Federal Court  Cour fédérale

Date: 20190424

Docket: IMM-4392-18

Citation: 2019 FC 509

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, April 24, 2019

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

ARCADIO AVELINO SANCHEZ REBAZA

Applicant

and

MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP CANADA

Respondent

JUDGMENT AND REASONS

[1] On January 14, 2016, an immigration officer at the Canadian Embassy in Cuba [Officer] concluded that the applicant, a Peruvian national with permanent resident status in Canada since 2003, had not complied with the residency obligation imposed on him by subsection 28(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act], during the five-year period ending on December 15, 2015.

[2] On January 8, 2018, the applicant tried to appeal the Officer's decision to the Immigration Appeal Division [IAD]. Given the time that had elapsed since that decision had been issued, the applicant had to file an application for an extension of time to be able to pursue his appeal. His application was denied since the IAD was of the opinion that the applicant had not provided a reasonable explanation for the delay, shown a continuing intention to appeal the Officer's decision or demonstrated that his appeal had some merit.

[3] The applicant is seeking judicial review of that decision.

[4] Since this type of decision raises questions of mixed fact and law, in my opinion, it must be reviewed on the reasonableness standard (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 51, 53 [*Dunsmuir*]; see also *Bouali v Canada (Citizenship and Immigration)*, 2019 FC 152 at para 9). The parties do not claim the contrary even though the applicant also submits that the IAD violated the rules of procedural fairness in deciding as it did, which according to him—and I agree—is reviewable on the correctness standard (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43).

[5] It is important to note at the outset that the Court is not called upon to decide, in this case, whether the applicant should be granted an extension of time. It is rather called upon to determine whether the IAD's decision to deny him an extension of time is reasonable. To intervene, the Court must be satisfied that the decision under review falls outside a range of possible, acceptable outcomes in respect of the facts and the applicable law (*Dunsmuir* at para 47). In other words, it must be satisfied that the decision is without any rational basis

whatsoever (*Kanthasamy v Canada (Citizenship and Immigration)*, 2014 FCA 113 at para 99, rev'd on other grounds 2015 SCC 61).

[6] My role here is therefore not to substitute my own assessment of the facts and law for that of the IAD. In other words, if I am satisfied that the IAD's decision has a rational basis in light of the facts of the case and the applicable law, I must dismiss this application even if I could have come to a different conclusion than the one the IAD arrived at should I have been in its place.

[7] I am of the view that there is no need to intervene in this case.

[8] The facts relevant to this case can be summarized as follows. The applicant arrived in Canada in 1998 and, as I have already stated, acquired permanent resident status in 2003.

[9] On December 15, 2015, he applied for a permanent resident travel document at the Canadian embassy in Cuba because his permanent resident card had not been valid since March 2014. On January 7, 2016, he was interviewed by the Officer, who invited him to produce other evidence to show that he had complied with the residency obligation in Canada set out in subsection 28(2) of the Act.

[10] In a letter dated January 14, 2016, the Officer determined that the applicant had not complied with the statutory threshold of the number of days of physical presence in Canada during the five-year period ending on December 15, 2015. The applicant had declared 674 days

of physical presence, while he needed at least 730 days. The Officer was also not satisfied that humanitarian and compassionate considerations warranted making an exception to the requirements of the Act. I note that no such grounds were relied on by the applicant in his application for a travel document.

[11] Based on the Global Case Management System [GCMS] notes, the Officer noted inconsistencies between the list of dates when the applicant entered and left Cuba provided by Cuban authorities and that provided by Canadian authorities. She also noted that the applicant had a tourism business in Peru that was still active and that he did not seem to be working in Canada. The GCMS notes also indicate that on January 14, 2016, the applicant was personally informed of the content of the letter documenting the decision denying him a permanent resident travel document. Since the applicant had resided in Canada for at least one day in the year before the decision, a travel document for a single entry, valid until February 1, 2016, was given to him that same day so that he could return to Canada.

[12] The applicant acknowledges that the decision denying him a permanent resident travel document was hand-delivered to him in January 2016, but he believes that this was done in a particular context, which did not enable him to understand that his permanent resident status in Canada was compromised. He claims that he understood the true scope of the Officer's decision in November 2017 when he tried to renew his permanent resident card and that he then started the process of appealing the IAD decision. According to his version of the facts, he believed that the issue of his permanent resident status had been resolved when he was granted his temporary travel document in January 2016 allowing him to re-enter Canada.

[13] On the basis of the test in *Canada (Attorney General) v Hennelly* (1999), 167 FTR 158 (FCA) [*Hennelly*], applicable in time extension matters, the IAD stated that it was not satisfied with those explanations. It found that, first, the letter documenting the Officer's decision was "quite clear", and that the applicant, who said he was familiar with the procedure for obtaining a permanent resident travel document, had to ensure that he had understood the implications of that decision and that he was informed of the steps to take to comply with the Act. Second, it found that the applicant had not demonstrated, in this context, a continuing intention to appeal the Officer's decision. Finally, it found that the applicant had failed to show that his appeal had some merit with respect to both his residency obligation and humanitarian and compassionate considerations that may warrant an exception to the Act.

[14] Regarding the residency obligation, while noting that the Cuban certificate of entries into and exits from Cuba did not correspond to the documented entries into Canada, for which the applicant offered no explanation, the IAD found that the documents submitted by the applicant were passive and vague evidence of his physical presence in Canada. Regarding the humanitarian and compassionate considerations component, the IAD noted that the applicant had presented few grounds and that his claim was weak in law despite the fact that he had family in Canada, namely, his daughter, and ties to it.

