regard to the issue of the application for leave, the applicant responded to these arguments and requested that the issue of the extension of time, which, according to her, raises several issues of law, be examined at the judicial review stage rather than at the stage of the application for leave and judicial review.

[18] On March 24, 2010, Justice Shore granted leave for the application for judicial review, and, as requested by the applicant, did not address the issue of the extension of time.

Relevant statutory provisions with regard to the extension of time and the objection to the late filing of the application

[19] The relevant excerpts from the Act are sections 72 and 169, which read as follows:

72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	**72.** (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.
(2) The following provisions govern an application under subsection (1):	(2) Les dispositions suivantes s'appliquent à la demande d'autorisation :
(*a*) the application may not be	*a*) elle ne peut être présentée

made until any right of appeal that may be provided by this Act is exhausted;

tant que les voies d'appel ne sont pas épuisées;

(*b*) subject to paragraph 169(*f*), notice of the application shall be served on the other party and the application shall be filed in the Registry of the Federal Court ("the Court") within 15 days, in the case of a matter arising in Canada, or within 60 days, in the case of a matter arising outside Canada, after the day on which the applicant is notified of or otherwise becomes aware of the matter;

b) elle doit être signifiée à l'autre partie puis déposée au greffe de la Cour fédérale — la Cour — dans les quinze ou soixante jours, selon que la mesure attaquée a été rendue au Canada ou non, suivant, sous réserve de l'alinéa 169*f*), la date où le demandeur en est avisé ou en a eu connaissance;

(*c*) a judge of the Court may, for special reasons, allow an extended time for filing and serving the application or notice;

c) le délai peut toutefois être prorogé, pour motifs valables, par un juge de la Cour;

(*d*) a judge of the Court shall dispose of the application without delay and in a summary way and, unless a judge of the Court directs otherwise, without personal appearance; and

d) il est statué sur la demande à bref délai et selon la procédure sommaire et, sauf autorisation d'un juge de la Cour, sans comparution en personne;

(*e*) no appeal lies from the decision of the Court with respect to the application or with respect to an interlocutory judgment.

e) le jugement sur la demande et toute décision interlocutoire ne sont pas susceptibles d'appel.

169. In the case of a decision of a Division, other than an interlocutory decision:

169. Les dispositions qui suivent s'appliquent aux décisions, autres qu'interlocutoires, des sections :

(*a*) the decision takes effect in accordance with the rules;

a) elles prennent effet conformément aux règles;

(*b*) reasons for the decision must be given;

b) elles sont motivées;

(*c*) the decision may be rendered orally or in writing, except a decision of the Refugee Appeal Division, which must be rendered in writing;

c) elles sont rendues oralement ou par écrit, celles de la Section d'appel des réfugiés devant toutefois être rendues par écrit;

(*d*) if the Refugee Protection Division rejects a claim, written reasons must be provided to the claimant and the Minister;

d) le rejet de la demande d'asile par la Section de la protection des réfugiés est motivé par écrit et les motifs sont transmis au demandeur et au ministre;

(*e*) if the person who is the subject of proceedings before the Board or the Minister requests reasons for a decision within 10 days of notification of the decision, or in circumstances set out in the rules of the Board, the Division must provide written reasons; and

e) les motifs écrits sont transmis à la personne en cause et au ministre sur demande faite dans les dix jours suivant la notification ou dans les cas prévus par les règles de la Commission;

(*f*) the period in which to apply for judicial review with respect to a decision of the Board is calculated from the giving of notice of the decision or from the sending of written reasons, whichever is later

f) les délais de contrôle judiciaire courent à compter du dernier en date des faits suivants : notification de la décision et transmission des motifs écrits.

[20] The relevant excerpts from the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22 are found in section 6:

6. (1) A request for an extension of time referred to in paragraph 72(2)(*c*) of the Act shall be made in the application for leave in accordance with Form IR-1 set out in the schedule.	**6.** (1) Toute demande visant la prorogation du délai au titre de l'alinéa 72(2)*c*) de la Loi, se fait dans la demande d'autorisation même, selon la formule IR-1 figurant à l'annexe.
(2) A request for an extension of time shall be determined at the same time, and on the same materials, as the application for leave.	(2) Il est statué sur la demande de prorogation de délai en même temps que la demande d'autorisation et à la lumière des mêmes documents versés au dossier.

