Federal Court  Cour fédérale

**Date: 20211115**

**Docket: IMM-3965-21**

**Citation: 2021 FC 1237**

**Ottawa, Ontario, November 15, 2021**

**PRESENT: The Honourable Mr. Justice Southcott**

**BETWEEN:**

**YENI BEATRIZ BARAHONA MENDEZ**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

# ORDER AND REASONS

## I. Overview

[1] The Applicant has filed a motion, seeking to appeal an order of Prothonotary Ring, which dismissed a motion for an extension of time in order to perfect her application for judicial review. In the alternative, her motion asks that the Court grant an extension of time, based on the evidence and argument now presented.

[2] As explained in more detail below, this motion is dismissed, because the Applicant's appeal is prohibited by s 72(2)(e) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. Although I have considered various alternative arguments raised by the Applicant in an effort to avoid this prohibition, none would merit the requested relief even if the Court had the jurisdiction to grant that relief.

## II. **Background**

[3] The Applicant is a citizen of El Salvador. She and her sister first came to Canada in 2014 as temporary workers. In 2016, when her sister returned home to visit her family in San Salvador, she was targeted by a local gang, Mara-18, who threatened her life and attempted to extort her because they believed she had financial resources after working in Canada. The Applicant's sister subsequently made a claim for refugee protection in Canada, which was accepted by the Refugee Protection Division [RPD] in February 2019. The Applicant also has other siblings who have sought asylum in the United States [US].

[4] The Applicant says she faced the same threats and harassment as her sister when she has returned home, in particular during a 2018 visit to San Salvador to see her parents. She sought refugee protection following her return to Canada. Her claim was heard and rejected by the RPD in September 2020, with the determinative issue being the Applicant's credibility. She appealed to the Refugee Appeal Division [RAD], which rejected her appeal and affirmed the RPD's decision in May 2021.

[5] On June 14, 2021, the Applicant filed an application for leave and judicial review of the RAD's decision. Under Rule 10 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, the Applicant had until July 14, 2021 to serve and file her application record. On July, 15, 2021 the Court issued a direction granting the Applicant's informal request for an extension of time, giving her until September 1, 2021 to serve and file her record.

[6] On August 27, 2021, the Applicant filed a motion seeking a further extension of time until December 3, 2021, in order to obtain and file additional evidence, including a report from a psychiatrist and information about ongoing refugee claims made by her siblings in the US. The Respondent opposed the motion. On September 15, 2021, Prothonotary Ring [the Prothonotary] issued the Order now under appeal, dismissing the Applicant's motion for a further extension [the Order].

## III. **The Prothonotary's Order**

[7] The Order notes that the power to extend time is discretionary and that the applicable test includes considering whether the moving party has demonstrated: (a) a continuing intention to pursue the application; (b) that the application has some merit; (c) that no prejudice to the respondent arises from the delay; and (d) that a reasonable explanation for the delay exists (see *Canada (Attorney General) v Hennelly*, [1999] FCJ No 846, 244 NR 399 [*Hennelly*] at para 3). The Order also notes that not all elements of the test need be satisfied by the moving party, in order for the Court to grant an extension, and that the overriding consideration is whether justice is done between the parties.

[8] The Order states that, while the Court is confident the Applicant has the continuing intention to pursue the application and that there will be no prejudice to the Respondent in granting an extension of time, the second and fourth elements weigh against the Applicant.

[9] On the second factor, the merits of the application, the Prothonotary found that the written arguments of the Applicant did not allege any error on the part of the RAD, but rather stated simply that the case had merit. The Prothonotary also noted that the Applicant did not swear an affidavit providing evidence of the merits, instead submitting an affidavit from a legal assistant at her counsel's firm in support of the motion. The Prothonotary explained that this process can be acceptable where the delay is slight and the merits of the application are more or less obvious. However, in the context of the Applicant's request for a three month extension of time, the Prothonotary found that a legal assistant's affidavit was insufficient, especially considering that the merits of the application were questionable on the face of the record.

[10] The Prothonotary further concluded that, even if the legal assistant's affidavit were to be given weight, it contained bald assertions unsupported by any evidence, in particular the contention that the Applicant may have post-traumatic stress disorder [PTSD] or a learning disability and the argument that the RAD refused her claim because she was unable to articulate her grounds for refugee status. Moreover, the Prothonotary found that the Applicant had not explained or substantiated how a psychiatric evaluation obtained after the fact, and not before the RAD at the time it made its decision, could form the basis for a reviewable error in the underlying judicial review.

[11] Turning to the fourth factor of the *Hennelly* test, the reasonable explanation for the extension, the Prothonotary found that the Applicant's explanation amounted to a request for additional time to gather new evidence that was not before the RAD to prove that there were errors in the RAD's reasoning. Citing *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 [*Access Copyright*] at para 20, which set out the narrow categories of new evidence that are admissible on judicial review, the Prothonotary concluded the Applicant had failed to make an argument that the new evidence fell into any of the exceptions to the general rule that the review should be conducted on the basis of evidence before the decision-maker.

[12] In the absence of any argument by the Applicant to establish that the proposed new evidence may be admissible under any of the exceptions recognized in *Access Copyright*, the Prothonotary found that she had not established a reasonable justification for a further three month extension of time to file her record.

[13] Ultimately, Prothonotary Ring found the requested extension was not in the interests of justice and dismissed the motion.

## IV. **The Applicant's Motion**

[14] The Applicant filed an appeal of the Order by motion dated September 24, 2021, under Rule 51 of the *Federal Courts Rules*, SOR 98-106 [the Rules], seeking to set aside the Order. In the event the appeal is successful, or even if it is not, the Applicant's motion also asks the Court to set a date for her to serve and file her Applicant's Record including Memorandum of

Argument and asks that the Court grant leave under Rule 351 to present additional evidence in this application for judicial review. This evidence consists of: (a) a psychiatric report; (b) an affidavit by the Applicant's sister, exhibiting her decision from the RPD granting her refugee claim; and (c) declarations from the Applicant's siblings who have ongoing asylum claims in the US.

[15] On October 29, 2021, i.e., the business day before the hearing of the motion scheduled for November 1, 2021, the Applicant served and purported to file a supplementary affidavit of her counsel's legal assistant, attaching as an exhibit a letter dated October 26, 2021, from a psychiatrist practising in Calgary, Alberta [the Supplementary Affidavit]. At the hearing of the motion, the Respondent opposed the filing of the Supplementary Affidavit.

## V. **Issues**

[16] Taking into account the parties' respective written and oral submissions, I would characterize the issues to be decided by the Court in this motion as follows:

A. Should the Supplementary Affidavit submitted by the Applicant be accepted for filing?

B. Is the Applicant's appeal of the Order prohibited by s 72(2)(e) of *IRPA*?

C. What is the standard of review applicable to the appeal of the Order?

D. Should the Order be disturbed on appeal?

E. In the event the appeal is dismissed, can and should the Court grant the Applicant: (a) an extension of time to serve and file her Applicant's Record including Memorandum of Fact and Law; and (b) leave to file additional evidence?

## VI. **Analysis**

### A. *Should the Supplementary Affidavit submitted by the Applicant be accepted for filing?*

[17] The Respondent objects to the Applicant's effort to file the Supplementary Affidavit, arguing that it represents extrinsic evidence that is irrelevant to the issues in the application for judicial review.

[18] I will consider the Respondent's arguments when addressing the merits of the Applicant's motion. However, the Applicant's efforts to convince the Court (first before the Prothonotary and now in this appeal) that her application for judicial review has merit turns significantly on her wish to rely on psychiatric evidence. Therefore, the psychiatric evidence obtained by the Applicant to date is at least potentially relevant to the issues in this motion, and my Order will grant leave for the filing of the Supplementary Affidavit.

### B. *Is the Applicant's appeal of the Order prohibited by s 72(2)(e) of IRPA?*

[19] The Respondent argues that the Applicant's appeal of the Order is prohibited by s 72(2)(e) of *IRPA*, which provides as follows:

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| **Application** | **Application** |
| **72(2)** The following provisions govern an application under subsection (1) : | (2) Les dispositions suivantes s’appliquent à la demande d’autorisation : |
| … | … |
| **(e)** no appeal lies from the decision of the Court with respect to the application or with respect to an interlocutory judgment. | **e)** le jugement sur la demande et toute décision interlocutoire ne sont pas susceptibles d’appel. |

[20] In response, the Applicant submits that s 72(2)(e) does not apply, because it prohibits appeals of interlocutory judgments, and the Applicant argues that the Order is final in nature because, if it is not disturbed, it precludes her perfecting her application for leave and for judicial review and therefore will result in dismissal of her application.

