Federal Court  Cour fédérale

Date: 20100903

Docket: IMM-6304-09

Unrevised certified translation **Citation: 2010 FC 868**

Ottawa, Ontario, September 3, 2010

PRESENT: The Honourable Madam Justice Bédard

BETWEEN:

JUAN MANUEL CORNEJO ARTEAGA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act* (the Act) of a decision by the Refugee Protection Division of the Immigration and Refugee Board of Canada (the Board) in which the Board denied the applicant's application to reopen his refugee claim. The application for judicial review was also filed with a request for an extension of time to serve and file an application for leave and judicial review under paragraph 72(2)(*c*) of the Act.

Background

[2] The applicant is a Mexican citizen who worked as a journalist. He arrived in Canada on February 9, 2008, and made a claim for refugee protection on March 5, 2008. In support of his claim for refugee protection, the applicant claimed that he and his family had received threats and that he himself had been assaulted after he had filed a news story on drug traffickers. The applicant's spouse and son also left Mexico to join the applicant in Canada and claimed refugee protection for themselves on June 4, 2009.

[3] The Board's Refugee Protection Division summoned the applicant to a hearing on June 22, 2009, to deal with his refugee claim. The applicant failed to appear at the hearing because he was sick. He left a message at the office of his counsel, who then informed the Board. The Board subsequently informed the applicant's counsel that it would commence abandonment proceedings with regard to the refugee claim, but that a second hearing would be scheduled for July 21, 2009, to allow the applicant to explain to the Board why the claim should not be declared abandoned.

[4] The notice of the hearing for July 21, 2009, received by the applicant indicated that he would be asked to explain why the Board should not declare the claim abandoned. The notice of the hearing also stated that the hearing was to start at 1:15 p.m., but that the applicant was to be there at 12:45 p.m. Prior to the date of the hearing, the applicant filed exhibits in the Board's record. When the hearing began on July 21, 2009, the applicant was not present. Counsel for the applicant, who was present, communicated with the applicant, who apparently informed him that he was on his way, but that he was caught in traffic and would be late. Counsel relayed this information to the

Board, which waited for about fifteen minutes. Since the applicant had still not arrived at 1:31 p.m., the Board declared the claim abandoned. The applicant showed up at 1:45 p.m., but his claim had already been declared abandoned.

[5] On August 11, 2009, the applicant made an application to reopen his refugee claim pursuant to Rule 44 and Subrule 55(1) of the *Refugee Protection Division Rules*. This application was dismissed on August 27, 2009, [TRANSLATION] "based on the lack of medical evidence corroborating the claimant's absence from the hearing on June 22, 2009".

[6] The applicant claims that he later retained the services of an immigration consultant who suggested that he make a new application to the Board to reopen his refugee claim. The applicant submitted a letter to the Board, dated September 16, 2009, in which he [TRANSLATION] "asks for the Board's help". The applicant submits that he checked with the Board around November 2009 and was then informed that his application had not been acted upon. The Board then re-sent him the letter refusing to reopen the refugee claim, dated August 27, 2009. The applicant apparently received this letter on November 14, 2009.

[7] The applicant maintains that he subsequently went through a period of panic, depression and anxiety, and that on December 10, 2009, he finally consulted a lawyer who informed him of the possibility of applying to the Federal Court for judicial review. The application for leave and judicial review was filed with the Federal Court on December 11, 2009, and the application for leave was granted by Justice Shore on June 2, 2010.

Analysis

[8] The impugned decision was rendered on August 27, 2009, and the application for leave and judicial review was filed on December 11, 2009.

[9] Given that an extension of time is a condition precedent to the consideration of the application for judicial review, I will deal with that issue first.

[10] Parliament has imposed a fairly short period of time for filing an application for leave and judicial review. Section 72 of the Act provides 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): (*a*) the application may not be made until any right of appeal that may be provided by this Act is exhausted; (*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	(2) Les dispositions suivantes s'appliquent à la demande d'autorisation : *a*) elle ne peut être présentée tant que les voies d'appel ne sont pas épuisées; *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

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;	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.

[11] This section is complemented, in matters of immigration and refugee protection, by Rule 6 of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22:

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.

[12] In spite of Subrule 6(2), both the Federal Court and the Federal Court of Appeal have recognized that the judge hearing the application for judicial review has jurisdiction to rule on the request for an extension of time when the judge who allowed the application for leave to apply for judicial review has not decided this issue and that one should not infer from the granting of leave that the motion judge also granted an extension of time (*Deng Estate v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 59; *McBean v. Canada (Minister of Citizenship and Immigration*), 2009 FC 1149; *Villatoro v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 705).

[13] The time limits for filing applications for judicial review are mandatory and, unless a judge grants an extension, must be respected. As the Federal Court of Appeal indicated in *Canada v. Berhad*, 2005 FCA 267, time limits serve the public interest and must be allowed to bring finality to administrative decisions.

[14] In *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41, the Federal Court of Appeal reiterated the principle set out in *Berhad* and reaffirmed, at paragraph 24, that "a time-limit for the commencement of challenges to administrative decisions is not whimsical".

[15] In addition, Parliament has given judges the discretion to grant an extension of time for "valid reasons". While each request for a time extension must be assessed in light of the particular circumstances of the case, judges should not lose sight of the importance of the time limits imposed

by Parliament. However, it is equally important for judges to ensure that justice is done between the parties (*Tarsem Singh Grewal v. Canada (Minister of Employment and Immigration*), [1985] 2 F.C. 263 (F.C.A.)). The case law has developed factors which can guide judges in their assessment of "valid reasons". These factors were set out by the Federal Court of Appeal in *Canada (Attorney General) v. Hennelly*, [1999] F.C.J. No. 846 (QL), and they have been consistently upheld since then. The applicant must demonstrate:

a. a continuing intention to pursue his or her application;

b. that the application has some merit;

c. that no prejudice to the respondent arises from the delay; and

d. that a reasonable explanation for the delay exists.

