Federal Court  Cour fédérale

Date: 20230201

Docket: IMM-8156-22

Citation No: 2023 FC 149

Ottawa, Ontario, February 1, 2023

PRESENT: Associate Judge Benoit M. Duchesne

BETWEEN:

Mudashiru Ishola ABIKAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS AND ORDER

[1] The Applicant has brought a motion pursuant to Rule 369 of the *Federal Court Rules*, SOR/98-106 (the "Rules") for an Order pursuant to Rule 8 of the *Rules* extending the time as set out in Rule 10 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 (the *"FCCIRPR"*), *nunc pro tunc*, to permit them to perfect their application by filing their Application Record.

[2] They also seek an Order revoking the deemed discontinuance of their proceeding because of the effect of the Court's December 6, 2022, Notice to the Profession (amended December 22,

2022) titled “Deemed Discontinuance of Incomplete Applications for Leave and Judicial Review in Proceedings under the Immigration and Refugee Protection Act *and the* Citizenship Act” (the “Deemed Discontinuance Practice”).

[3] The Respondent has not served nor filed any responding record within the time permitted by Rule 369. Accordingly, I shall proceed without considering any representations that might have been made by the Respondent.

[4] For the reasons that follow, the Applicant’s motion is dismissed.

I The Deemed Discontinuance Practice

[5] Preliminary consideration must be given to that part of the Applicant’s motion that seeks an Order revoking the deemed discontinuance of this proceeding, reopening the proceeding, and granting an extension of time.

[6] On December 6, 2022, the Chief Justice issued the Deemed Discontinuance Practice and caused it to be published on the Court’s website. The Deemed Discontinuance Practice was amended on December 22, 2022, to include Applications for Leave and for Judicial Review (“ALJR”) involving the *Citizenship Act*. The content of the Deemed Discontinuance Practice was otherwise unchanged by the December 22, 2022, amendment.

[7] The thrust of the Deemed Discontinuance Practice is that the Court has adopted the administrative practice of deeming applicants to have discontinued their ALJR pursuant to Rule 165 of the *Rules* if they fail, after December 6, 2022 (or December 22, 2022, as the case may be)

to have perfected their applications by serving and filing their Application Record within the time set out by Rule 10 of the *FCCIRPR*. The time period for perfection set out in Rule 10 of the *FCCIRPR* may vary depending on whether the applicant has received a copy of the written reasons of the decision for which judicial review is sought, but the time for perfection is calculable in every case and is fixed. This administrative practice, as set out in the practice itself, has been adopted to address the diversion of court resources to deal with potentially abandoned ALJRs and to devise a fair and just manner by which to manage them.

[8] The mere passage of time and the failure to perfect an ALJR by its perfection date triggers the deemed discontinuance of the ALJR pursuant to the Deemed Discontinuance Practice. It also triggers the requirement for the applicant to promptly bring a motion to revoke the deemed discontinuance, to reopen the proceeding and to obtain an extension of time to perfect their ALJR if they wish to revive and continue their discontinued proceeding. The Deemed Discontinuance Practice provides that an ALJR will be deemed discontinued, "[…] without the need for formal notice by the Applicant or a Court Order." The Deemed Discontinuance Practice continues to state that, "The Registry will provide notice to the parties by way of a recorded entry in the online docket on the Court website." The Deemed Discontinuance Practice does not contemplate that a recorded entry of a deemed discontinuance in the online docket on the Court website is a triggering event for the deemed discontinuance to be have occurred or a condition of the deemed discontinuance having occurred. The docket entry is but a record of the deemed discontinuance having been effected by the passage of time and an applicant's failure to perfect in a timely manner. It follows that a deemed discontinuance can occur and be effective prior to any docket entry confirming it.

[9] The online docket for this proceeding reflects that no deemed discontinuance had been recorded by the Registry on the docket as of the date of the motion before me. As explained above, the absence of a docket entry is irrelevant to the deemed discontinuance having effect.