[21] Finally, the relevant excerpts from the *Immigration Appeal Division Rules* are sections 13 and 53, subsection 54(1) and section 55:

13. (1) A person who is the subject of an appeal must provide their contact information in writing to the Division and the Minister.	**13.** (1) La personne en cause transmet ses coordonnées par écrit à la Section et au ministre.
(2) The contact information must be received by the Division and the Minister	(2) Les coordonnées doivent être reçues par la Section et le ministre :
(*a*) with the notice of appeal, if the person is the appellant; and	*a*) avec l'avis d'appel, dans le cas où c'est la personne en cause qui interjette appel;
(*b*) no later than 20 days after the person received a notice of appeal, if the Minister is the appellant.	*b*) au plus tard vingt jours suivant la date à laquelle la personne reçoit l'avis d'appel du ministre, dans le cas où

c’est le ministre qui interjette appel.

(3) A person who is represented by counsel must, on obtaining counsel, provide without delay the counsel’s contact information in writing to the Division and the Minister.

(3) Dès qu’elle retient les services d’un conseil, la personne en cause transmet les coordonnées de celui-ci par écrit à la Section et au ministre.

(4) If the contact information of the person or their counsel changes, the person must without delay provide the changes in writing to the Division and the Minister.

(4) Dès que les coordonnées de la personne en cause ou celles de son conseil, le cas échéant, changent, la personne en cause transmet les nouvelles coordonnées par écrit à la Section et au ministre.

53. When the Division makes a decision, other than an interlocutory decision, it must provide a notice of decision to the parties.

53. Lorsqu’elle rend une décision autre qu’interlocutoire, la Section transmet par écrit un avis de décision aux parties.

54. (1) The Division must provide to the parties, together with the notice of decision, written reasons for a decision on an appeal by a sponsor or for a decision that stays a removal order.

54. (1) La Section transmet aux parties, avec l’avis de décision, les motifs écrits de la décision portant sur un appel interjeté par un répondant ou prononçant le sursis d’une mesure de renvoi.

55. A decision of the Division made orally by one Division member at a proceeding takes effect when the member states the decision. A decision made in writing takes effect when the member signs and dates the decision.

55. La décision de la Section rendue de vive voix à l’audience par un tribunal constitué d’un commissaire unique prend effet au moment où le commissaire prononce la décision. Celle rendue par écrit prend effet au moment où le commissaire signe et date la décision.

Analysis of the issue of the request for an extension of time and the objection with regard to the late filing of the application

[22] Subsection 6(2) of the *Federal Courts Immigration and Refugee Protection 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. The first issue in the case at bar is therefore jurisdictional, i.e. whether the judge hearing the application for judicial review has the jurisdiction to decide whether or not to grant an extension of time when the issue was not decided at the application for leave stage.

[23] The Federal Court of Appeal recently issued a favourable response with regard to this matter in *Deng Estate v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 59, [2009] F.C.J. No. 243 (QL), at paragraphs 17 and 18 (application for leave to appeal to the Supreme Court of Canada dismissed on July 9, 2009, Number 33142). According to this precedent, I therefore do have the jurisdiction to decide the issue of whether to grant an extension of time.

[24] Paragraph 169(*f*) of the Act, reproduced above, specifically provides that the period in which to apply for judicial review with respect to a decision of one of the divisions of the Immigration and Refugee Board is calculated from the sending of written reasons. Moreover, under paragraph 72(2)(*b*) of the Act, the period of 15 or 60 days in which to file an application for leave is not calculated from the date the applicant is notified of or otherwise becomes aware of the decision in the case of a decision of a division of the Immigration and Refugee Board; in

fact, it specifically provides that the manner in which the period should be calculated is ‘‘subject to paragraph 169(*f*)’’.

[25] In the case at bar, with regard to the decision at issue, under paragraph 169(*f*) of the Act, the period for serving and filing the application for leave and judicial review began as of the sending of the reasons for the decision, namely, as of July 13, 2009.