[21] The Applicant’s argument is inconsistent with this Court’s jurisprudence. The Respondent refers the Court to *Lovemore v Canada (Citizenship and Immigration)*, 2013 FC 171 [*Lovemore*], in which Justice Zinn found a prothonotary’s order, dismissing a motion for an extension of time to perfect an application for judicial review in an immigration matter, to be an interlocutory order, as a result of which s 72(2)(e) of *IRPA* deprived him of jurisdiction to consider the appeal.

[22] The Respondent also relies on *Williams v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 32 [*Williams*], in which Justice Annis followed other authorities of this Court in concluding that s 72(2)(e) bars the Court from having jurisdiction in respect of a decision of a prothonotary dismissing a motion for an extension of time to file an application record (at para 20). However, the Applicant notes that Justice Annis nevertheless proceeded to

consider the appeal of the prothonotary's decision, based on acknowledgement by the respondent in that case that the prohibition in s 72(2)(e) does not apply when the decision-maker refused to exercise their discretion and/or when there is a reasonable apprehension of bias (at para 21).

[23] While *Williams* does not cite authority for this exception, the Federal Court of Appeal has explained that a privative clause does not necessarily preclude an appeal on the grounds of jurisdictional error including a reasonable apprehension of bias (see, e.g., *Horne v Canada (Citizenship and Immigration)*, 2010 FCA 337). However, this exception has no application to the present motion, where the Applicant advances no allegation of jurisdictional error or apprehension of bias on the part of the Prothonotary, the RPD, or the RAD.

[24] I therefore find that s 72(2)(e) of *IRPA* applies, and the Court has no jurisdiction to entertain an appeal of the Order.

[25] In arriving at this conclusion, I have considered the request, made by the Applicant's counsel during the hearing of this motion that, if I were inclined to find against the Applicant on the s 72(2)(e) issue, I grant an adjournment for the Applicant to prepare further arguments challenging the constitutionality of s 72(2)(e). The Respondent opposes the adjournment request, and I decline to grant this request as it would serve no purpose. Consistent with Justice Zinn's approach in *Lovemore*, I have considered the Order and, as explained below, can identify no error on the part of the Prothonotary. Therefore, even if the Court had jurisdiction to entertain the Applicant's appeal, the appeal would not succeed.

C. *What is the standard of review applicable to the appeal of the Order?*

[26] The Applicant takes the position that the standard of review applicable to the appeal of the Order is correctness. With respect, there is no merit to this position.

[27] In *Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 [*Hospira*], the Federal Court of Appeal stated that the standard of review to be applied by Federal Court judges, hearing appeals of decisions from the Court's prothonotaries, is that set out in *Housen v Nikolaisen*, 2002 SCC 33. As explained at paragraph 64 of *Hospira*, that standard requires that discretionary orders of prothonotaries be interfered with only when such decisions are incorrect in law or based on a palpable and overriding error with respect to the facts.

D. *Should the Order be disturbed on appeal?*

[28] The Applicant argues that the Prothonotary erred in applying the *Hennelly* test, which guides the exercise of the Court's discretion in considering a request for an extension of time. The Applicant correctly submits that the party requesting an extension of time need not satisfy all four elements identified in the test. Rather, the overriding consideration is to ensure that justice is done between the parties. However, the Prothonotary expressly noted both these points in the Order.

[29] As explained above, the Prothonotary concluded that the Applicant had not satisfied either the second or fourth element of the test. The Prothonotary found that the Applicant had not provided a basis for the Court to conclude that her application for leave and for judicial review

presented an arguable case or provided justification for the delay. As such, the prothonotary was not satisfied that it was in the interests of justice to grant the requested extension of time.

[30] In applying both these elements of the test, the Prothonotary considered the Applicant's assertion that she may have PTSD or a learning disability that resulted in her being unable to articulate her refugee claim in her hearing before the RPD. The Prothonotary noted that the Applicant was seeking an extension of time in order to be able to gather psychiatric evidence, as well as documentation related to her family members' refugee claims. In significant measure, the Prothonotary's findings, in relation to the second and fourth elements of the *Hennelly* test, turned on the Applicant's failure to articulate how this evidence, which was not before the RAD at the time it made its decision, could form the basis of a reviewable error by the RAD in an application for judicial review before the Court. The Prothonotary applied the guidance in *Access Copyright* and concluded that the proposed new evidence did not fall within any of the exceptions to the general rule prohibiting the admission, in an application for judicial review, of evidence that was not before the decision-maker.