[10] The Applicant filed their motion in this case prior to my reasons and order in *Virk et al. v. Minister of Citizenship and Immigration*, 2023 FC 143 being released (*"*Virk*"*). In *Virk*, I considered the test applicable to a deemed discontinuance and developed the two-step test to be applied on a motion to revoke a deemed discontinuance, reopen a proceeding and obtain an extension of time for the perfection of an ALJR. There was accordingly no way for the Applicant to know which evidence should have been led on this motion to satisfy that part of the applicable test that deals with revoking the deemed discontinuance as no test had been articulated on the issue at the time.

[11] Considering my conclusions below on the request for an extension of time, it would be counterproductive to ask the Applicant to now file fresh evidence to meet the revocation test as set out in *Virk.* Accordingly, I shall assume for the purposes of this motion that the Applicant has satisfied the test as articulated in *Virk* for the revocation of the deemed discontinuance. I therefore turn to consider whether an extension of time to perfect an ALJR pursuant to Rule 8 of the *Rules* is warranted in this case.

II. The law for an extension of time

[12] Rule 8 of the *Rules* provides that the Court may, on a motion, extend a period of time set out in the *Rules* or by an Order of the Court. The factors to be considered in the exercise of the

Court's discretion to extend the time were recently summarized by Justice Strickland in *Kiflom v. Canada (Citizenship and Immigration*), 2020 FC 205 (CanLII), as follows:

> [26] In *Pham v Canada (Citizenship and Immigration)*, 2018 FC 1251 (*"Pham"*), Justice Harrington summarized the principles concerning the granting of a request for an extension of time:
>
> [27] There is a wealth of jurisprudence dealing with extensions of time under IRPA, or under the Federal Courts Act and Rules. The underlying premise is that justice should be done. The Federal Court of Appeal has held, time and time again, that an extension of time is discretionary and should take into account the following four criteria:
>
> > a. Did the moving party have a continuing intention to pursue the judicial review application?
> >
> > b. Is there some potential merit to the application?
> >
> > c. Does the moving party have a reasonable explanation for the delay?
> >
> > d. Is there prejudice to the other party arising from the delay?
>
> It is not necessary that all four criteria be satisfied *(Canada (Attorney General) v Hennelly*, 1999 CanLII 8190 (FCA), [1999] F.C.J. No. 846; *Canada (Attorney General) v Larkman*, 2012 FCA 204 and just recently *Thompson v Attorney General of Canada et al*, 2018 FCA 212).
>
> [27] The Federal Court of Appeal in *Canada (Attorney General) v Larkman*, 2012 FCA 204 (*"Larkman"*) listed the above factors and also discussed their interrelationship:
>
> [62] These questions guide the Court in determining whether the granting of an extension of time is in the interests of justice: *Grewal*, supra at pages 277-278. The importance of each question depends upon the circumstances of each case. Further, not all of these four questions need be resolved in the moving party's favour. For example, "a compelling explanation for the delay may lead to a positive response even if the case against the judgment appears weak, and equally a strong case may counterbalance a less satisfactory justification for the delay": *Grewal*, at page 282. In certain cases, particularly in unusual cases, other questions may be relevant. The overriding consideration is that the interests of justice be served. See generally *Grewal*, at pages 278-279; *Canada*

> *(Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41 at paragraph 33; *Huard v. Canada (Attorney General)*, 2007 FC 195, 89 Admin LR (4th) 1.

III - Analysis

[13] The questions set out in *(Attorney General) v Hennelly*, 1999 CanLII 8190 (FCA), [1999] F.C.J. No. 846, at para. 3 are the questions of concern on this motion. I shall consider each in turn in light of the evidence in the Motion Record before me.

[14] The evidence on this motion consists of the Applicant's 13-paragraph affidavit and a single exhibit. The exhibit is a Certificate Information Page from Legal Aid Ontario that reflects the six (6) different steps and decisions made by Legal Aid Ontario, along with the dates of each, to determine that the Applicant would receive funds to pay for legal services in connection with the preparation of their ALJR. The certificate reflects that Legal Aid Ontario decided to provide limited funds to the Applicant for the preparation of their ALJR on November 21, 2022. The last recorded steps in connection with the Applicant's requests to Legal Aid Ontario as shown on the exhibit, other than the final decision, are dated August 16, 2022. There are no entries shown for the period between August 16, 2022, and November 21, 2022.

