Federal Court  Cour fédérale

Date: 20160923

Docket: T-692-16

Citation: 2016 FC 1083

Ottawa, Ontario, September 23, 2016

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

KOEHNE, MIRKO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an appeal of the Order of Prothonotary Lafrenière of August 4, 2016. The Prothonotary denied the motion in writing of July 22, 2016 whereby the applicant sought an extension of time to file the applicant's record in order to complete his judicial review application pursuant to s 22.1 of the *Citizenship Act*, RSC, 1985, c C-29. An application for leave must be filed and served within 30 days of the day on which the applicant becomes aware of the

matter (para 22.1(2)(a) of the *Citizenship Act*). The applicant's record is due within 30 days of the leave application being served and filed.

[2] In the case at hand, the Citizenship Court decision was handed down on April 15, 2016. The application for leave and judicial review was filed on May 4, 2016. However, the applicant's record, which was due on June 3, was not filed. Instead, the applicant attempted to file documents or, alternatively, sought an extension of time to be granted. The applicant is not represented by counsel, although he claims he receives advice.

[3] The documents submitted were not accepted for filing as not conforming with rule 10 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, as amended. Nevertheless, an extension of time was granted on June 27, 2016; a further direction was issued on July 11, fixing the extension deadline to July 22 in order to perfect the record in accordance with rule 10.

[4] The applicant made a motion dated August 3, 2016, for the purpose of a further extension of time to August 31, 2016.

[5] On August 4, Prothonotary Lafrenière dismissed the motion for extension of time. Applying the four factors that govern the discretionary decision to grant, or not, an extension of time, the Prothonotary concluded that there was no explanation for the delay and the merit of the underlying application had not been established. The four criteria, set out in *Canada (Attorney General) v Hennelly* (1999), 244 NR 399 (FCA)[*Hennelly*], read:

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.

[6] In essence, the applicant's record was due on June 3 and by August 3, it still was not ready for filing as the applicant was asking for an extra month to file his record. Obviously, the applicant wants to pursue his application; the Crown, which opposed the motion before the Prothonotary, did not claim that it would suffer some prejudice. Instead, it argued that there is no reasonable explanation for the delay: holidays and not being legally trained will not do. In fact, the Prothonotary found that two of the four *Hennelly* criteria were not satisfied.

[7] Prothonotary Lafrenière concluded that steps had to be taken by the applicant to immediately correct the record of its irregularities. Nothing, or not much, appears to have been done between June 24 to July 16, when the applicant left for his vacation. As the Prothonotary puts it, "[t]he applicant wrongly assumed that his vacation time should take priority over a court-imposed deadline."

[8] Moreover, the Prothonotary noted that the applicant did not establish the merit of the underlying application as he failed to go beyond the general assertions that the Citizenship Judge's decision was unreasonable and that there would be some procedural unfairness. Such generalities do not say much about the merits of the case.

[9] On appeal of the Prothonotary's order, the applicant fails to establish what is the error made by the Prothonotary other than he disagrees with him. The applicant raises that he is not assisted by counsel and that he needed to take his planned holidays in view of the demands of his job. In the view of the applicant, this Court ought not to treat him as if he were a counsel, as he continuously has had to struggle with various rules of courts.

[10] The Crown did not participate in the appeal of the Prothonotary's order, choosing to rely on its already thin submissions made before the Prothonotary. It is unfortunate that the Crown limited its participation since an appeal of the Prothonotary's order is governed by different rules: the Crown is treating the matter is if the appeal was in the nature of a *de novo* appeal, by relying on its submissions before the Prothonotary. It is not.

[11] The appeal of a Prothonotary order is governed by the same standard of review applicable in civil matters. A panel of five appellate judges overturned the standard of review applicable to discretionary orders made by prothonotaries enunciated in *Canada v Aqua-Gem Investments Ltd*, [1993] 2 FCR 425 [*Aqua-Gem*] in the case of *Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 [*Hospira Healthcare*]. In its place, the Federal Court of Appeal abandoned the *Aqua-Gem* standard for the standard adopted in *Housen v Nikolaisen*, 2002 SCC 3, [2002] 2 SCR 235 [*Housen*]. That development in the law follows in the footsteps of *Imperial Manufacturing Group Inc v Decor Grates Incorporated*, 2015 FCA 100, [2016] 1 FCR 246, in which the Federal Court of Appeal endorsed the same test for discretionary decisions made by judges of first instance. As the Court put it in *Hospira Healthcare* "it is not in

the interests of justice to continue with a plurality of standards when one standard, i.e. the *Housen* standard, is sufficient to deal with the review of first instance decisions." (para 28)

[12] As a result of this latest development in the law, it is not appropriate anymore to figure out if a *de novo* review is to be conducted on appeal. Rather, a standard of correctness applies to questions of law, that is that if an error of law has been made, the reviewing court would be able to substitute its own decision. In the case of questions of fact or of mixed fact and law, *Housen* requires that the error be palpable and overriding.

[13] Here, the applicant argues that the Prothonotary is wrong. The applicant seems to contend that the time taken to "educate himself" is a proper explanation for missing the deadline of June 3, and then take up another two months without having a proper applicant's record.

[14] The applicant did not identify an error in the decision of the Prothonotary, let alone one that would be palpable and overriding. Although there may be a measure of leniency in favour of self-represented litigants, having to educate oneself and not being familiar with the rules of court does not explain the three-month delay in this case. Furthermore, there is no indication that the underlying application for the authorization to launch a judicial review has any merit for lack of specificity. All that is found are generalities.

[15] The issue is not whether or not this Court would exercise its discretion to extend the time as it is to consider if an error has been made by the Prothonotary and, if so, whether it is palpable and overriding. No such error was shown.

[16] As a result, the appeal of the discretionary decision of the Prothonotary must be dismissed. There will be no costs awarded.

JUDGMENT

THIS COURT'S JUDGMENT is that the appeal of the discretionary decision of the Prothonotary is dismissed.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-692-16
STYLE OF CAUSE:	KOEHNE, MIRKO v THE MINISTER OF CITIZENSHIP AND IMMIGRATION

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

JUDGMENT AND REASONS:	ROY J.
DATED:	SEPTEMBER 23, 2016

APPEARANCES:

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Don Klaassen	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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