Federal Court  Cour fédérale

**Date: 20211006**

**Docket: IMM-611-20**

**Citation: 2021 FC 1044**

**Ottawa, Ontario, October 6, 2021**

**PRESENT: Madam Justice Pallotta**

**BETWEEN:**

**KEVIN NICHOLAS PINGAULT**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

# JUDGMENT AND REASONS

## I. Overview

[1] The applicant, Kevin Pingault, seeks judicial review of a visa officer's (Officer) July 11, 2018 decision that refused his application for permanent residence for the failure to produce all relevant evidence and documents reasonably required by the Officer: sections 11(1) and 16(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. Mr. Pingault submits the Officer's decision is unreasonable, and should be overturned on the basis that the Officer ignored

or discounted valid evidence. Also, he submits the Officer breached procedural fairness by relying on extrinsic evidence without first providing notice and an opportunity to respond.

[2] Mr. Pingault's application for leave and judicial review (ALJR) in this matter was filed late—more than 18 months after he received the Officer's decision on July 21, 2018. The ALJR includes a request for an extension of time but the order granting leave in this matter does not address it. The respondent argues that this application for judicial review should be dismissed because Mr. Pingault has not established that the deadline for filing the ALJR should be extended: sections 72(2)(b) and (c) of the *IRPA*.

[3] For the reasons set out below, I am not satisfied that it is in the interests of justice to grant the extension of time. Accordingly, the issues raised on this application are moot, and the application for judicial review must be dismissed.

[4] Nonetheless, in view of circumstances that resulted in a full oral hearing on the merits (which will be explained below), I have considered Mr. Pingault's submissions on procedural fairness and the reasonableness of the Officer's decision. Even if these issues were not rendered moot, I would dismiss this application on the basis that Mr. Pingault has not established a breach of procedural fairness, or that the Officer's decision is unreasonable.

## II. **Background**

[5] Mr. Pingault is a 20-year-old citizen of India. Mr. Pingault's father entered Canada on a work permit, became involved in a common-law relationship, and applied for permanent

residence in 2014 through his common-law partner. The application for permanent residence included Mr. Pingault and his younger sister Dewdrop Pingault as overseas dependents of their father. At the time, they were both minors living with their mother in India.

[6] In assessing the application, the Officer scheduled an interview with Mr. Pingault, his mother, and his sister due to concerns with the sufficiency of supporting documentation and concerns about the mother's consent to allow the children to immigrate to Canada and permanently reside with their father. Mr. Pingault's mother had provided an affidavit granting permission for her children to be taken to Canada, indicating that she was "ready to given [*sic*] custody" of the children to her husband. At the interview, the Officer asked Mr. Pingault's mother to provide a court-issued document transferring custody of the children to the father in Canada, and granting a right to take them out of India permanently. The Officer's decision letter notes that Mr. Pingault's mother had been advised during the interview that an affidavit was not acceptable, and a court-issued order was required.

[7] The Officer sent a reminder giving 45 days to comply. However, no document or explanation was provided and the Officer refused both children's applications as a result.

[8] The underlying decision on this judicial review is the Officer's decision refusing Mr. Pingault's application for permanent residence. His sister, Dewdrop Pingault, is not a party to this proceeding. She filed a separate ALJR (on the same date as Mr. Pingault's ALJR, January 28, 2020). Dewdrop Pingault's request for an extension of time and her application for leave were both dismissed on February 1, 2021 (court file IMM-605-20).

## III. **Determinative Finding: Extension of Time**

[9] At the hearing of this matter, I asked the parties to address the late-filed ALJR, noting that the ALJR included a request for an extension of time but the leave order did not address it. I asked whether the hearing should be adjourned to allow the parties to consider this issue and address it fully. Mr. Pingault argued that the extension request was addressed by an affidavit included in the application record, and asked for the respondent's consent to move forward with the merits of the hearing. The respondent stated that the extension of time had been granted by way of an order dated August 20, 2020, and undertook to provide a copy to the Court after the hearing. I agreed to proceed with the hearing on the merits, on the basis of the respondent's statement that there was a court order granting an extension of time to file the ALJR.

[10] After the hearing, the respondent wrote to indicate that the Court had not, in fact, granted an extension of time to file the ALJR under section 72(2)(c) of the *IRPA*, and the order of August 20, 2020 granted an extension of time to file the application record. As a result, I issued a direction asking the parties to provide post-hearing submissions to address the late-filed ALJR.

