Federal Court Cour fédérale

Date: 20221020

Docket: IMM-8673-22

Citation: 2022 FC 1430

[ENGLISH TRANSLATION REVISED BY THE AUTHOR]

Ottawa, Ontario, October 20, 2022

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

AVIJINDER PAL SINGH KHINDA
CHARU KHINDA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

[1] The respondent is bringing a motion to strike the applicants' application for leave and judicial review, alleging that it is out of time. I dismiss that motion, as it is premature and complicates rather than simplifies the proceedings.

[2] The decision that is the subject of the application was made on July 25, 2022. The application was filed on September 6, 2022. The application was *prima facie* filed outside the 15-day time limit set out in paragraph 72(2)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act]. It did not include a request for extension of time. However, in the notice of application, the applicants stated that they did not receive the decision until August 24, 2022. If that is true, the application is not out of time, as the period set out in paragraph 72(2)(b) does not begin until "the applicant is notified … or … becomes aware" of the impugned decision.

[3] Nonetheless, the respondent is seeking to have the application struck. He claims that it is unreasonable that the applicants would not have received the decision until 30 days after it was mailed to them and a copy was sent electronically to their counsel. He accuses the applicants of being negligent and not filing their application within the time limit and not submitting any sworn evidence concerning the date on which the impugned decision was received.

[4] In my view, the respondent's motion is premature. The only pleading on record is the application for leave. Under section 5 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 [the Rules], that application must include "the grounds on which the relief is sought, including a reference to any statutory provision or Rule to be relied on", but need not include an affidavit or other type of evidence. It must be prepared based on Form IR-1, which includes the following instructions:

> Set out the date and details of the matter — the decision or order made, measure taken or question raised — in respect of which a judicial review is sought and the date on which the applicant was notified or otherwise became aware of the matter.
>
> [Emphasis added.]

[5] The application for leave serves the same function as a notice of application under rule 301 of the *Federal Court Rules*, SOR/98-106: It delineates the matter in dispute to inform the respondent of the case to meet and to circumscribe the evidence to be put on the record. Like the notice of application, the application for leave is not itself evidence and does not need to list the evidence on which the applicants intend to rely: *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250 at paragraphs 40–41, [2014] 2 FCR 557.

[6] In this case, the applicants were not required to attach sworn evidence to their application for leave to support their assertion concerning the date on which the decision was received. Under rule 10, the applicants are required to provide "one or more supporting affidavits that verify the facts relied on" when they file their record, including the facts required to show that the application was filed within the time limit set out in paragraph 72(2)(b).

[7] Only after the applicants have filed their record will it be possible to determine the starting point of the 15-day period set out in paragraph 72(2)(b). That is also when it can be determined whether the presumption of receipt set out in section 35(2) of the *Refugee Appeal Division Rules*, SOR/2012-257, is rebutted or whether the rules concerning allegations against the applicant's former counsel set out in paragraphs 46 to 54 of the *Consolidated Practice Guidelines for Citizenship, Immigration and Refugee Protection Proceedings* (June 24, 2022) must be followed.

[8] The application should therefore not be struck before the applicants have the opportunity to file their record. The purpose of the motion is essentially to force the applicants to submit evidence before the time set out in the Rules.

[9] In fact, the applicants can hardly be blamed for having followed Form IR-1 to the letter and having indicated the date on which the impugned decision was received in the way provided for on that form.

[10] In addition, paragraph 74(c) of the Act states that an application for leave and judicial review must be disposed of "without delay and in a summary way". The Rules set out a simplified process in this regard. They do not allow for the possibility of bringing a motion to strike. Although the Court may strike an application based on its inherent powers, the bringing of a motion to strike in immigration cases should be strongly discouraged: *Mubenga v Canada (Citizenship and Immigration)*, 2015 FC 111 at paragraph 12; *Krah v Canada (Citizenship and Immigration)*, 2019 FC 361 at paragraphs 13–14; *Kaur v Canada (Citizenship and Immigration)*, 2022 FC 676 at paragraphs 7–8.

[11] If this Court were to grant this motion, compliance with the time limit set out in paragraph 72(2)(b) would become a separate issue that could be the subject of a preliminary debate. That would be contrary to the spirit of the Rules. Rule 6 states that a request for extension of time must be disposed of at the same time as the application for leave. Logically, the issue of whether a request for extension of time is needed should be addressed at the same time. If the respondent is of the view that the application is out of time, he must make that

submission when responding to the application for leave: *David Bull Laboratories (Canada) Inc. v Pharmacia Inc.*, [1995] 1 FC 588 (CA) at 596–97. Given that most immigration applicants have only modest means, it is undesirable to add another step to the process set out in the Rules.

[12] The motion to strike is therefore dismissed.

ORDER in IMM-8673-22

THIS COURT ORDERS that:

1. The style of cause is amended to name the Minister of Citizenship and Immigration as the respondent.

2. The motion to strike brought by the respondent is dismissed.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-8673-22
STYLE OF CAUSE:	AVIJINDER PAL SINGH KHINDA, CHARU KHINDA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO, PURSUANT TO RULE 369

ORDER AND REASONS:	GRAMMOND J.
DATED:	OCTOBER 20, 2022

APPEARANCES:

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Chantal Chatmajian	FOR THE RESPONDENT

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