

Federal Court



Cour fédérale

Date: 20120418

Docket: IMM-1574-11

Citation: 2012 FC 446

Ottawa, Ontario, April 18, 2012

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

JEYAKUMARAN MUNEESWARAKUMAR

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION & THE MINISTER OF
PUBLIC SAFETY AND EMERGENCY
PREPAREDNESS**

Respondents

Docket: IMM-1575-11

AND BETWEEN:

JEYAKUMARAN MUNEESWARAKUMAR

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION & THE MINISTER OF
PUBLIC SAFETY AND EMERGENCY
PREPAREDNESS**

Respondents

REASONS FOR ORDER AND ORDER

[1] This is a motion by the respondents for an order extending the time permitted by the orders of Mr. Justice James O'Reilly, dated July 14, 2011, to serve and file the respondents' further affidavits and allowing the respondents further affidavits to be filed and served *nunc pro tunc* or as ordered by the Court. The respondents also seek costs in the amount of \$500.

[2] The underlying judicial reviews were for review of the negative decision in the applicant's H&C application and his paragraph 115(2)(b) of the *Immigration and Refugee Protection Act* application; decisions that were issued in February 2011.

[3] In March 2011, criminal charges were laid against the applicant. An arrest warrant was issued on March 3, 2011. The applications for leave and for judicial review were filed on March 10, 2011.

[4] During the month of March 2011, the applicant's counsel was negotiating with Canada Border Services Agency (CBSA) officials for the release of the applicant from detention. As a result, CBSA officials were aware of the charges against the applicant. However, according to the argument at the hearing of this motion, the respondents' counsel was not aware of this information until much later on October 6, 2011.

[5] The applicant's affidavit for the judicial review applications was sworn on April 5, 2011 and contained the following sentence:

I, Jeyakumaran Muneeswarakumar, presently resident of the Central East Correction Centre, in Lindsay, Ontario, Make Oath and Say as Follows:

[6] The respondents' further affidavits which are at issue here, deal with the eleven new criminal charges against the applicant.

[7] **Issue**

Should the respondents be granted an extension of time in which to file the further affidavits?

Analysis and Decision

[8] Rule 8 of the *Federal Courts Rules*, SOR/98-106, permits an extension of time for filing affidavits to be made by the Court.

[9] In *Canada (Attorney General) v Hennelly* (1999) 244 NR 399, [1999] FCJ No 846, the Federal Court of Appeal stated the test for granting an extension of time as follows (at paragraphs 3 and 4):

3. The proper test is whether the applicant has demonstrated
 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.

4. Any determination of whether or not the applicant's explanation justifies the granting of the necessary extension of time will turn on the facts of each particular case.

[10] The facts of this case are somewhat different from those in *Hennelly* above, where the issue was failure to file a record within the time limit. Here, an extension of time is sought to file affidavits. I am of the view that the above test nevertheless also applies to this situation.

[11] A continuing intention to pursue his or her application

There is no doubt that the respondents always intended to pursue their defence of the decision at issue in these judicial review applications.

[12] That the application has some merit

Again, the respondents' defence of the merits of this application would meet this branch of the test. I note that in making this finding, I am not deciding any of the merits of the decisions under judicial review.

[13] That no prejudice to the respondent arises from the delay

The respondents are probably correct that there would be no prejudice to the applicant should the motion be granted. The applicant could ask to file further material to add to his arguments. Any extra costs could be compensated by an award of costs.

[14] That a reasonable explanation for the delay exists

The facts relating to this branch of the test bear repeating. The decisions under review were made on February 2, 2011. The applicant was charged with the criminal offences in early March

2011. In March 2011, the applicant's counsel was negotiating with CBSA officials for the release of his client from detention. The respondents knew in March 2011 that the applicant was facing new charges but apparently their counsel was not made aware of this fact until October 6, 2011.

[15] On this motion, the respondents' explanation for the delay is contained in paragraph 4 of the affidavit of Harminder Niki Singh:

Due to an inadvertent oversight, the Department of Justice was not provided with the information and documentation about the Applicant's pending criminal charges and detention until October 6, 2011.

[16] In *Hennelly* above, the Federal Court of Appeal stated at paragraphs 6 and 7:

6. In this case the Motions Judge found that inadvertence was an insufficient explanation for the appellant's delay.

7. We can find no compelling reason to interfere with the Motions Judge's exercise of discretion in finding that the appellant failed to provide an adequate explanation which would justify granting an extension of time.

[17] A perusal of the Singh affidavit does not persuade me that the deponent was handling the file at CBSA. The affidavit only states that Harminder Niki Singh is a justice liaison officer with CBSA and that he reviewed the applicant's file after an inquiry was received. It is obvious that for some reason the respondents did not provide their counsel with the information about the applicant's charges. The sole explanation for the delay from March 2011 to October 6, 2011 in providing the information to their counsel was "inadvertent oversight". The Court has no idea what caused the oversight or what was involved in the oversight. As a result, I must conclude that there has not been a reasonable explanation for the delay since the respondents knew since March 2011 of

the new criminal charges. What is important here is when the parties knew; not when they told their counsel.

[18] The respondents also contended that an extension of time should be granted to file the affidavits because they were useful for the clean hands argument, the futility argument and the credibility argument.

[19] The clean hands argument is based on the fact that the applicant did not disclose his additional criminal charges in his judicial review application affidavit. I would not grant the extension of time on this basis for the following reasons. The applicant stated in his affidavit that he was presently resident in Central East Correction Centre. This is an indication that he probably had been charged with an offence. Also, the fact is that the respondents actually knew in March 2011 that the applicant had been charged as negotiations for his release were taking place.

[20] I would also not grant the extension of time for reason of the futility argument. I have no way of knowing whether the applicant will be found guilty of the charges. As well, any future decisions with respect to the applicant are discretionary decisions. What the Ministers' delegate does with the charges on any possible convictions is a discretionary decision on the delegate's part.

[21] Finally, with respect to the need for the new affidavits to address the credibility issues, I am of the view that the credibility issues can be dealt with on the basis of the material already filed in these judicial review applications.

[22] The Court is also mindful that, with limited exceptions that have not been raised here, the material before the judge conducting the judicial review is the material that was before the decision maker below. The jurisprudence of this Court has also stated that the affidavit evidence for which an extension of time to file is made must be relevant and admissible.

[23] As a result of my findings on the *Hennelly* above test, and after balancing these findings, I am of the view that the respondents' motion for an extension of time in which to file the additional affidavits (in each file) must be dismissed.

[24] The applicant has asked for solicitor and client costs in this matter. Bearing in mind that this matter is related to immigration, I am not persuaded that there are special reasons to award costs (see Rule 22 of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22).

ORDER

THIS COURT ORDERS that the respondents' motion is dismissed.

“John A. O’Keefe”

Judge

Federal Court



Cour fédérale

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-1574-11

STYLE OF CAUSE: JEYAKUMARAN MUNEESSWARAKUMAR

- and -

THE MINISTER OF CITIZENSHIP AND
IMMIGRATION & THE MINISTER OF
PUBLIC SAFETY AND EMERGENCY
PREPAREDNESS

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: October 20, 2011

**REASONS FOR ORDER
AND ORDER OF:** O'KEEFE J.

DATED: April 18, 2012

APPEARANCES:

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