[26] For the purposes of this proceeding, the Court is not called upon to determine whether the applicable period in this case is 15 days, given that the decision was issued in Canada, or 60 days, given that the matter that gave rise to the appeal before the Immigration Appeal Division arose in Honduras. The fact remains that, in either case, the applicant has long been out of time.

[27] Several factors may justify allowing an extension of time, but the party seeking the extension must first be able to justify the delay incurred for the entire period in question.

[28] Therefore, I have to determine whether the applicant has justified her failure to observe the time limits or whether she has demonstrated valid reasons that would justify granting an extension of time. The principal ground invoked by the applicant in support of her request for an extension of time is that she was not aware of the content of the decision before her arrival in Canada and was therefore unable to act sooner.

[29] It is clear from the transcript of the hearing before the Immigration Appeal Division on June 15, 2009, that the decision regarding the applicant was rendered that same day with the reasons issued at the hearing in the presence of her counsel, who participated in the proceeding in person, and the applicant herself, who participated via teleconference. While an interpreter was present at the hearing, the reasons given by the panel were not simultaneously translated into Spanish. Rather, it was the applicant's counsel who undertook to explain the reasons to his client over the telephone.

[30] The written decision was sent by the Immigration Appeal Division on July 13, 2009, by prepaid regular mail in three copies.

[31] The first copy was sent to the applicant at the address in Honduras she had indicated in the form provided for this purpose by the Immigration Appeal Division, which she had completed and signed.

[32] The second copy was sent to the applicant, but was sent ''care of'' Thomas Armando Guevara Villatoro in Montréal. This was the person in Canada who had been specifically designated by the applicant in writing in her notice of appeal form as being the person through whom she could be reached.

[33] The third copy was sent to the lawyer who had also been specifically designated by the applicant, in writing, to receive a copy.

[34] Despite these mailings, the applicant states in her affidavit that she left Honduras on July 30, 2009, without having received the written decision, and that it was only upon her arrival in Canada on December 5, 2009, that she was able to learn about the decision and to take note of the reviewable errors made by the Immigration Appeal Division with regard to her file. There were no details provided in her affidavit regarding her comings and goings during the period of nearly five months between July and December 2009, or about her correspondence with her lawyer or with the person she had designated in Canada. Furthermore, the applicant does not deny having been informed of the decision at issue, but is instead simply claiming that she did not personally receive the written reasons during that five-month period.

[35] It is completely implausible that the applicant was not aware of the content of the Immigration Appeal Division's decision prior to December 6, 2009, for many reasons.

[36] First, the applicant was in contact with the panel by telephone when the decision was made. Second, she was represented by counsel, and he took it upon himself to relay the reasons for the decision to her by telephone. Third, the written decision was sent both to her lawyer and to the person in Canada who had been designated by the applicant as someone through whom she could be reached. Finally, the applicant was able to argue her appeal before the Immigration Appeal Division from Honduras without suffering undue hardship. She even retained the services of a lawyer for this purpose and received the notices from that Appeal Division; thus, she was able to have her appeal heard and participate in the hearing.

[37] In light of these facts, one can only conclude that the applicant could have filed an application for leave and judicial review of that decision in the days following the date on which it was rendered, or in the days following the sending of the reasons. The applicant had been able conduct her appeal from Honduras, and there is no serious reason to believe that she could not have done the same with regard to the judicial review of the decision resulting from that appeal.

[38] The extension of time is therefore not granted. Consequently, the application for judicial review is dismissed.

[39] The respondent did not raise any question for certification pursuant to paragraph 74(*d*) of the Act. The applicant asked the Court to provide her with the opportunity to prepare questions on the substance of the proceedings. However, given that in this case I have not examined any substantive questions, and given that no serious question of general importance arises from the request for an extension of time, no question will be certified pursuant to paragraph 74(*d*) of the Act.

JUDGMENT

THIS COURT'S JUDGMENT IS that:

The request for an extension of time within which to serve and file the application for leave and judicial review is dismissed; accordingly, the application for judicial review is dismissed.

''Robert M. Mainville''
Judge

Certified true translation

Sebastian Desbarats, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6202-09
STYLE OF CAUSE:	NORA MARINA GUEVARA VILLATORO v. MCI
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	June 16, 2010
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APPEARANCES:

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