

Federal Court



Cour fédérale

Date: 20240516

Docket: IMM-11358-22

Citation: 2024 FC 748

Ottawa, Ontario, May 16, 2024

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

**HARJINDER KAUR KHANGURA
SURJIT SINGH**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS AND ORDER

[1] By a motion submitted for consideration pursuant to the *Federal Courts Rules*, SOR/98-106 (the “Rules”), Ms. Harjinder Kaur Khangura and Mr. Surjit Singh (the “Applicants”) seek an Order setting aside the deemed discontinuance of their application for leave and judicial review and an extension of time within which to file their application record.

[2] The Applicants filed their application for judicial review on November 15, 2022. The Index of Recorded Entries does not show the entry of a deemed discontinuance.

[3] In *Virk v. Canada (Citizenship and Immigration)*, 2023 FC 143, Associate Judge Duchesne set out a test for responding to a motion seeking to set aside a deemed discontinuance, as follows:

Step 1: is there evidence in the Motion Record that the [application for leave and judicial review] was not perfected in accordance with and within the time set out in Rule 10 of the [*Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22] or an Order of the Court because of exceptional circumstances or of a fundamental event that affected the applicant’s ability to perfect their [application for leave and judicial review] in a timely manner despite acting diligently? If Step 1 is satisfied, Step 2 can be considered. If Step 1 is not satisfied, then there is no need consider Step 2.

Step 2: is there evidence in the Motion Record to satisfy the test for an extension of time?

[4] In *Singh v. Canada (Citizenship and Immigration)*, 2023 FC 380, Associate Judge Tabib applied the test for an extension of time, without requiring the applicant to satisfy “Step 1” from the test set out above.

[5] In the present motion, the Minister of Citizenship and Immigration (the “Respondent”) relies upon the decision in *Virk, supra* and submits that the Applicants’ motion for relief should be dismissed.

[6] The basis of the Applicants’ prayer for relief is the oversight by their Counsel in diarizing the due date of the application record.

[7] In *Canada (Attorney General) v. Hennelly* (1999), 244 N.R. 399 (F.C.A.), the Federal Court of Appeal set out four factors for consideration upon a request for an extension of time:

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] In *Canada (Attorney General) v. Larkman* (2012), 433 N.R. 184 (F.C.A.), the Federal Court of Appeal said that the overriding consideration is that the interests of justice be served.

[9] The decisions of the Associate Judges are part of the jurisprudence but, in my opinion, these decisions are less persuasive than the decisions of the Federal Court of Appeal addressing the factors to be considered upon a request for an extension of time.

[10] I will briefly address the factors in *Hennelly, supra*.

[11] The motion record filed by the Applicants includes the affidavit of Ms. Rekha McNutt, a lawyer with the law firm representing the Applicants.

[12] In her affidavit, Ms. McNutt deposed that the Applicants always had a continuing intention to pursue the application for leave and judicial review. She deposed that she was responsible for missing the time for filing the application record and that there were delays associated with obtaining affidavits from the Applicants who reside in India.

[13] The Respondent argues that the Applicants have failed to meet any of the *Hennelly* factors, noting in particular that oversight by counsel is not a reasonable explanation for delay and that, in the absence of an application record containing argument about the errors in the negative decision, there is no basis upon which to assess the merits of the application. He also submits that prejudice can be inferred from the delay and the need to respond to the motion for an extension of time.

[14] I agree with the Respondent's submissions, which are supported by the applicable jurisprudence. The considerations he raises are sufficient for me to conclude that the Applicants have not met the test for an extension of time, and this motion will be dismissed. In the exercise of my discretion pursuant to the Rules, there is no Order as to costs.

ORDER IN IMM-11358-22

THIS COURT'S ORDER is that the motion is dismissed, no Order as to costs.

"E. Heneghan"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-11358-22

STYLE OF CAUSE: HARJINDER KAUR KHANGURA ET AL. v. THE
MINISTER OF CITIZENSHIP AND IMMIGRATION

**MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO
RULE 369 OF THE *FEDERAL COURTS RULES***

REASONS AND ORDER: HENEGHAN J.

DATED: MAY 16, 2024

WRITTEN REPRESENTATIONS BY:

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