Federal Court Cour fédérale

Date: 20180308

Docket: IMM-626-17

Citation: 2018 FC 272

Ottawa, Ontario, March 8, 2018

PRESENT: THE CHIEF JUSTICE

BETWEEN:

EMMANUEL LESLY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA

Respondent

JUDGMENT AND REASONS

[1] The central issue raised in this Application is whether an apparently strong case for judicial review should overcome a weak case for granting an extension of time within which to file an Application for Leave to seek Judicial Review.

[2] The answer to this question must turn on the particular facts of the Application at hand. In this Application, the facts do not support granting the Applicant's request for an extension.

[3] In the exercise of the Court's discretion to allow an extended time for filing an Application for Leave to seek Judicial Review, the length of delay is a potentially significant factor to be considered. The longer the delay, the more this may weigh in favour of not granting the extension. In this case, the delay of approximately five and a half years served to reinforce an already cogent basis for rejecting the Applicant's request for an extension.

I. **Background**

[4] The Applicant, also referred to as "B001," is a 43 year-old citizen of Sri Lanka. He is one of the 492 people who arrived in Canada on August 13, 2010, aboard the *MV Sun Sea*. Upon arrival, he made a claim for refugee protection based on his fear of persecution in Sri Lanka, as a member of that country's Tamil minority. Although he is sometimes referred to as Mr. Lesly, I understand that his family name is Emmanuel.

[5] In April 2011, before Mr. Emmanuel's application for refugee protection was assessed, a delegate of the Minister of Citizenship and Immigration recommended that he be referred to an admissibility hearing. That recommendation was made following a report by a Canada Border Services Agency officer under subs. 44(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [**IRPA**]. It was based on the allegation that Mr. Emmanuel was the "captain" of the *MV Sun Sea*.

[6] In September 2011, the Immigration Division of the Immigration and Refugee Board [**ID**] found Mr. Emmanuel to be inadmissible under paragraph 37(1)(b) of the IRPA. That conclusion was reached after the ID found that there were reasonable grounds to believe that

Mr. Emmanuel is a foreign national who engaged, in the context of transnational crime, in "people smuggling." As a consequence of that finding, a deportation order was issued, which has not yet been enforced.

[7] In arriving at its conclusion, the ID took the position that the elements the Minister is required to demonstrate to establish that a person has engaged in "people smuggling," within the meaning of paragraph 37(1)(b) of the IRPA, were the same as those that the Crown is required to establish the offence of "human smuggling" under s. 117 of that legislation. In this regard, the ID concluded that those elements consisted of "knowingly organizing, inducing, aiding or abetting the coming into a country of one or more persons who are not in possession of a visa, passport or other document required by that country." The ID specifically found that the Minister did not have to demonstrate the additional element that the person in question had engaged in the alleged human smuggling in order to obtain, directly or indirectly, a financial or other material benefit. As a result, it did not assess whether Mr. Emmanuel had agreed to captain the *MV Sun Sea* in order to obtain such a benefit.

[8] In *B010 v Canada (Citizenship and Immigration)*, 2015 SCC 58, at paras 5 and 76 [***B010***], the Supreme Court of Canada subsequently held otherwise. In a unanimous decision issued in November 2015, the Court ruled that paragraph 37(1)(b) of the IRPA "applies only to people who act to further illegal entry of asylum-seekers <u>in order to obtain, directly or indirectly, a financial or other material benefit</u> in the context of transnational organized crime" (at para 5, emphasis added).

[9] The Supreme Court in *B010* added that persons can escape inadmissibility under paragraph 37(1)(b) of the IRPA "if they merely aided in the illegal entry of other refugees or asylum-seekers in the course of their collective flight to safety" (*B010*, above at para 72). In other words, the Supreme Court found that the meaning of people smuggling in that provision does not extend to mutual assistance, aid to family members or conduct that was solely motivated by humanitarian considerations. In the companion decision of *R v Appulonappa*, 2015 SCC 59, at paras 34 and 84 [***Appulonappa***] issued the same day, the Supreme Court reached a similar conclusion with respect to s. 117 of the IRPA. This is significant for Mr. Emmanuel, because he testified before the ID that he had never intended to work aboard the *MV Sun Sea*, and only agreed to help navigate the vessel after he had boarded and the original Thai crew abandoned the ship. He stated that when that occurred, several of the passengers begged him to captain the ship to Canada, and told him that they could not go back to Sri Lanka. He added that he considered this to be a "matter of life or death."

[10] Based on the foregoing, Mr. Emmanuel maintains that he was found to be inadmissible to Canada based on an erroneous test. He asserts that if the ID had applied the test enunciated in *B010*, above, it would likely have reached a different conclusion with respect to his admissibility to Canada.

[11] In June 2012, approximately seven months after he was found to be inadmissible to Canada, Mr. Emmanuel was charged under subs. 117(1) of the IRPA. That provision makes it an offence to "knowingly organize, induce, aid or abet the coming into Canada of one or more persons who are not in possession of a visa, passport or other document required by this Act." It

appears that his trial, and the trials of his co-accused, were subsequently adjourned on consent pending the issuance of the Supreme Court's decision in *Appulonappa*, above. Ultimately, on January 25, 2017, Mr. Emmanuel was found not guilty of the charges that had been laid under subsection 117(1).

[12] Approximately three weeks later, on February 10, 2017, Mr. Emmanuel applied for Leave to seek Judicial Review of the inadmissibility decision rendered by the ID in September 2011.

[13] By Order dated July 4, 2017, Justice Strickland granted leave to commence this Application, subject to the Hearing Judge's decision on Mr. Emmanuel's request for an extension of time within which to file the Application. Her order specified that such request would be heard immediately prior to the judicial review.

II. **Relevant Legislation**

[14] For the purposes of the determination of whether to grant Mr. Emmanuel's request for an extension of time within which to file an application for Leave to seek Judicial Review, the relevant legislation is set forth in paragraphs 72(2)(b) and (c) of the IRPA.

[15] Pursuant to paragraph 72(2)(b), a notice of application must be filed with this Court within 15 days after the day on which the applicant is notified or otherwise becomes aware of the matter that is the subject of the application.

[16] Pursuant to paragraph 72(2)(c), “a judge of the Court may, for special reasons, allow an extended time for filing and serving the application or notice.”

[17] The full text of subs. 72(2) is set forth in Appendix 1 to these Reasons for Judgment. The text of paragraph 37(1)(b) and s. 117, which are relevant to the merits of Mr. Emmanuel’s Application for Judicial Review, have also been set forth in Appendix 1.

III. **Analysis**

A. *General Principles*

[18] The time limits applicable to proceedings in this Court are not whimsical. They exist “in the public interest, in order to bring finality to administrative decisions so as to ensure their effective implementation without delay and to provide security to those who comply with the decision or enforce compliance with it, often at considerable expense” (*Canada v Berhad*, 2005 FCA 267, at para 60 [***Berhad***]. See also *Cornejo Arteaga v Canada (Citizenship and Immigration)*, 2010 FC 868, at paras 13-14 [***Arteaga***]).

[19] In considering whether special reasons exist to justify allowing an extended period of time for filing and serving an application before this Court, the principal factors to be considered are whether the applicant has demonstrated:

i. that the application has some merit;

ii. a reasonable explanation for the delay;

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

iv. that no prejudice to the respondent arises from the delay.

(*Canada (Attorney General) v Hennelly*, 1999 CanLII 8190 (FCA), at para 3 [***Hennelly***]; *Canada (Minister of Human Resources Development) v Hogervorst*, 2007 FCA 41, at para 32 [***Hogervorst***].)

[20] In addition, the period of time for which an extension is sought can be important (*Grewal v Canada (Min of Employment & Immigration)*, [1985] FCJ No 144, at 277 **[*Grewal*]**; *Hogervorst*, above, at paras 41 and 47), and the explanation given for the delay must justify it for the entire period in question (*Arteaga*, above, at para 16; *Guevara Villatoro v Canada (Citoyenneté et Immigration)*, 2010 FC 705, at para 27 [***Villatoro***]).

[21] Moreover, any laxity or failure to pursue an application as diligently as could reasonably be expected will militate strongly against the granting of an extension (*Westinghouse Canada Inc v Canada (International Trade Tribunal)*, 1989 CarswellNat 722, at para 6, [1989] FCJ No 540 (FCA) **[*Westinghouse*]**; *Grewal*, above).

[22] The overriding consideration in determining whether to allow an extended period of time to serve and file an application is to ensure that justice is done between the parties (*Grewal*, above, at 272; *Hogervorst*, above, at para 33). This ensures that an extension of time can still be granted even if one of the four criteria mentioned above is not satisfied (*Hogervorst*, above, at para 33).

[23] However, the merits of the underlying application, even if very strong, may not necessarily provide a sufficient basis for granting the extension. If it were otherwise, this "would effectively abolish the time limit for all such cases and make the granting of extensions a matter of course without regard for the principle that at some stage the judgment of a court must become final" (*Grewal*, above, at 280). Stated differently, "the time limit for bringing an application for judicial review was not intended to capture only 'weak' cases" (*Zen v Canada (Minister of National Revenue)*, 2008 FC 371, at paras 52 – 53; *Chen v Canada (Citizenship and Immigration)*, 2010 FC 899, at para 33 [***Chen***]).

[24] In addition to ensuring that justice is done between the parties, it may also be relevant to consider the broader interests of justice, including impacts on third parties (*Grewal*, above, at 273-274, discussing *Berkeley, Re, Borrer v Berkeley,* [1944] 2 All ER 395 (CA)). In my view, this can include fairness to third parties who acted diligently in filing their application and any appeals therefrom, and as a result are no longer able to benefit from the same substantive change in the law that may form the basis for an application.

[25] In any event, the exercise of the Court's discretion to grant an extension of time will turn on the facts of each particular case (*Hennelly*, above, at para 4; *Grewal*, above, at 272; *Chen*, above, at paras 33-34).

[26] Subject to this Court's exercise of its discretion to grant an extension of time pursuant to paragraph 72(2)(c) of the IRPA, the underlying decision in respect of which an application for judicial review may be sought is considered to be *res judicata* upon the expiry of the 15-day

period set forth in paragraph 72(2)(b) (*Yeager v Day*, 2013 FCA 258, at para 10; *Rogers Communications Partnership v Society of Composers, Authors and Music Publishers of Canada (SOCAN)*, 2016 FCA 28, at para 86, leave to appeal to SCC refused, 36907 (23 June 2016)). Stated differently, unless an extension is granted, intervening developments in the common law do not have retrospective effect to decisions that have acquired the status of being "final" (*Ipex Inc v Lubrizol Advanced Materials Canada*, 2015 ONSC 6580, at paras 22-25). This parallels the approach taken to convictions in criminal law in cases that are no longer "in the system," even where the provision under which the accused was convicted is subsequently declared constitutionally invalid (*R v Sarson*, [1996] 2 SCR 223, at paras 25-27); *R v Wigman*, [1987] 1 SCR 246, at 248; *R v Thomas*, [1990] 1 SCR 713, at 715-6).

B. *Application of the general principles to the particular facts of this case*

[27] Mr. Emmanuel submits that the particular circumstances of his case are so exceptional and extenuating that the Court should exercise its discretion to grant him the extension of time that he has requested to file his application for review of the ID's inadmissibility decision.

[28] I disagree. Based on my review of the assessment factors listed at paragraph 19 above, I consider that it would not be appropriate to grant that extension of time. I also consider that it would not be in the interests of justice to do so.

(1) The merits of Mr. Emmanuel's application

[29] Mr. Emmanuel submits that the merits of his Application for Judicial Review are strong. This is because the ID applied essentially the same interpretation of paragraph 37(1)(b) of the IRPA that was found to have been erroneous in *B010,* above. Based on that error, B010's case, along with those of his co-appellants, were remitted to the ID for reconsideration in accordance with the narrower interpretation of that provision that was articulated by the Supreme Court. Mr. Emmanuel submits that the outcome of his Application should be the same, given that the ID did not assess whether he assumed the functions of "captain" of the *MV Sun Sea* in order to obtain a financial or other material benefit.

[30] During the oral hearing of this request for an extension, the Respondent conceded that the merits of Mr. Emmanuel's Application for Judicial Review of the ID's decision appear to be strong. However, it maintained that those merits are not as strong as Mr. Emmanuel suggests. In this regard, the Respondent asserted that, in contrast to the applicant in *B010*, above, Mr. Emmanuel did not argue before the ID that paragraph 37(1)(b) contemplates that a person must have engaged in human smuggling for financial or other material benefit (*B010 v Canada (Citizenship and Immigration)*, 2012 FC 569, at para 17 [***B010 FC***]). As a result, the ID did not assess whether he had received, or had expected to receive, such a benefit. Moreover, the Respondent referred to evidence in the record which suggests that Mr. Emmanuel may in fact have received, or been promised, a financial benefit in return for agreeing to captain the *MV Sun Sea* (Certified Tribunal Record, at 539).

[31] Notwithstanding the foregoing, I agree with Mr. Emmanuel that the merits of his Application appear to be strong, at least on a *prima facie* basis, because the ID failed to make an express or implied determination as to whether Mr. Emmanuel agreed to captain the *MV Sun Sea* in exchange for a direct or indirect financial or other material benefit (*Gechuashvili v Canada (Citizenship and Immigration)*, 2016 FC 365, at paras 22-23; *Vashakidze v Canada (Citizenship and Immigration)*, 2016 FC 1144, at para 23; *Handasamy v Canadsa (Public Safety and Emergency Preparedness)*, 2016 FC 1389, at para 42).

(2) Mr. Emmanuel's explanation for delay

[32] The ID issued its decision on September 8, 2001. However, Mr. Emmanuel waited approximately five and a half years before applying, on February 10, 2017, for Leave to apply for Judicial Review of that decision.

[33] The explanation that Mr. Emmanuel provided for that delay was that he was being investigated for criminal charges relating to the same conduct that was at issue in his hearing before the ID. Although the charges against him were not laid until June 4, 2012, he stated that he was aware much earlier that he was being investigated by the RCMP and that charges "would likely" be laid. Given that a conviction under s. 117 "would also have implied a finding of inadmissibility under s. 37," he considered that it would make sense to await the outcome of his criminal trial before contesting the ID's decision. His view in that regard was reinforced by his assessment that a conviction under s. 117 also would have resulted in his inadmissibility under s. 36(1)(a) of the IRPA for serious criminality. He asserts that this would have carried the same

inadmissibility consequences, thereby rendering any further litigation of the ID’s inadmissibility finding “meaningless and moot.”

[34] Once the Supreme Court of Canada granted Leave in *B010* and *Appulonappa*, above, his charges, as well as those of his three co-accused, were stayed pending the release of the decisions in those cases, which occurred on November 27, 2015. The stay was then lifted and he was ultimately acquitted on January 25, 2017. Three weeks later, he filed his application in this Court for Leave to apply for Judicial Review of the ID’s September 2011 decision.

[35] Mr. Emmanuel stated that his situation was further complicated by the fact that he was in immigration detention, and needed to prepare to argue for his release every 30 days from the time he first arrived in Canada. In addition, he spent a significant amount of time preparing an application for a Pre-Removal Risk Assessment [PRRA], which he submitted soon after his hearing before the ID, in September 2011, and which apparently remains outstanding.

[36] Given all the foregoing, Mr. Emmanuel maintains that the issues in his criminality and admissibility proceedings were not only complex but also fundamentally interrelated, such that it was entirely reasonable for him to have wanted to wait until the Supreme Court issued its decisions in *B010* and *Appulonappa*, above, before considering whether to further litigate the ID’s inadmissibility decision. He asserts that his position in this regard was reinforced by virtue of the fact that he had “limited means.”

[37] In my view, the explanations that Mr. Emmanuel has provides for his very long delay in seeking Leave to apply for Judicial Review in respect of the ID's inadmissibility decision are not reasonable.

[38] Mr. Emmanuel had nine months to preserve his rights in respect of that decision, prior to when charges were laid against him in June 2012. However, he failed to do so. His explanation that he believed charges would "likely" be laid is inconsistent with his own evidence before the ID that it was "a matter of speculation" as to whether a "committal or a conviction in this case" would ensue. Unfortunately, Mr. Emmanuel did not file any affidavit evidence to shed further light on this matter. Moreover, during the hearing before me, Mr. Emmanuel's counsel acknowledged that Mr. Emmanuel had been released from detention prior to when he was charged. As of that time, he was no longer constrained in his ability to seek Leave to apply for Judicial Review of the ID's decision, by virtue of being detained.

[39] Indeed, as the Respondent noted, many other passengers or crew members on the *MV Sun Sea* who were the subject of inadmissibility decisions by the ID or the Immigration Appeal Division [**IAD**] sought Leave to apply for Judicial Review within the prescribed time limit. This included *B010* and others who had raised the argument that paragraph 37(1)(b) requires a demonstration of a "financial or other material benefit," as set forth in the international *Protocol against Smuggling of Migrants by Land, Sea and Air* (see *B010 FC*, above, at paras 13-18). This Court's decision in *B010 FC*, which discussed that issue in detail, was rendered in May 2012, approximately one month before the charges against Mr. Emmanuel were laid. In that decision, Justice Noël certified the following question:

> For the purposes of para 37(1)(b) of the IRPA, is it appropriate to define the term ‘people smuggling’ by relying on section 117 of the same statute rather than a definition contained in an international instrument to which Canada is a signatory?