[16] The party requesting an extension of time must also be able to provide explanations for the delay incurred for the entire period in question (*Villatoro*).

[17] The case law has, to a very great degree, established that good faith and ignorance of the Act do not constitute grounds that warrant granting an extension of time and that, in general, an error by the legal representative does not, in and of itself, warrant granting an extension of time. As Justice Tremblay-Lamer noted in *Mutti v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 97 at para. 4, "[h]aving poor legal representation and ignorance of the law are neither excuses nor justifications for a delay". I also share the opinions of Justice Barnes in *Washagamis First Nation of Keewatin, Ontario v. Ledoux*, 2006 FC 1300 and Justice Gauthier in *McBean*, who favoured, when

solicitor error is invoked, an approach that not only looks at the behaviour of the solicitor but at the behaviour of the applicant as well.

[18] A similar approach was adopted by the Federal Court of Appeal in *Canada (Attorney General) v. Larouche*, [1994] F.C.J. No. 1720 (QL) at para. 6. While that judgment was issued in a different context from the one presently at issue, the principle set out by the Court is just as applicable to the case at bar:

> The precedents of this Court are clear: good faith and ignorance of the law do not in themselves excuse a failure to comply with a legislative requirement; a belated claimant must still show that she acted as a reasonable person in the same situation would have done to protect the rights and obligations imposed on her by the Act.

[19] In this case, I find that the applicant demonstrated a continuing intention to challenge the Board's decision. I am also satisfied that the case has some merit and that no prejudice to the respondent arose from the delay in filing the application for judicial review. However, I do not find that the applicant has satisfactorily established that he had reasonable explanations to justify his failure to act within the specified time frame.

[20] The applicant explained his delay on two grounds. First, the applicant claims that he was given bad advice by an immigration consultant, who encouraged him to commence the wrong proceeding, namely, the second application to reopen his claim filed with the Board on September 16, 2009. This first circumstance would explain the delay between the time he received the decision on August 27, 2009, and the month of November 2009, when he contacted the Board to follow up on his second application to reopen his claim.

[21] I find it very unfortunate that the applicant consulted an immigration consultant who proffered bad advice to him. I am also convinced that the applicant acted in good faith. However, and as was previously stated, ignorance of the law and inadequate legal representation do not, in and of themselves, justify the failure to respect a deadline. Moreover, I find that the applicant himself was not sufficiently diligent. The applicant was represented by counsel at the first two hearings regarding his refugee claim and the abandonment proceedings. The applicant was probably still in contact with his counsel up until the Board's decision was rendered and that same counsel undoubtedly received a copy of the decision. It is not possible to determine from the evidence whether the applicant met with his counsel after having received the decision, but it would be quite surprising if he had not. The applicant did not explain why he chose to cease retaining the services of that counsel and instead consult an immigration consultant, but in doing so he was taking a risk. Furthermore, the Board's decision dismissing the application to reopen the applicant's refugee claim clearly indicates that he has the right to file an application for judicial review with the Federal Court. The annotation at the end of the decision reads as follows:

> You have the right under ss. 72(1) of the *Immigration and Refugee Protection Act* to apply for a judicial review of this decision, with leave of a judge of the Federal Court – Trial Division. You may wish to consult with counsel immediately as your time for applying for leave is limited under that section.

[22] This very clearly indicated the path to follow in order to challenge the decision as well as the time limits for doing so; the applicant neglected to follow this path.

[23] To explain the delay between the time he was informed that his second application to reopen his claim had not been acted upon, namely, on or about November 14, 2009, and December 10, 2009, the date on which he consulted counsel, the applicant cited health reasons. He stated the following at paragraphs 18 and 19 of his affidavit:

> [TRANSLATION]
>
> 18- I was seized with panic and I was very anxious and under a lot of stress. I did not know what to do and asked several people for advice;
>
> 19- Finally, on December 10, 2009, I was able to meet with Andrea Claudia Molina, a lawyer who explained the Federal Court's judicial review procedures to me and who also told me that the application to reopen on humanitarian grounds that had been filed with the help of the immigration consultant was not the appropriate legal means by which to challenge the IRB's decision;

[24] There is insufficient evidence to support this claim. The applicant submitted a doctor's certificate indicating that the applicant had gone to see him for a consultation on December 13, 2009. The certificate is very brief; it does not state the reason for the consultation nor does it indicate any diagnosis. Moreover, the consultation was after the application for leave and judicial review was made and can surely not be used to explain the applicant's failure to act before the date on which the application was made. I also find that the applicant's statement that he was experiencing anxiety and stress does not in itself mean that he was unable to act.

[25] I am therefore of the view that the explanations provided by the applicant do not warrant the granting of an extension of time.

[26] Thus, the extension of time is not granted and, consequently, the application for judicial review is dismissed.

[27] No question of general importance was submitted by the parties for certification and none will be certified.

JUDGMENT

THE COURT ORDERS AND ADJUDGES 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.

"Marie-Josée Bédard"
Judge

Certified true translation

Sebastian Desbarats, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6304-09
STYLE OF CAUSE:	JUAN MANUEL CORNEJO ARTEAGA and THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Montréal, Quebec
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DATED:	September 3, 2010

APPEARANCES:

Stéphanie Valois	FOR THE APPLICANT
Thi My Dung Tran	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Stéphanie Valois Montréal, Quebec	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT