

Federal Court of Appeal



Cour d'appel fédérale

Date: 20230526

Docket: A-242-22

Citation: 2023 FCA 112

Present: LOCKE J.A.

BETWEEN:

EHTESHAM A RAFIQUE

Appellant

and

MINISTER OF NATIONAL REVENUE

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on May 26, 2023.

REASONS FOR ORDER BY:

LOCKE J.A.

Federal Court of Appeal



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REASONS FOR ORDER

LOCKE J.A.

[1] The appellant, Ehtesham A. Rafique, moves for an extension of time to file a motion pursuant to Rule 343(3) of the *Federal Courts Rules*, S.O.R./98-106 (the Rules), to determine the contents of the appeal book in the present appeal. The respondent, the Minister of National Revenue (the Minister), contests the motion.

[2] The parties agree that this Court's decision in *Canada (Attorney General) v. Hennesly* (1999), 244 N.R. 399, 1999 CarswellNat 967 (F.C.A.) (*Hennesly*) provides helpful guidance on the present motion. At paragraph 3 thereof, this Court considered the following factors:

1. A continuing intention to pursue the appeal;
2. That the appeal has some merit;
3. That no prejudice to the respondent arises from the delay; and
4. That a reasonable explanation for the delay exists.

[3] This Court has since slightly reworded and clarified the test: see *Canada (Attorney General) v. Larkman*, 2012 FCA 204 (*Larkman*) at paragraphs 61 and 62:

[61] The parties agree that the following questions are relevant to this Court's exercise of discretion to allow an extension of time:

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

[62] These questions guide the Court in determining whether the granting of an extension of time is in the interests of justice. The importance of each question depends upon the circumstances of each case. Further, not all of these four questions need be resolved in the moving party's favour. For example, "a compelling explanation for the delay may lead to a positive response even if the case against the judgment appears weak, and equally a strong case may counterbalance a less satisfactory justification for the delay". In certain cases, particularly in unusual cases, other questions may be relevant. The overriding consideration is that the interests of justice be served... [Citations omitted]

[4] The Minister concedes point 1 (that Mr. Rafique has demonstrated a continuing intention to pursue the appeal) and point 3 (that no prejudice to the Minister arises from the delay), but argues that Mr. Rafique has failed to demonstrate either that his appeal has any merit, or that a reasonable explanation for the delay exists.

[5] I find it convenient to address first the question of reasonable explanation for the delay. The Tax Court of Canada decision under appeal issued on November 8, 2022. Mr. Rafique filed his notice of appeal on November 15, 2022. Following unsuccessful efforts by Mr. Rafique to file documents in relation to a motion pursuant to Rule 343(3) (because the documents were irregular), Justice Richard Boivin of this Court directed on December 15, 2022 that Mr. Rafique should file any such motion in accordance with the Rules no later than January 13, 2023. Mr. Rafique cites the following to explain his confusion that led to the Court's Direction: (i) he is self-represented before the Court, and (ii) the Rules lack any detail as to what constitutes written representations that are required by Rule 364 to be included in a motion record. I confess that I do not fully understand the nature of such confusion, but I am sympathetic to a layperson attempting to learn this Court's procedures.

[6] Mr. Rafique failed to meet the January 13, 2023 deadline, but submitted a letter to the Court on January 16, 2023 (the next business day) stating that he had attempted to file the record in support of his motion pursuant to Rule 343(3), and requesting that the motion be considered. He cited a misunderstanding as to the date of the deadline. Though I do not fully understand the nature of that misunderstanding, I recognize that the delay was short. It appears that Mr. Rafique did not leave his motion record with the Registry. He also did not leave his motion record with

the Registry on February 10, 2023 when he attempted again to file it. In fact, it appears that the Court still does not have the motion record that he intends to file.

[7] After some further clarification as to what constitutes written representations under the Rules, Mr. Rafique submitted his record in support of the present motion on March 16, 2023, including written representations.

[8] Despite the Minister's arguments to the contrary, I find that Mr. Rafique has provided a reasonable explanation for the delays thus far. That said, the weakness of Mr. Rafique's explanations, as summarized above, makes this a borderline call. I expect that, with the assistance of the Registry, Mr. Rafique has now familiarized himself with the Rules, to the extent that they apply to his proposed motion pursuant to Rule 343(3). Any future failures by Mr. Rafique to respect the Rules should be justified by better explanations.

[9] I turn now to the question of merit in the appeal. The Minister focuses principally on this factor in her submissions. She argues that the Tax Court of Canada decision under appeal denied a motion by Mr. Rafique before that court on the basis that that court lacks jurisdiction to issue a writ of mandamus. The Minister argues that Mr. Rafique has not demonstrated that his appeal has any merit. The Minister urges this Court to deny the requested extension of time. The Minister also argues that such denial, which would leave Mr. Rafique unable to file a motion pursuant to Rule 343(3), should result in the dismissal of the present appeal pursuant to Rule 168.

[10] Mr. Rafique addresses the argument of lack of merit in his reply submissions. Though his arguments will likely have to be clearer if he expects to prevail on the merits in the present appeal, I am not prepared to reject his motion for an extension of time based on lack of merit. The limited documents that have been put before the Court in relation to this motion are insufficient to convince me that the lack of merit of the present appeal is so clear that the interests of justice favour dismissing the present motion. In my view, the other factors set out in *Hennelly* and *Larkman* tip the balance in favour of granting the motion.

[11] Accordingly, I will grant an extension of time for Mr. Rafique to file his motion pursuant to Rule 343(3). I would have expected Mr. Rafique to have submitted his record in support of that motion as part of his motion for an extension of time. Since he has not done so, and assuming that his motion record has been ready for some time, I will require that it be filed with minimal delay. Moreover, the motion record that Mr. Rafique submits for filing should comply with the Rules and take into account the information and input he has received from the Registry. Mr. Rafique should also bear in mind Rule 72(1), which provides that a document that is submitted for filing shall be either accepted for filing or, in the case of apparent non-conformity with the Rules, referred to a judge. The Registry is not empowered to reject an irregular document that is submitted for filing.

"George R. Locke"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:

A-242-22

STYLE OF CAUSE:

EHTESHAM A RAFIQUE v.
MINISTER OF NATIONAL
REVENUE

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:

LOCKE J.A.

DATED:

MAY 26, 2023

WRITTEN REPRESENTATIONS BY:

Ehtesham A Rafique

FOR THE APPELLANT
(On his own behalf)

Allan Mason

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Shalene Curtis-Micallef
Deputy Attorney General of Canada

FOR THE RESPONDENT