[31] In presenting the appeal of the Order, the Applicant's counsel again advanced no arguable position as to how any of the proposed new evidence could support a finding of reviewable error by the RAD, when that evidence was not before the RAD.

[32] Applying the *Hospira* standard of review, I can identify no legal error by the Prothonotary, in selecting the principles to apply to the Applicant's motion, or any palpable and

overriding error in applying those principles to the facts. Therefore, if I had jurisdiction to entertain the Applicant's appeal, I would identify no reviewable error in the Order.

E. *In the event the appeal is dismissed, can and should the Court grant the Applicant: (a) an extension of time to serve and file her Applicant's Record including Memorandum of Fact and Law; and (b) leave to file additional evidence?*

[33] In raising this final issue, the Applicant argues that, even if her appeal of the Order is dismissed, the Court retains the jurisdiction to grant, and should grant, an extension of time for her to file her Applicant's Record and Memorandum of Fact and Law, so that she may perfect her appeal, as well as leave to include additional evidence. As before the Prothonotary, the Applicant seeks sufficient time to gather further psychiatric evidence. However, she also submits that, even if the Court is not prepared to grant any further time beyond the present, she should be granted the extension necessary to perfect her appeal now, with the benefit of whatever evidence she has presently assembled.

[34] The Respondent opposes this request, arguing that the Court is without jurisdiction to grant a motion that would amount to an end run around the decision of the Prothonotary. The Respondent submits that it would be inconsistent with s 72(2)(e) of *IRPA* if the Applicant were permitted to seek from the Court at this juncture relief which is materially the same as that which was denied by the unappealable Order of the Prothonotary.

[35] I find the Respondent's position on this question of the Court's jurisdiction compelling. However, as the question first surfaced during the oral hearing of this matter, I do not have the benefit of comprehensive submissions or supporting authorities from the parties on this point. I

therefore decline to address this question, particularly given that (as explained below) the facts of this case would not support granting the requested relief even if I had jurisdiction to do so.

[36] The evidence now before the Court has expanded somewhat from that which was before the Prothonotary. That evidence now includes an affidavit from the Applicant attaching the transcript of her RPD hearing, an affidavit from the Applicant's sister attaching a copy of her favourable decision from the RPD, a copy of the Applicant's negative RPD decision, and the Supplementary Affidavit attaching the letter from the psychiatrist.

[37] I note that the psychiatrist's letter dated October 26, 2021, based on a three hour consultation with the Applicant on October 21, 2021, states the psychiatrist's preliminary conclusions that the Applicant is suffering from a major depressive episode, that she had a rather traumatic upbringing that might have resulted in PTSD, and that she seems to be exhibiting some intellectual limitations that merit further assessment. The psychiatrist's opinions are brief and somewhat tentative. However, their lack of impact on the merits of the Applicant's application for judicial review of the RAD decision turns not on the nature of the opinions but on the point, as previously emphasized by the Prothonotary in the Order, that neither evidence nor argument surrounding intellectual limitations was raised before the RAD.

[38] Assessing the matter independently of the Prothonotary's analysis, including with the benefit of the new evidence, I would arrive at the same conclusion as the Prothonotary. As the Respondent argues, the new evidence is extrinsic to the administrative process before the RPD and RAD. The Applicant has not raised an arguable position as to how the psychiatric evidence

or the evidence surrounding the refugee claims by members of the Applicant's family, including the successful claim by her sister, could support a finding of reviewable error by the RAD when such evidence was not before the RAD at the time it made its decision.

[39] In the absence of any viable argument to support a conclusion that the Applicant's application for leave and judicial review of the RAD decision has merit, it would not be in the interests of justice to grant the Applicant the requested extension of time.

**THIS COURT ORDERS that:**

1. Leave is granted for the filing of the Supplementary Affidavit.
2. The Applicant's motion is dismissed.

" Richard F. Southcott "
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-3965-21 |
| **STYLE OF CAUSE:** | YENI BEATRIZ BARAHONA MENDEZ v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | HEARD VIA VIDEOCONFERENCE CALGARY |
| **DATE OF HEARING:** | NOVEMBER 1, 2021 |
| **ORDER AND REASONS:** | SOUTHCOTT J. |
| **DATED:** | NOVEMBER 15, 2021 |

**APPEARANCES:**

| | |
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| Devin Frank | FOR THE APPLICANT |
| Camille Audain | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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| Attorney General of Canada<br>Edmonton, Alberta | FOR THE RESPONDENT |