Federal Court  Cour fédérale

Date: 20160128

Docket: 15-T-51

Citation: 2016 FC 105

Vancouver, British Columbia, January 28, 2016

PRESENT: The Honourable Mr. Justice Mosley

JOYCE WAI YEE TAM

Applicant

and

THE MINISTER OF TRANSPORT

Respondent

ORDER AND REASONS

[1] This is a motion in writing under Rule 369 of the *Federal Courts Rules*, SOR/98-106, for an Order under Rule 8 for an extension of time to file an application for judicial review of a decision by the Minister of Transport pursuant to s. 18.1 (2) of the *Federal Courts Act*, R.S.C., 1985, c. F-7. The motion is opposed by the Minister.

[2] The applicant has been employed at the Vancouver International Airport by Air Transat since April 30, 2012. She held a security clearance known as a Restricted Area Identity Card. On December 22, 2014, the applicant received a letter from the Chief of Security Screening

Programs for Transport Canada. The letter advised her that her clearance was being reviewed because of the receipt of adverse information that raised concerns as to her suitability to retain a clearance. The letter set out information regarding contacts by the applicant with persons described as being involved in gang related activities related to organized crime on five occasions between October 17, 2005 and February 3, 2012.

[3] The letter invited the applicant to provide additional information outlining the circumstances surrounding the associations and incidents and any other relevant information or explanation including any extenuating circumstances within 20 days of receipt of the letter. The applicant replied on January 12, 2015 setting out explanations pertaining to the five incidents and relationships with the other individuals referred to in the December 22, 2014 letter.

[4] By letter dated August 14, 2015 from the Director General Aviation Security, the applicant was advised that the Minister of Transport had canceled her security clearance. This decision was based on a review of the information outlined in the December 22, 2014 letter, the applicant's submission and the recommendation of the Transportation Security Clearance Advisory Body. The letter concluded by noting that the applicant had the right to seek a review of the decision to the Federal Court within thirty (30) days.

[5] In her affidavit in support of the motion the applicant acknowledges having read the statement in the letter about the limitation period but states that she did not appreciate its significance. She contacted a lawyer on August 21, 2015 who had no related experience. She contacted two other lawyers on August 24, 2015 but did not retain them because the fees that

they quoted to her were too high. Sometime later the applicant noted a news article online mentioning her current counsel of record and retained him on December 21, 2015. This motion for an extension of time was filed on December 23, 2015.

[6] The issue on this motion is whether the Court should exercise its discretion to extend the 30 day deadline to allow the applicant to file her late judicial review application.

[7] The applicant submits that her affidavit evidence satisfies the criteria set out by the Federal Court of Appeal in *Canada v Hennelly* (1999), 244 N.R. 399, namely that she has demonstrated:

(i) a continuing intention to pursue her application;

(ii) that the application has some merit;

(iii) that no prejudice to the respondent arises from the delay; and

(iv) that a reasonable explanation for the delay exists.

[8] With regard to her intention to pursue the application, the applicant submits that she did not have the resources to retain counsel prior to the expiry of the 30 day limitation period. She says that she did not receive any meaningful advice on the need to file in advance of the deadline from the counsel she met with or her union representatives. During the fall of 2015 she was also dealing with a significant illness in her immediate family. Her delay in bringing the application was as a result of her lack of understanding of the process as well as her inability to retain counsel.

[9] The applicant argues that her application has some merit as the Director General Aviation Security made several errors in her reasoning including failure to consider evidence, misapprehension of the evidence and reaching a conclusion not supported by the evidence. She submits that the respondent would not be prejudiced by the delay because "[t]he nature of the review is documentary and as such there is no concern regarding the ability of each side to effectively argue their positions…".

[10] The respondent contends that the applicant has not provided the Court an adequate basis for it to exercise its discretion to grant an extension. The respondent argues that, based on her own affidavit evidence, the applicant has not demonstrated a diligent, continuing intention to pursue her application. The grant of an extension would be contrary to the public interests of finality, certainty and security that are necessary for the administration of the air transport program. The applicant has not reasonably explained the delay between August and December and the application, the respondent submits, is bereft of any reasonable prospect of success.

