Federal Court  Cour fédérale

Date: 20220511

Docket: IMM-2458-21

Citation: 2022 FC 699

Toronto, Ontario, May 11, 2022

PRESENT: Mr. Justice Diner

BETWEEN:

NASER AFSHARI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

(Delivered orally from the Bench by videoconference at Toronto, Ontario on May 10, 2022

I. Overview

[1] The Applicant seeks judicial review of a decision (the Decision) of the Immigration Appeal Division (IAD) of the Immigration and Refugee Board of Canada to refuse his request for an extension to file a Notice of Appeal against a decision of an immigration officer refusing

him a permanent resident travel document (Travel Document). For the reasons that follow, I find the Decision was reasonable and the present application will be dismissed.

[2] The Applicant is a 58-year-old citizen of Iran, who became a permanent resident of Canada in 2006. In 2014, he travelled to Iran to care for his elderly mother. During his travels, he lost his wallet in Iran, which contained his Permanent Resident card, Social Insurance card and Health card. As a result, he applied for a replacement Travel Document.

[3] On November 30, 2017, his application was refused, pursuant to s 28(2)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, for failing to comply with his residency obligation to be present in Canada for at least 730 days in the relevant five-year period. The Applicant was informed that he had 60 days to appeal the decision to the IAD and that if he did not, the decision concerning his non-compliance with permanent residency obligations would become final. On November 18, 2020, the Applicant applied to the IAD for an extension of the time to file a Notice of Appeal of the November 30, 2017 decision.

II. Decision under review

[4] In a decision (the Decision) dated March 10, 2021, the IAD denied the request and provided written reasons in response. The IAD began by citing jurisprudence in support of the principle that time limits for the commencement of challenges in administrative law are not whimsical and must be allowed to bring finality to administrative decisions (*J2 Global Communications Inc. v. Protus IP Solutions Inc.*, 2007 FCA 41 at para 24; *Cornejo Arteaga v. Canada (Citizenship and Immigration)*, 2010 FC 868 at para 13). The IAD also cited s 58(d) of

its own *Immigration Appeal Division Rules*, SOR/2002-230, in addition to the leading Federal Court of Appeal case setting out the criteria for obtaining an extension of time, *Canada (Attorney General) v. Hennelly*, 1999 CanLII 8190 (FCA), 167 FTR 158 [*Hennelly*], namely a continuing intention to pursue the appeal, some merit to the appeal, no prejudice to the responding party, and a reasonable explanation for the delay. The IAD also observed that in evaluating these four factors, justice must be done, and not all the four factors must be satisfied for an extension to be granted.

[5] The IAD then turned to applying the criteria to the facts, accepting that the Applicant had been under cardiac medical care from February 2017 to May 2018 and that he underwent cardiac surgery on December 19, 2017, ten days after having received the decision from the Canadian Embassy pertaining to his Travel Document. The IAD also noted that the Applicant had received treatment from a psychologist for general and existential anxiety disorder from May 2015 until February 2018. In light of all this, the IAD accepted that the Travel Document refusal had compounded the Applicant's stress and likely contributed to his cardiac issues.

[6] The IAD also noted that it was not until September 2018 that the Applicant retained an immigration consultant, at which time, rather than filing a notice of appeal, he instead submitted a new Travel Document application, which was received, and refused the same day, in October 2019. The IAD noted that if the Applicant had requested the extension to file his notice of appeal in September 2018, when he retained the consultant, it was very likely his request for an extension would have been granted.

[7] However, the IAD observed that it was not until November 2020, nearly three years after receiving the Travel Document decision, that the notice for an extension was received. Taking this delay into consideration, in addition to his medical predicament and the fact that the Applicant was aware of the time limits involved, the IAD determined that he had failed to demonstrate a continuing intention to pursue the appeal and refused his application for an extension (see Annex A for the part of the refusal letter setting out the appeal deadline).

III. Analysis

[8] The only issue in this judicial review is whether the IAD's Decision was reasonable. A court performing a reasonableness review scrutinizes the decision maker's decision in search of the hallmarks of reasonableness – justification, transparency and intelligibility (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para 99 [*Vavilov*]).

[9] The Applicant argues that his failure to file a timely notice of appeal is entirely due to the professional negligence of his immigration consultant who, instead of filing a notice of appeal, reapplied for a Travel Document on his behalf in 2019. He submits that he had no control over the consultant's unprofessional conduct and that the IAD erred by holding him responsible for the fault of his consultant, who failed to act properly on his instructions.

[10] The Applicant further argues that the IAD failed to properly apply the *Hennelly* factors and that if it had, the efforts that the Applicant took following his medical difficulties would have been taken into account, and clearly demonstrated a continuing intention to pursue the matter.

[11] The Respondent submits that despite his arguments, the Applicant has not provided any of the necessary evidence to uphold an allegation of professional negligence before this Court and relies on the Federal Court of Appeal's decision in *Canada (Citizenship and Immigration) v. Singh*, 2016 FCA 96, which held at para 67:

> In this respect, I would note that it is settled in Federal Court immigration jurisprudence that an allegation of professional incompetence of counsel will not be upheld if there is no evidence that a complaint has been filed with the competent authorities of the bar to which the counsel belongs or without an explanation personally issued by the professional involved: see as examples, *Odafe v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 1429 at para. 8, [2011] F.C.J No. 1762; *Teganya v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 336 at paras. 26-37, [2011] F.C.J No. 430; *Parast v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 660 at para. 11, [2006] F.C.J No. 844; *Yang v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 269 at paras. 17-28, [2008] F.C.J No. 344. Indeed, the Federal Court adopted a protocol in March 2014 outlining the procedure when a party wishes to make such an allegation, and in particular setting out the obligation to send a notice to counsel who is the subject of the allegations that are to be made against him or her and invite him or her to provide a response that could be submitted to the Court (*Procedural Protocol Re: Allegations Against Counsel or Other Authorized Representative in Citizenship, Immigration and Protected Person Cases before the Federal Court* (March 7, 2014), on line: Federal Court of Canada <http://www.fct-cf.gc.ca>).

[12] Even if I were prepared to accept the allegations of professional negligence at face value in the absence of any of the evidence that is required to substantiate such a claim, this explanation would only be helpful to explain the delay up to and including the second application for a Travel Document, which was submitted in October of 2019. However, the record shows that the Applicant was informed the very same day he reapplied for a Travel Document that his application was refused because he had failed to appeal the first refusal.

[13] In spite of this, the Applicant has not provided any explanation as to why it took an additional 13 months, from October 2019 until November 2020, to submit his request for an extension to file a notice of appeal to the IAD. As such, the professional misconduct allegations, which, I must note, it is not even clear were made to the IAD, are completely insufficient to discharge the Applicant of his burden of showing that he had a continuing intention to pursue the appeal, let alone to challenge the IAD's Decision as unreasonable.

[14] To the contrary, I am in complete agreement with the Respondent that the IAD considered the evidence that was provided, transparently applied the appropriate legal test, and provided a reasonable justification for why an extension was not warranted under the circumstances. Despite the Applicant's continued submissions at the hearing that the matter has merit, that the Applicant had an intention to pursue the matter, but in a manner beyond his control in that he was negligently advised, his arguments to the IAD were all addressed and adjudicated in an intelligible, transparent and justifiable manner.

[15] It is not open to this Court to, as the Applicant submits, simply correct a "procedural technicality". Rather, as stated during the hearing, this Court's role is to review the reasonableness of the IAD Decision (*Farooqui v Canada (Minister of Citizenship and Immigration)*, 2022 FC 560 at paras 6-7). I agree with the Respondent the Court must also be concerned with the finality of administrative decisions (*Sanchez Rebaza v Canada (Minister of Citizenship and Immigration)*, 2019 FC 509 at para 17).

[16] Ultimately, the IAD was not persuaded that the Applicant had provided evidence to demonstrate a continuing intention to pursue the matter for the entire 33-month period between his deadline to file a notice of appeal of the 2017 Travel Document refusal, and the December 2020 request for an extension.

IV. Conclusion

[17] The IAD's Decision was intelligible, transparent and justified in relation to the facts and the law. Consequently, I find it reasonable and will dismiss the application for judicial review.

JUDGMENT in file IMM-2458-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. No questions for certification were proposed and I agree that none arise.

3. No costs will be issued.

"Alan S. Diner"
Judge

ANNEX A

If you have not been in Canada at least once during the past 365 days, you must apply to the Immigration Appeal Division for authorization to be physically present at the hearing of your appeal in Canada. To be granted authorization to do this, you must first file your appeal with the Immigration Appeal Division no later than **SIXTY (60) DAYS** from the date you receive this letter.

Your request to be present at your appeal hearing may be submitted on the "Notice of Appeal" form that is attached to this letter. However you submit your request to attend the appeal hearing, your request must be submitted no later than **SIXTY (60) DAYS** after you file the Notice of Appeal. If the Immigration Appeal Division is satisfied that your presence is required at the hearing, a travel document will be issued to enable you to return to Canada. You will be asked to present your passport and appeal documents to this office before the travel document is issued.

Should you choose not to submit an appeal of this decision to the Immigration Appeal Division in Canada, this decision concerning your non-compliance with the residency obligation under section 28 of the Act will become a final determination of your residency status. You will be inadmissible to Canada as a permanent resident for failing to comply with section 28. You will be considered to have lost your status as a permanent resident of Canada, in accordance with paragraph 46(1)(b). You will not be allowed to enter Canada as a permanent resident, in accordance with subsection 19(2).

FEDERAL COURT

SOLICITORS OF RECORD

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