[11] Mr. Pingault submits that I have discretion, as the hearing judge, to find that the leave order implicitly granted the extension of time requested in the ALJR. Furthermore, Mr. Pingault states he has met the test for an extension of time because the respondent consents, it is clear that there is merit to the case since leave was granted, and he has shown an intention to proceed.

[12] The respondent submits that an extension of time should not be inferred simply on the basis that leave was granted; where an order granting leave does not explicitly address a request for an extension of time, the jurisdiction to decide whether an extension should be granted rests with the judge hearing the application for judicial review: *Deng Estate v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 59 at paras 14-17 [*Deng Estate*]; *Huot v Canada (Minister of Citizenship and Immigration)*, 2010 FC 973 at paras 11-12 [*Huot*]; *Ofori v Canada (Minister of Citizenship and Immigration)*, 2019 FC 212 at para 10. The respondent submits there is no discretion to find that a leave order implicitly grants an extension of time: *Deng Estate* at paras 16-17; *Canada (Minister of Human Resources Development) v Eason*, 2005 FC 1698 at para 20.

[13] The respondent submits that the Court must authorize an application for judicial review that is commenced after the limitation period: *Deng Estate* at para 18; *Huot* at para 11. In this matter, the respondent argues an extension of time should not be granted as Mr. Pingault has failed to satisfy the four factors set out in *Canada (Attorney General) v Hennelly*, [1999] FCJ No 846, 244 NR 399 (FCA) [*Hennelly*], and it is not in the interests of justice that the extension be granted: *Whitefish Lake First Nation v Grey*, 2019 FCA 275 at para 3 [*Whitefish Lake First Nation*]; *Cossy v Canada Post Corporation*, 2021 FC 559 at paras 17-18. The respondent argues Mr. Pingault has not demonstrated: (i) a continuing intention to pursue judicial review of the Officer's decision, (ii) that the application has some merit, (iii) that no prejudice to the respondent arises from the delay, and (iv) that there is a reasonable explanation for the delay.

[14] While I am not convinced that a hearing judge would be prohibited from finding, in an appropriate case, that an extension of time was implicitly granted by an order granting leave (see my comments in *Fayazi v Canada (Minister of Citizenship and Immigration)*, 2021 FC 1019 at paragraphs 13-14), in my view, the record in this case does not support a finding that an extension of time was granted implicitly. The request for an extension of time consists of one sentence in the ALJR, supported by a single ground: "Applicant must retain and instruct counsel in this matter." The applicant's memorandum of fact and law does not include any submissions about the extension of time, and does not request an extension in the section setting out the relief sought. Similarly, the respondent's memorandum does not mention the extension request. In *Deng Estate*, the hearing judge whose decision was appealed found that the leave judge had overlooked an extension request even though both parties had made arguments about the extension in their memoranda, and the Federal Court of Appeal considered that finding to be reasonable: *Deng Estate* at para 15. Based on the record in this case, where the extension request was not addressed in the parties' memoranda, I find that the leave judge overlooked the request.

[15] I will now turn to the question of whether I should grant a retroactive extension of time to file the ALJR.

[16] I note that Rule 6(2) of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 [*CIR Rules*] states that a request to extend the time for filing and serving an application for leave shall be determined at the same time, and on the same materials, as the application for leave. Mr. Pingault's application record that was before the leave judge does not address the *Hennelly* test or provide submissions explaining why the extension request

ought to be granted. Nonetheless, I will address each of the *Hennelly* factors, and Mr. Pingault's post-hearing submissions.

[17] First, the only explanation offered for the 18-month delay is a bare assertion of the need to retain and instruct counsel. This was the sole ground pleaded in the ALJR to support the request for an extension of time; there are no other details and no evidence explaining the delay in the record. As such, Mr. Pingault has not provided a reasonable explanation for his delay in filing the ALJR.

[18] Second, Mr. Pingault's affidavit that is included in the application record contains a bare statement that he has "always had all intentions to proceed with [his] Judicial Review". This bare statement is insufficient to demonstrate a continuing intention to pursue the application during the period of delay.

[19] With respect to the third *Hennelly* factor, prejudice to the respondent, Mr. Pingault relies on the respondent's consent. I note that there is no indication the respondent provided consent before leave was granted. As mentioned above, the respondent did not address Mr. Pingault's extension request in the responding memorandum. At the hearing before me, the respondent's counsel did state that the respondent consents to an extension of time, although that statement was made under a mistaken belief that this Court had already granted the extension; in the post-hearing submissions, the respondent takes the position that the extension would cause prejudice.

[20] One of the purposes of time limits is to ensure evidence does not go stale: *Singh v Canada (Minister of Citizenship and Immigration)*, 2021 FC 93 at para 17. Also, time limits exist in the public interest, in order to bring finality to administrative decisions: *Lesly v Canada (Minister of Citizenship and Immigration)*, 2018 FC 272 at para 18. A party is entitled to expect that extensions will not be granted where the failure to comply with a time limit lacks a reasonable explanation: *Collins v Canada (Attorney General)*, 2010 FC 949 at para 6. In my view, prejudice to the respondent is a factor that weighs against granting the extension.

[21] Fourth, turning to the merits of the application, in his post-hearing submissions Mr. Pingault relies on the fact that leave was granted. I am not convinced that this is a proper consideration under the fourth *Hennelly* factor, since an extension request should be determined "at the same time, and on the same materials" as the application for leave (Rule 6(2) of the *CIR Rules*) and leave was granted after the extension request ought to have been considered. However, I will accept that the merits of the application is a factor that weighs in favour of granting an extension of time.

[22] Mr. Pingault has not satisfied all four factors identified in *Hennelly*. Most importantly, Mr. Pingault has failed to provide a reasonable explanation for a significant delay of 18 months, and he has failed to demonstrate a continuing intention to pursue judicial review of the Officer's decision. While a decision to grant or refuse an extension of time to commence an application for judicial review is typically based on the four factors identified in *Hennelly*, it is not always necessary that the party seeking the extension of time be able to satisfy all four factors: *Whitefish Lake First Nation* at para 3. The overriding consideration is whether it is in the interests of

justice that the extension of time be granted: *Ibid*. Even if I accept that the third and fourth factors—merit to the application and a lack of prejudice to the respondent—weigh in favour of granting an extension of time, I am not satisfied that it is in the interests of justice to grant an extension of time.

[23] Accordingly, the request for an extension of time is denied, the issues raised on this application are moot, and the application for judicial review is dismissed.

## IV. **Alternative Findings: Reasonableness and Procedural Fairness**

[24] Since I heard the parties' submissions on the merits, I will address whether Mr. Pingault has established that the Officer's decision is unreasonable, or that the Officer breached procedural fairness.

[25] The reasonableness of the Officer's decision is determined according to the guidance set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. Reasonableness is a deferential but robust form of review: *Vavilov* at paras 12-13, 75 and 85. The reviewing court must determine whether the decision bears the hallmarks of reasonableness—justification, transparency, and intelligibility: *Vavilov* at para 99. A reasonable decision is based on an internally coherent and rational chain of analysis and it is justified in relation to the facts and law that constrain the decision maker: *Vavilov* at para 85. The party challenging the decision bears the onus of demonstrating that it is unreasonable: *Vavilov* at para 100.

[26] Questions of procedural fairness are reviewable on a standard that is akin to correctness: *Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54 [*Canadian Pacific Railway*]. The duty of procedural fairness is "eminently variable", inherently flexible, and context-specific: *Vavilov* at para 77. A court assessing a procedural fairness question is required to ask whether the procedure was fair, having regard to all of the circumstances: *Canadian Pacific Railway* at para 54.

A. *Is the Officer's decision unreasonable?*

[27] Mr. Pingault submits that a court-issued custody order was not required to allow him to travel to Canada. There is no such requirement under the *IRPA* and it was unreasonable for the Officer to find an affidavit from Mr. Pingault's mother to be insufficient.

[28] The respondent submits that under subsection 16(1) of the *IRPA*, an applicant must produce all relevant evidence and documents that a visa officer reasonably requires. If an applicant fails to fulfill the obligations under subsection 16(1) of the *IRPA*, an officer is bound to refuse the application: *Lan v Canada (Minister of Citizenship and Immigration)*, 2004 FC 770 at para 10 [*Lan*].

[29] The respondent argues that a visa officer's request for documentation is reasonable if the documentation is: (i) relevant; and (ii) not impossible to obtain: *Canada (Minister of Citizenship and Immigration) v Ndayinase*, 2016 FC 694 at para 27, citing *Lan*. The Officer requested a

court-issued order granting custody to the father due to concerns about whether the mother was providing informed consent. Mr. Pingault's mother was advised during the interview that her affidavit was insufficient and a court-issued order was required. Since Mr. Pingault did not provide the document, or provide evidence or an explanation as to why it was impossible to obtain it, the Officer reasonably refused the application.

[30] In my view, the Officer's decision is reasonable. The Global Case Management System (GCMS) notes indicate that the Officer scheduled an interview out of concern about whether the mother was providing informed consent for her children to immigrate to Canada without her. The Officer noted that Mr. Pingault's mother had expressed some confusion over the nature of the application process and its consequences. She initially thought she would be included in the application for permanent residence or sponsored at a later date, stating that she and her husband were in a relationship. She later stated that she was aware she would not be sponsored because her husband was in a common-law relationship in Canada. Mr. Pingault's mother also stated she could apply for a visitor visa to see her children, and the Officer informed her there was no guarantee that she would be issued a visitor visa. As a result of the conversations during the interview, the Officer asked Mr. Pingault's mother to provide a "guardianship document from the court transferring the custody of the children to the father and giving him the right to take them out of the country permanently".

[31] Since a permanent residence visa would grant a right to remove the children from India, it was reasonable for the Officer to request a court order. Despite a written reminder, Mr. Pingault did not provide it. Also, he did not provide evidence or an explanation as to why he could not

obtain the document. It was open to the Officer to refuse Mr. Pingault's permanent residence application for failing to meet the obligations under subsection 16(1) of the *IRPA*: *Lan* at para 10.

B. *Did the Officer breach procedural fairness?*

[32] Mr. Pingault submits the Officer breached procedural fairness by failing to disclose extrinsic evidence that could have affected the decision to comply with the request for a court order. He argues that where an officer relies on "extrinsic evidence, not brought forward by the applicant", the officer must give notice and an opportunity to respond: *Ardiles v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1323 at paras 29-30, citing *Dasent v Canada (Minister of Citizenship and Immigration)*, 1994 CanLII 3539, [1995] 1 FC 720 (FCTD) and *Shah v Canada (Minister of Employment and Immigration)*, 1994 CanLII 3502, [1994] FCJ No 1299 (FCA). The GCMS notes indicate that, "though it cannot be disclosed to the mother at the time of interview", the Officer wanted to assess whether she was aware of the father's criminal charge in Canada. Mr. Pingault submits there is no evidence his mother was aware of his father's criminal charge, or that the Officer disclosed this information to his mother, and therefore, the Officer relied on this extrinsic evidence without disclosing it. He submits the Officer breached procedural fairness because his father's criminal charge was the real reason for refusing his application, and the Officer relied on the criminal charge to conclude that his mother's affidavit was insufficient, and to require a court custody order.

[33] The respondent submits there was no breach of procedural fairness. The application was refused for failure to provide a court custody order, contrary to Mr. Pingault's obligations under

subsection 16(1) of the *IRPA*. The respondent submits that the father's criminal charge was not stated to be a reason for the refusal, and it did not affect the disposition of the case.

[34] I am not persuaded that the Officer was required to disclose the father's criminal charge or that this information was the basis for the Officer's refusal. Furthermore, the Officer articulated a number of reasons for finding the mother's affidavit to be insufficient that were unrelated to the father's criminal charge. The Officer did not breach procedural fairness.

## V. **Conclusion**

[35] This application for judicial review is dismissed. As I have refused to grant a retroactive extension of time to file the ALJR, the issues raised on the application are moot. In any event, I would dismiss the application on the merits. In my view, the Officer's decision is reasonable, and the Officer did not breach procedural fairness.

[36] I asked the parties whether either of them proposes a question for certification in respect of the merits of this application, or in respect of the extension of time. Neither party proposes a question for certification and in my view there is no question to certify.

**JUDGMENT in IMM-611-20**

**THIS COURT'S JUDGMENT is that:**

1. The request for an extension of time is refused.

2. This application for judicial review is dismissed.

3. There is no question for certification.

"Christine M. Pallotta"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-611-20 |
| **STYLE OF CAUSE:** | KEVIN NICHOLAS PINGAULT v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | HELD BY WAY OF VIDEO CONFERENCE |
| **DATE OF HEARING:** | JUNE 7, 2021 |
| **JUDGMENT AND REASONS:** | PALLOTTA J. |
| **DATED:** | OCTOBER 6, 2021 |

**APPEARANCES:**

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|---|---|
| Peter Lulic | FOR THE APPLICANT |
| Kevin Spykerman | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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