[11] The importance of limitation periods was underscored by the Federal Court of Appeal in *Canada (Attorney General) v Larkman*, 2012 FCA 204, at paragraph 87 where it was stated:

> The need for finality and certainty underlies the 30 day deadline. When the 30 day deadline expires and no judicial review has been launched against a decision or order, parties ought to be able to proceed on the basis that the decision or order will stand. Finality and certainty must form part of our assessment of the interests of justice.

[12] The *Hennelly* criteria, often restated as questions, guide the court in determining whether the granting of an extension of time is in the interests of justice: *Grewal v Canada (Minister of*

Employment & Immigration), [1985] 2 F.C. 263 (C.A.). As noted in *Larkman* above, at paragraph 62, the importance of each question depends upon the circumstances of each case. And 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 appears weak and a strong case may outweigh a less satisfactory justification for the delay. The overriding consideration is that the interests of justice be served.

[13] In this instance, it is clear that the applicant had received the notice of cancellation by August 21, 2015 as that is the date on which she first sought legal counsel. The period of delay is, therefore, approximately four months. The applicant had also been on notice since December 22, 2014 that a review of her security clearance was underway. There is no doubt that the applicant initially intended to pursue a judicial review application. However, she failed to carry through on that intention until she came across an online reference to her present counsel at some time prior to December 21, 2015. This, in my view, does not demonstrate a diligent continuing intention to pursue the application.

[14] Nor has the applicant reasonably explained her delay. She has ascribed it to a lack of awareness of legal procedures and lack of confidence. Such explanations have been held by the Federal Court to be unreasonable: *Mutti v Canada (Minister of Citizenship and Immigration)*, 2006 FC 97; *Thibodeau v Canada (Minister of Transport)*, 2002 FCT 386; *Flores Cabrera v Canada (Canada (Minister of Citizenship and Immigration*), 2011 FC 1251. While the applicant also refers to her mother's unfortunate diagnosis with cancer, it is not clear how this prevented a 30-year-old woman from taking action to protect her legal interests.

[15] These concerns, on their own, may have been insufficient to bar the exercise of the Court's discretion in the applicant's favour. More fatal, in my view, is that she has failed to demonstrate that her application for judicial review has some potential merit. Contrary to the applicant's argument, the letter from the Director General Aviation Security does not demonstrate that Transport Canada ignored her evidence and merely issued a boilerplate statement to her without explaining how it came to its conclusion. It sets out the reasons why the Minister's discretion was exercised to cancel the clearance and refers to the admissions made by the applicant in her response to the initial advisory letter.

[16] This is not a case similar to *Ho v Canada (Attorney General),* 2013 FC 865, cited by the applicant. In *Ho*, Justice Harrington found a decision to revoke a security clearance to be unreasonable because the Minister of Transport did not have evidence to contradict some of that presented by the applicant. In this instance, the applicant has acknowledged that she associated with individuals with gang ties in her early 20s. Her argument is that stale associations of this nature cannot be enough to justify canceling her clearance. However, the Court has found that is not unreasonable for the Minister to consider such associations notwithstanding a lengthy period of elapsed time: *Christie v Canada (Minister of Transport)*, 2015 FC 210. As noted by Justice Kane in *Brown v Canada (Attorney General),* 2014 FC 1081, at paragraph 71, the Minister is entitled to err on the side of public safety. Accordingly, I see no prospect of success on the application should it be allowed to proceed.

[17] In the result, the motion for an extension of time is dismissed. While the respondent has requested costs, the Court will exercise its discretion not to award them in the circumstances.

ORDER

THIS COURT'S JUDGMENT is that the motion for an extension of time is dismissed without costs.

"Richard G. Mosley"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	15-T-51
STYLE OF CAUSE:	JOYCE WAI YEE TAM v THE MINISTER OF TRANSPORT

MOTION IN WRITING CONSIDERED AT VANCOUVER, BRITISH COLUMBIA PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

ORDER AND REASONS:	MOSLEY J.
DATED:	JANUARY 28, 2016

WRITTEN REPRESENTATIONS BY:

Scott R. Wright	FOR THE APPLICANT
Jon Khan	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Sutherland Jetté Barristers Vancouver, British Columbia	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT