Federal Court  Cour fédérale

Date: 20210331

Docket: IMM-250-21

Citation: 2021 FC 278

St. John's, Newfoundland and Labrador, March 31, 2021

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

ABDULKADIR AHMED MAYOW

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

[1] By a Notice of Motion dated March 15, 2021, submitted for consideration without personal appearance pursuant to Rule 369, of the *Federal Courts Rules,* SOR/98-106 (the "Rules"), Mr. Abdulkadir Ahmed Mayow (the "Applicant") seeks an extension of time within which to seek leave and judicial review of a decision of the Immigration and Refugee Board, Refugee Appeal Division (the "RAD").

[2] In that decision, the RAD confirmed the decision of the Immigration and Refugee Board, Refugee Protection Division (the "RPD") that the Applicant was excluded from Refugee protection under Article 1F(b) of the *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137 (the "Refugee Convention"), found in the Schedule to the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act"), for the commission of a serious non-political crime outside of Canada.

[3] The Applicant was convicted, upon entry of a guilty plea, for a hit and run incident in Missouri, U.S.A., that happened on December 18, 2001.

[4] The Motion is supported by the affidavits of the Applicant and of Ms. Gentiana Morina.

[5] In his affidavit, the Applicant refers to his proceedings before the RPD and the RAD, and his engagement of new Counsel to represent him upon an application for leave and judicial review of the RAD decision. He also offers an explanation for the delay in submitting his application for leave and judicial review, including a request for Legal Aid.

[6] Ms. Morina is a law student employed in the office of current counsel for the Applicant. In her affidavit, she describes the initial contact from the Applicant about bringing an application for leave and judicial review in respect of the RAD decision. Attached to her affidavit are a number of exhibits, including the documents filed before the RAD, the decision of the RAD, and emails relating to the Applicant's application for Legal Aid.

[7] The Applicant argues that he meets the four-part test for an extension of time set out in *Canada (Attorney General) v. Hennelly*, 244 N.R. 399, as follows:

1. a continuing intention to pursue his or her application;
2. that the application has some merit;
3. that no prejudice to the respondent arises from the delay; and
4. that a reasonable explanation for the delay exists.

[8] The Minister of Citizenship and Immigration (the "Respondent") argues that the Applicant has failed to meet any of the four elements for an extension of time.

[9] The Applicant claims that he received the RAD decision on December 7, 2020. He sent current Counsel an email with a photo of the Notice, the cover page of the reasons and the distribution list of the reasons. He deposed that he applied for Legal Aid on December 16, 2020 and received advice on January 15, 2021 that a certificate for such assistance would be issued.

[10] On January 18, 2021, the application for leave and judicial review was filed with the Registry of the Court in Winnipeg.

[11] On February 18, 2021, the Applicant found more pages of the reasons and sent "unclear pictures" of the remaining pages of the reasons and on February 19, 2021, he delivered the RAD reasons to Counsel.

[12] On February 27, 2021, Counsel prepared an affidavit for execution by the Applicant via video conference. The Applicant did not have a printer and did not know how to connect via video conference. The Applicant executed this affidavit on March 6, 2021.

[13] On March 15, 2021, the Applicant filed his motion record in support of his motion for an extension of time.

[14] The Applicant submits that he meets the four part test for an extension of time. He says that he held a continuous intention to seek leave and judicial review of the RAD decision but because his former lawyer had moved, he had to find a new lawyer. He argues that the decision of the RAD is based upon an issue not addressed by the RPD, that is, his credibility, and that his application for leave and judicial review has merit.

[15] While the Applicant acknowledges that the delay in seeking leave and judicial review causes prejudice to the Respondent, in terms of postponing finality of the proceedings before the Board, he argues that the prejudice is minor.

[16] Finally, the Applicant submits that he has a reasonable explanation for the delay and that granting an extension of time would be in the interests of justice.

[17] For his part, the Respondent argues that the evidence submitted by the Applicant does not show a continuing intention to seek leave and judicial review, that the decision of the RAD is reasonable, that there is no reasonable explanation for the whole of the delay, that the application

for leave and judicial review does not raise a serious issue, that the time limits for seeking leave and judicial review are not “whimsical”, and that the interests of justice do not favour granting an extension. He also submits that the delay is prejudicial.

[18] The jurisprudence dealing with an extension of time relative to an application for leave and judicial review under the Act was reviewed in detail in the decision *Kiflom v. Canada (Minister of Citizenship and Immigration)*, 2020 FC 205. In that decision, Justice Strickland addressed the elements of the *Hennelly, supra,* decision and dismissed the motion.

[19] The Respondent disagrees with the Applicant about the commencement date for the calculation of time. He says that the RAD decision was mailed to the Applicant on September 22, 2020, and the Applicant says that he received the decision on December 7, 2020.

[20] According to the *Refugee Appeal Division Rules*, SOR/2012-257, receipt of the decision is deemed to occur seven days later, that is by September 29, 2020. In such circumstances the application for leave and judicial review was to be filed within 15 days, that is by October 14, 2020.

[21] If the date of December 7, 2020 is accepted as the date on which the Applicant received the decision, his delay for filing an application for leave and judicial review was December 22, 2020.

[22] The Applicant did not submit his application for leave and judicial review until January 18, 2021.

[23] In either case, the Applicant was late.

[24] In *Flores Cabrera v. Canada (Citizenship and Immigration)*, 2011 FC 1251, the Court decided that waiting for the issuance of a Legal Aid certificate is not a reasonable explanation for failing to file an application for leave and judicial review within the time limits set out in paragraph 72(2)(b) of the Act.

[25] I agree with the position of the Respondent that the Applicant has failed to explain the whole period of the delay, even if that delay is calculated by reference to the date of December 7, 2020.

[26] The Respondent argues that the proposed application for leave and judicial review lacks merit, that the issue of credibility was raised by the Applicant in his submissions to the RAD, and that he cannot complain that this is a "new issue" that was addressed by the RAD without notice to him.

[27] I note that in the submissions to the RAD, former counsel for the Applicant said the following at paragraph 17:

> 17. It is settled law that when a claimant swears facts are true, it creates a presumption of that truthfulness unless there is a valid reason to doubt the credibility. *(Maldonado v Canada (Minister of Employment and Immigration)*, [1979] F.C.J. No. 248 (CA)) Mr.

> Mayow testified that he was subjectively unaware of the suspension. In her reasons, Member Chan holds at para 42, that driving while suspended shows a disregard with respect to driving regulations and public safety. It is respectfully submitted that this is an erroneous assertion given that there is disagreement that Mr. Mayow was aware of the suspension, which would negate any assertion regarding his state of mind at the time of the accident.

[28] The RAD spoke about the Applicant's credibility in paragraphs 12, 13 and 14, as follow:

> [12] Counsel for the appellant argues that the RPD erred in her analysis as she concluded that the fact that the appellant was driving while his licence was suspended is an aggravating factor in assessing the seriousness of the offence. The panel disagrees. The evidence before the panel indicates that at the time of the offence, the appellant's driver's licence was suspended. The appellant testified that he was unaware that his licence was suspended at the time of the offence. The panel has listened to the recording of the RPD hearing and finds that the appellant was not a credible witness. The appellant was asked at the RPD hearing about another offence involving the possession of a concealed weapon. While the panel recognizes that this is a separate offence and not related to the Article lF(b) exclusion, it is revealing of the appellant's lack of credibility.
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> [13] The appellant was questioned about the gun charge. He testified that he found a bag near a school that contained a gun, drugs and cash. The appellant further stated that he did not want the school children to find the bag. The appellant states that he planned to tum the gun over to the authorities but he forgot. He stated that when the police approached him, he forgot about the gun. The panel finds that the appellant was not credible and that he improvised his testimony at the RPD hearing to try and diminish his responsibility for being in possession of a concealed weapon.
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> [14] The police report involving the incident provides a significantly different version of events. For example, the police report indicates that the appellant had the gun tucked in his belt and that it was visible. When the police approached, the appellant tried to dispose of the weapon. The panel prefers the version of events in the police report over the version provided by the appellant. The panel simply does not find the appellant credible that he found a weapon and had the intention of turning it over to the authorities but he simply forgot. The panel finds that this negatively impacts the appellant's overall credibility. For this

> reason, the panel finds that the appellant was not credible in his testimony that he was unaware that his licence was suspended at the time of the offence.

[29] It seems that the RAD made credibility findings against the Applicant in respect of a matter for which he was not charged, that is possession of a concealed weapon, and then used those negative credibility findings to conclude that the Applicant was not credible relative to the offence with which he had been charged, that is a hit and run incident.

[30] In my opinion, the Respondent's submissions, that credibility was raised by the Applicant before the RAD, are only partly correct. The Applicant raised credibility with respect to the issue of exclusion under Article 1F(b), in connection with an offence to which he had pleaded guilty and for which he received a suspended sentence.

[31] The Applicant did not raise any issue of credibility in connection with an offence for which he had not been charged.

[32] In *Canada (Minister of Citizenship and Immigration) v. Huruglica*, 396 D.L.R. (4th) 527, at paragraph 103, the Federal Court of Appeal described the role of the RAD upon an appeal, as follows:

> I conclude from my statutory analysis that with respect to findings of fact (and mixed fact and law) such as the one involved here, which raised no issue of credibility of oral evidence, the RAD is to review RPD decisions applying the correctness standard. Thus, after carefully considering the RPD decision, the RAD carries out its own analysis of the record to determine whether, as submitted by the appellant, the RPD erred. Having done this, the RAD is to provide a final determination, either by confirming the RPD

> decision or setting it aside and substituting its own determination of the merits of the refugee claim. […]

[33] In my opinion, the RAD improperly strayed beyond its appointed role and unilaterally considered a matter that was not in issue before it.

[34] Eventually, the RAD returned to the matter that was properly before it, that is whether the decision of the RPD, finding that the Applicant is excluded from refugee protection, pursuant to Article 1F(b), was correct.

[35] While I am prepared to say that the Applicant may have raised a serious issue for trial, for the purpose of obtaining leave to bring an application for judicial review, I cannot say that he would succeed upon such an application, in light of the evidence about the motor vehicle accident and subsequent criminal charge in the United States.

[36] The RPD found that the Applicant was excluded from protection, either as a Convention refugee or person in need of protection, on the basis of Article 1F(b) of the Refugee Convention that is for the commission of a serious non-political crime outside of Canada. It found that the motor vehicle incident in Missouri was a “serious non-political crime” committed outside of Canada.

[37] Ultimately, The RAD confirmed this finding of the RPD.

[38] Such a finding is largely based upon facts, subject to the applicable law, therefore raising a question of mixed fact and law that is subject to review on the standard of reasonableness.

[39] In my opinion, the decision of the RAD would likely withstand review on the standard of reasonableness. Subsequent to the decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov* (2019), 441 D.L.R. (4th) 1 (S.C.C.), the content of the reasonableness standard remains the same as per the decision in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190.

[40] According to the decision in *Dunsmuir*, *supra*, the standard of reasonableness requires that a decision be justifiable, transparent and intelligible, falling within a range of possible, acceptable outcomes that are defensible on the law and the facts.

[41] The Applicant's delay in filing his application for leave and judicial review beyond the time limited by the Act is, *per se*, prejudicial. I refer to the decision in *Collins v. Canada (Attorney General)*, 2010 FC 949 cited by the Respondent.

[42] Finally, there is the element of the interests of justice, the overriding consideration in an application for an extension of time.

[43] The "interests of justice" mean more than the interests of a particular party or applicant. They are to be assessed relative to the factors identified in the jurisprudence.

[44] Weighing the evidence submitted by the Applicant and considering the arguments of the parties, in light of the guiding jurisprudence, I am not satisfied that the Applicant has made a case for the exercise of discretion in favour of his motion for an Order extending the time to commence an application for leave and judicial review.

[45] Accordingly, the motion is dismissed.

[46] The Respondent does not seek costs and in the exercise of my discretion pursuant to Rule 400 of the Rules, no costs are awarded.

ORDER in IMM-250-21

THIS COURT'S ORDER is that the motion for extension of time is dismissed, no order as to costs.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-250-21
STYLE OF CAUSE:	ABDULKADIR AHMED MAYOW v THE MINISTER OF CITIZENSHIP AND IMMIGRATION

MOTION IN WRITING CONSIDERED AT ST. JOHN'S, NEWFOUNDLAND AND LABRADOR PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

ORDER AND REASONS:	HENEGHAN J.
DATED:	MARCH 31, 2021

WRITTEN REPRESENTATIONS BY:

David Matas	FOR THE APPLICANT
Brendan Friesen	FOR THE RESPONDENT

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