[15] The Applicant deposes that their deadline to serve and file their Application Record in this proceeding was November 25, 2022. They further depose that Legal Aid Ontario decided to grant them funding for legal services in connection with their application on November 22, 2022. Although there is some inaccuracy in the evidence on this motion, nothing turns on the distinction between November 21 or 22, 2022, on this motion.

[16] The Applicant's evidence is that, "The delay in determining the application for funding impacted counsel's ability to perfect the application record on the deadline set out in the rules. I am however aware that counsel had continued to work toward preparing the memorandum and application record, which was completed on December 15, 2022". The delay in perfecting the application, says the Applicant, was primarily caused by the delay in receiving funding from Legal Aid Ontario.

[17] The balance of the Applicant's affidavit contains single sentence statements of diligence in following up with Legal Aid Ontario, that the Applicant desires to have their application heard with dispatch, that the Respondent will not suffer any prejudice from the extension of time sought, and that they have a good case on the merits. These single sentence statements are bald statements without any corresponding evidence to substantiate the bald statements.

a) *Hennelly* Question 1: A Continuing Intention

[18] The Applicant's continuing intention to pursue their application is difficult to ascertain on the evidence before me. The affidavit evidence establishes that the Applicant's lawyer worked on completing their Application Record until it was completed on December 15, 2022, but there is no evidence to suggest when the lawyer was in fact retained or when the materials necessary for the preparation of the Application Record were delivered to counsel by the Applicant. There is also no evidence as to what the Applicant was doing to prepare their Application Record between the date when the ALJR was filed in late August 2022 and December 15, 2022, when the lawyer completed the Application Record, other than following up with Legal Aid Ontario with respect to the Applicant's request for funding. I observe that no exhibit has been filed to

establish when or how the Applicant followed up with Legal Aid Ontario with respect to their request for funding, or whether the Applicant made statements in those follow-ups that the deadline for the service and filing of their Application Record was fast approaching. The absence of the Applicant's Application Record as an exhibit on this motion precludes ascertaining when the Applicant completed their affidavit in support of their application, if at all.

[19] Although it is clear from the evidence that the Applicant had a continuing intention to determine whether they would receive funds from Legal Aid Ontario to apply toward legal services to be retained in connection with their ALJR, it does not necessarily follow that the Applicant had a continuing intention to serve and file their Application Record in a timely manner and pursue this ALJR from the same evidence. Having an intention to continue an application once legal representation is retained and having an intention to continue an application without legal representation are two different states of mind. There is evidence before me with respect to the former but not necessarily with respect to the latter.

[20] There is no evidence filed with respect to any steps the Applicant had taken to prepare their Application Record prior to the November 21, 2022, Legal Aid Ontario funding decision date. There is similarly no evidence of any communications between the Applicant and the solicitor of record for the Respondent for the purposes of seeking an extension of time to serve and file their Application Record in the event that funding was obtained and counsel retained, or to extend the time to serve and file pending a determination by Legal Aid Ontario, or otherwise. Given that the Application Record filing deadline was fast approaching and that a decision from Legal Aid Ontario was not known prior to November 21, 2022, it would have been usual and

prudent for the Applicant to at least suggest a possible extension of time to the Respondent. No evidence was tendered in this regard.

[21] Although the evidence filed is lacking in many respects, I am inclined to find that the Applicant had a continuing intention to pursue this application if funding had been granted by Legal Aid Ontario. As the funding was granted, I find that the Applicant had a continuing intention to pursue their Application.

b) *Hennelly* Question 2: Potential Merit of the Application

[22] The Applicant's written submissions set out that issues of law and fact, as well as issues of reasonableness and several other points extensively laid out in the Application Record, show that the Applicant has a strong case on the merits and a strong prospect of success. That may be from the Applicant's perspective, but I have no way of determining that on this motion despite that I am required to.