[40] From approximately that time onward, Mr. Emmanuel’s counsel should have been aware of the serious issue of general importance that had been raised in respect of the ID’s restrictive interpretation of paragraph 37(1)(b) in his case. This is particularly so given that that there was a person working at Legal Aid who was involved in each of the 492 cases filed by persons who were aboard the *MV Sun Sea*. (This was noted in passing by the individual who represented Mr. Emmanuel at the hearing before me.) In any event, no action was taken to preserve his rights to challenge that decision, by seeking Leave to apply for Judicial Review in this Court and then requesting an adjournment pending the outcome of *B010* on appeal, as is often done in similar circumstances.

[41] Affidavit evidence filed on behalf of Mr. Emmanuel indicates that he has maintained consistent contact with representatives of Edelman & Co Law Offices since his admissibility proceeding before the ID. However, further affidavit evidence shedding light on the reasons for Mr. Emmanuel’s delay, and explaining how his “limited means” differed from the other crew members and passengers who were being assisted by Legal Aid and had to deal with similar issues, was not filed.

[42] In addition to all of the foregoing, Mr. Emmanuel failed to seek Leave to apply for Judicial Review in this Court for a further period of approximately fifteen months following the issuance of the *B010*, above, upon which he now relies. In my view, that failure was not

reasonable, particularly given the clarifications provided by the Supreme Court in that case and in *Appulonoppa*, above, regarding paragraph 37(1)(b) and s. 117 of the IRPA, respectively. That is to say, Mr. Emmanuel's explanation that he wanted to wait until the conclusion of his criminal trial before challenging the ID's decision in this Court is not reasonable. This is especially so given his position that he did not receive a financial or other material benefit in exchange for agreeing to captain the *MV Sun Sea*. In any event, if long extensions of time for filing an application for leave were to be allowed whenever an applicant is facing outstanding criminal charges, it would undermine the public interest in bringing "finality to administrative decisions so as to ensure their effective implementation without delay" (*Berhad*, above).

[43] I will simply add in passing that Mr. Emmanuel's failure to contest the ID's inadmissibility decision in a more timely manner stands in stark contrast to the applicant in *Grewal*, above, who sought Leave to apply for Judicial Review in respect of an inadmissibility decision of the IAD promptly upon becoming aware of the Supreme Court of Canada's decision in *Singh v Minister of Employment and Immigration*, [1985] 1 SCR 177.

[44] The absence of a reasonable explanation for Mr. Emmanuel's failure to pursue this Application as diligently as could be reasonably expected, and as diligently as other passengers and crew members of the *MV Sun Sea*, militates against the granting of the extension that he has requested (*Grewal*, above, at 277; *Westinghouse*, above, at para 6).

(3) Did Mr. Emmanuel have a continuing intention to pursue his application?

[45] During the hearing before me, Mr. Emmanuel acknowledged that this is a weak factor for him. He concedes that he “did not strictly speaking maintain an intention to pursue this application, given the unique and complex legal circumstances” of this case. However, he maintains that he demonstrated a continuing intention to dispute the allegations of people smuggling against him, in both the immigration and criminal contexts, and that he always maintained that he did not materially benefit or profit from his actions.

[46] Notwithstanding the foregoing, Mr. Emmanuel did not file any evidence whatsoever which indicates that he had any intention to challenge the ID’s inadmissibility decision at any time during the five and a half year period between the time it was issued and the time he filed this Application. His failure to file such evidence is another factor that weighs strongly against the granting of the long extension of time that he now seeks in respect of this Application (*MacDonald v Canada (Attorney General)*, 2017 FC 2, at para 14; *Pfizer Canada Inc. v Canada (Minister of Health)*, 2010 FC 1236, at paras 20-21). The fact that he may have had a continuing intention to pursue his PRRA application and to contest the criminal charges that were laid against him is not particularly relevant in this context.

[47] Mr. Emmanuel also asserted that the basis for his “decision to bring this judicial review did not arise until the Supreme Court of Canada rendered its decision in *B010* and until he was acquitted of the charges for nearly the same underlying act under s. 117 of *IRPA* on January 25, 2017.” However, *B010* and other passengers on the *MV Sun Sea* sought judicial review of

inadmissibility decisions rendered by the ID in 2011 and 2012, based on the ID's failure to consider whether they had engaged in human smuggling in return for a "financial or other material benefit" (see for example, *B010 FC*, above, at para 17; *JP and GG v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 1466, at para 24; *Hernandez v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 1417, at paras 1-3 and 58-72). In contrast to the applicant in *Grewal*, above, Mr. Emmanuel did not suggest that he was unaware of this basis upon which the ID's decision could be attacked.

[48] Moreover, even if Mr. Emmanuel's assertion were to be accepted, that would not explain his failure to seek judicial review of the ID's decision immediately following the issuance of the Supreme Court's decision in *B010*, above. Given the fifteen-month interval between the time *B010* was issued and the time Mr. Emmanuel sought Leave in this Court, this failure alone weights strongly against the exercise of my discretion to grant the extension that he has requested (*Arteaga*, above, at para 16; *Villatoro*, above, at para 27).

(4) Would the Respondent be prejudiced by the granting of an extension?

[49] Mr. Emmanuel submits that delay, in and of itself, does not necessarily cause prejudice to the Respondent, even where the period of delay is five and a half years. In this regard, he relies on *Canada v Aqua-Gem Investments Ltd*, [1993] 2 FC 425, 1993 CarswellNat 855 at para 108. There, a majority of the Federal Court of Appeal suggested that it would not be appropriate to rely "solely on an intuitive notion that inordinate delay necessarily entails serious prejudice." Rather, there must be <u>evidence</u> of prejudice (*Ferguson v Arctic Transportation Ltd*, [1996] FCJ No 1074, at paras 30-33).

[50] The Respondent did not file such evidence. Instead, it relies on the long period of delay, in and of itself. In support of its position, it referred to this Court's decision in *Canada* (*Minister of Human Resources and Development) v Gattellaro*, 2005 FC 883, at paras 16-17 [***Gattellaro***]. There, Justice Snider suggested that a delay of over seven years could be very prejudicial to the Minister, even though the record disclosed no evidence whatsoever on this question. Among other things, the Court was concerned that allowing a matter to proceed, "absent compelling reasons, long after the expiry of time leads to a lack of certainty and finality for both he Minister and all parties to the process" (at para 17).

[51] In the context of the long delay at issue in the present Application, I am very sympathetic to the abovementioned views expressed by Justice Snider in *Gattellaro*, above. However, I am bound by *Aqua Gem*, above, which does not appear to have been drawn to Justice Snider's attention.

[52] Accordingly, I consider that the absence of a demonstration of prejudice by the Respondent should weigh in favour of exercising my discretion to grant the extension that Mr. Emmanuel has requested. On the particular facts of this case, I am of the view that it is more appropriate to consider the long period of delay in determining how much weight to give to Mr. Emmanuel's lack of intention to challenge the ID's inadmissibility decision in this Court for several years.

(5) Summary and the interests of justice

[53] In summary, the *prima facie* merits of Mr. Emmanuel's application, together with the absence of prejudice to the Respondent, weigh in favour of granting the extension that Mr. Emmanuel has requested. However, the absence of a reasonable explanation for his delay, and his lack of an intention to challenge the ID's inadmissibility decision for several years, weigh strongly against granting that extension.

[54] A further consideration that weighs against granting that extension is the interests of justice. As the Respondent has noted, many other passengers on the *MV Sun Sea* filed an Application for Judicial Review of an inadmissibility decision rendered by the ID, within the applicable time limit. In this regard, the Respondent filed an affidavit sworn by Kathryn Cowman, who stated that she had knowledge of 18 passengers or crew of that vessel who had inadmissibility hearings before the ID. Of those 18 persons, 12 commenced an Application for Judicial Review of decisions of the ID, or the IAD, in which they were found to have been inadmissible under paragraph 37(1)(b) of the IRPA. All but one of those applications were filed within the applicable time limit, while the other one was filed approximately three days after the deadline. To the extent that those proceedings have been determined and any appeals therefrom have been exhausted, the applicants cannot now take advantage of the change in the law brought about by *B010*, above. In my view, to allow Mr. Emmanuel to now do so would be very unfair to those other individuals. In effect, this would permit Mr. Emmanuel to benefit from his conscious decision to ignore, for a very long period of time, the time limit set forth in paragraph 72(2)(b) of

the IRPA, while his co-passengers who abided by that time limit would have no such recourse. In my view, this would not be in the interests of justice (*Grewal*, above, at 272, *Gattellaro*, above).

[55] By contrast, denying Mr. Emmanuel's request for an extension of time will effectively leave him in the same position as his fellow crew members and passengers mentioned above, including with respect to other potential mechanisms for avoiding deportation from Canada, such as seeking (or awaiting the outcome of) a PRRA, and seeking a Ministerial exemption under s. 42.1 of the IRPA.

IV. **Conclusion**

[56] For the reasons set forth above, the extension of time that Mr. Emmanuel has requested to file this Application will not be granted.

[57] When asked if there was a question for certification, counsel to the Respondent replied in the negative. However, counsel to Mr. Emmanuel initially suggested a question along the lines of whether a particularly strong case on the merits could overcome a very long delay in filing an Application for Leave for Judicial Review. On further reflection, Mr. Emmanuel's counsel quickly agreed that it is settled law that each case will turn on its particular facts (*Hennelly*, above, at para 4; *Grewal*, above, at 272; *Chen*, above, at paras 33-34).

[58] In my view, no serious question of general importance arises from this application. Accordingly, there is no question for certification.

JUDGMENT IN IMM-626-17

THIS COURT'S JUDGMENT is that:

1. An extension of time within which to file this Application will not be granted. Accordingly, this Application is dismissed.

2. There is no question for certification

"Paul S. Crampton"
Chief Justice

APPENDIX 1 — Relevant Legislation

***Immigration and Refugee Protection Act*, SC 2001, c 27**

Organized criminality

37 (1) A permanent resident or a foreign national is inadmissible on grounds of organized criminality for

(a) being a member of an organization that is believed on reasonable grounds to be or to have been engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment, or in furtherance of the commission of an offence outside Canada that, if committed in Canada, would constitute such an offence, or engaging in activity that is part of such a pattern; or

(b) engaging, in the context of transnational crime, in activities such as people smuggling, trafficking in persons or laundering of money or other proceeds of crime.

(…)

Application

72 (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 arising in Canada, or within 60 days, in the case of a

***Loi sur l'immigration et la protection des réfugiés*, LC 2001, ch 27**

Activités de criminalité organisée

37 (1) Emportent interdiction de territoire pour criminalité organisée les faits suivants :

a) être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle se livre ou s'est livrée à des activités faisant partie d'un plan d'activités criminelles organisées par plusieurs personnes agissant de concert en vue de la perpétration d'une infraction à une loi fédérale punissable par mise en accusation ou de la perpétration, hors du Canada, d'une infraction qui, commise au Canada, constituerait une telle infraction, ou se livrer à des activités faisant partie d'un tel plan;

b) se livrer, dans le cadre de la criminalité transnationale, à des activités telles le passage de clandestins, le trafic de personnes ou le recyclage des produits de la criminalité.

(…)

Application

72 (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 été rendue au Canada ou non, suivant, sous réserve de l'alinéa 169f), la date où le demandeur en est

matter arising outside Canada, after the day on which the applicant is notified of or otherwise becomes aware of the matter;

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.

(…)

(…)

Human Smuggling and Trafficking

Organizing entry into Canada

117 (1) No person shall organize, induce, aid or abet the coming into Canada of one or more persons knowing that, or being reckless as to whether, their coming into Canada is or would be in contravention of this Act.

Organisation d'entrée illégale au Canada

Entrée illégale

117 (1) Il est interdit à quiconque d'organiser l'entrée au Canada d'une ou de plusieurs personnes ou de les inciter, aider ou encourager à y entrer en sachant que leur entrée est ou serait en contravention avec la présente loi ou en ne se souciant pas de ce fait.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-626-17
STYLE OF CAUSE:	EMMANUEL LESLY V. THE MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA
PLACE OF HEARING:	VANCOUVER
DATE OF HEARING:	OCTOBER 2 2017
ORDER AND REASONS:	CRAMPTON C.J.
DATED:	MARCH 8, 2018

APPEARANCES:

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Mark East	FOR THE RESPONDENT

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