[15] In *Hennelly*, the Federal Court of Appeal ruled that a person who requires an extension of time must demonstrate (i) that there is a continuing intention to pursue the underlying proceeding; (ii) that the proceeding has some merit; (iii) that no prejudice to the respondent

arises from the delay in carrying out the proceeding; and (iv) that a reasonable explanation for the delay exists.

[16] These criteria, which are neither cumulative nor exhaustive, in sum help determine whether the granting of an extension of time is in the interests of justice (*Canada (Attorney General) v Larkman*, 2012 FCA 204 at para 62 [*Larkman*]). They were appropriate for the IAD, which was thus well-founded in using them to analyze the applicant's application for an extension of time (*Khangura v Canada (Citizenship and Immigration)*, 2012 FC 702 at para 16).

[17] It is important to specify here that it is the principle of finality of administrative decisions that underlies the time limit imposed to challenge such decisions (*Canada (Human Resources Development) v Hogervorst*, 2007 FCA 41 at para 24).

[18] In this case, the applicant had a time limit of 60 days after receiving the written reasons for the Officer's decision to appeal from that decision, in accordance with subsection 9(3) of the *Immigration Appeal Division Rules*, SOR/2002-230. That time limit was greatly exceeded.

[19] I note here that the Officer's decision was dated January 14, 2016; that, based on the evidence on the record, the applicant was informed of it in person on that same date; and that the letter documenting the decision was then mailed to his residential address in Canada and also emailed to him.

[20] The applicant acknowledges that the Officer's decision was hand-delivered to him (Certified Tribunal Record at p 64), but argues that he did not understand all of its implications until November 2017 when he wanted to renew his permanent resident card. It was at that time, according to him, that he quickly hired a lawyer to file a notice of appeal with the IAD.

[21] The IAD did not find that explanation satisfactory, and I must acknowledge that it is not. At the very least, this finding by the IAD is not at all unreasonable in the circumstances of this case.

[22] As noted by the IAD, the letter documenting the Officer's decision could not be clearer regarding the implications for the applicant's permanent resident status. The fact that, after having the decision hand-delivered to him, as he himself has admitted, the applicant did not understand its implications suggests implausibility, wilful blindness, serious carelessness or lack of knowledge of the law. However, in any case, it cannot justify the delay in filing the notice of appeal. Therefore, the IAD cannot be faulted for concluding as it did, that is, that the applicant did not meet either the criterion of having a continuing intention to act or that of the reasonable explanation for the delay.

[23] In a case like this, those two criteria are closely linked since they both depend on what the applicant believes explains why it was only in November 2017 that he realized the true scope of the Officer's decision, made more than 20 months earlier. Yet, as we have seen, all of the evidence points to the fact that the applicant was aware of the content of the decision when it was

issued: he was verbally informed of it on the day it was made; it was mailed to him here in Canada shortly after; and it was emailed to him.

[24] While it is true that a person who has no reason to believe that there is a decision cannot logically form the intention to pursue a proceeding contesting that decision (*Marcel Colomb First Nation v Colomb*, 2016 FC 1270 at para 105), that lack of knowledge still has to be established in a credible manner. However, as we have seen, it was not established in this case.

[25] Regarding the merits of the appeal itself, the IAD considered both the applicant's recriminations against the Officer's conclusions about his physical presence in Canada during the five-year period at issue and those related to the humanitarian and compassionate considerations. The applicant submits, however, that the IAD did not comply with the rules of procedural fairness by ignoring the documentary evidence submitted in support of his application for an extension of time.

[26] This argument is without merit because the IAD specifically referred to it in its decision. In any case, the IAD was not bound to make an explicit finding on each constituent element of the reasoning leading to its final conclusion or to refer to "all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16). In my view, its decision is sufficiently explicit on this point to enable me to understand the basis and to determine whether it falls within a range of possible, acceptable outcomes. In my opinion, it is, and the applicant has not persuaded me of the contrary.

[27] I reiterate that it is not my role to reweigh the evidence on the record regarding the merits of the appeal and to make my own findings regarding this. Here, I am satisfied that the IAD's conclusions regarding this aspect of its decision meet the requirements of intelligibility, justification and transparency and that they fall within the range of possible, acceptable outcomes in respect of the facts and the applicable law.

[28] Finally, as is often the case, the delay did not cause any prejudice to the respondent. The IAD stated that this was the case here, but it found that this was not enough to tip the scale in the applicant's favour. I see no error in this aspect either.

[29] To persuade me to agree with him, the applicant submitted a number of IAD decisions dealing with extensions of time. In addition to the fact that I am not bound by these decisions and that each case must be evaluated based on its own circumstances, they have factual backgrounds that are very different from this case. These decisions deal with situations where an applicant (i) was never informed of a decision, either through an error on the part of immigration authorities or through that of a third party; (ii) actively sought to inform himself or herself about his or her right to appeal to the IAD; or (iii) presented sufficient humanitarian and compassionate grounds in the IAD's view. This is not the case here.

[30] In sum, the IAD's decision has qualities that make it reasonable since the applicant did not, among other things, succeed in credibly justifying the significant delay in filing his appeal with the IAD and the rules of procedural fairness were not violated. This application for judicial

review will thus be dismissed. Neither party proposed a question for certification for appeal. I also do not see any matter for certification in the circumstances of this case.

JUDGMENT in IMM-4392-18

THE COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;

2. No question is certified.

"René LeBlanc"
Judge

Certified true translation
This 9th day of May 2019

Margarita Gorbounova, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4392-18
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