[23] It is impossible for me to determine on the evidence whether there is any potential merit to the Applicant's ALJR or to the submissions made in its regard because the Application Record sought to be served and filed is not included as an exhibit on this motion. The written submissions made about the merits of the application are of no assistance to me or to the Applicant as they are not supported by any filed evidence.

[24] Given the absence of evidence as to the merits of the underlying application other than bald statements of merit in the Applicant's affidavit, I must find that there is no demonstrated potential merit to the application.

c) *Hennelly* Question 3: A Reasonable Explanation for the Delay

[25] As I have noted above, there is evidence before me of the time taken by Legal Aid Ontario to decide to provide funding to the Applicant and of the impact that time had on the Applicant retaining counsel. However, there is no evidence of any other explanation for the Applicant's failure to serve and file their Application Record in a timely manner prior to November 21, 2022, or in taking steps to seek an extension of time to file their Application Record after November 21, 2022.

[26] I observe that the Court file shows that the Applicant was self-represented at the time of filing the ALJR and continued to be so until a Notice of Change of Solicitor was filed on December 20, 2022, well after the ALJR perfection date. Although its is understandable that many self-represented litigants would prefer to be represented by legal counsel in court proceedings and that approaching the Court, its procedures and the law without legal counsel may be daunting, a self-represented litigant's failure to comply with the times set out in the *Rules* is not excused by a preference or hope to be represented by legal counsel. Rule 122 of the *Rules* sets out that a party who is not represented by a solicitor shall do everything required, and may do anything permitted, to be done by a solicitor under the *Rules*. Although self-represented litigants will be given some latitude, the jurisprudence of this Court consistently refuses to consider a party's lack of legal training or understanding of the *Rules* as constituting a reasonable

justification for delay. Being self-represented carries with it obligations of self-education: *Cotirta v Missinnipi Airways*, 2012 FC 1262 at para 13, aff'd 2013 FCA 280); *Rooke v Canada (Attorney General)*, 2018 FC 204 at para 23.

[27] The Applicant was self-represented at the time that their Application Record was due for filing and it was not filed. No explanation for failing to file their Application Record in time was offered beyond that they were seeking funding to retain a lawyer. Although understandable, the explanation offered is not a reasonable one for a self-represented litigant at the time of the events at issue. It does not justify the delay.

[28] The Motion Record before me was filed on December 20, 2022, 25 days after the expiry of the time for the Applicant to file their Application Record. There is no evidence tendered to justify the passage of time between November 25, 2022 and the date on which this motion was brought. As held in *Canada v. Tran*, 2008 FC 297 (CanLII), at paragraphs 24 to 28, when it is apparent that a time limit has expired, the parties should move promptly and there must be a reasonable explanation for the delay in seeking an extension of time led in evidence. There is no evidence to justify not moving promptly with this motion, nor is there a reasonable explanation offered for the passage of time between November 25, 2022, and the date of the motion offered in this case.

[29] I therefore find that the Applicant's delay is not justified.

d) *Hennelly* Question 4: Is there prejudice to the other party arising from the delay?

[30] The only evidence of prejudice, or of the absence of prejudice, is a bald statement in the Applicant's affidavit of the absence of prejudice to the Respondent. Bald statements of this nature, without more, are self-serving, inconclusive, and fail to inform the analysis the Court must undertake to determine whether any prejudice arises to the Respondent as a result of the delay.

[31] Given that the Respondent has not responded to this motion to lead evidence of prejudice arising from the delay incurred, I can only surmise that the Respondent will be in no better or worse position than it would have been if the Application Record was filed in a timely manner. There is therefore no evidence of prejudice to the Respondent arising from the delay (*Koch v. Borgatti Estate*, 2022 FCA 201 (CanLII), at para. 79).

[32] Upon considering the *Hennelly* factors, I conclude that the Applicant had a continuing interest in pursing their application and that there is no prejudice to the Respondent arising from the delay. I also conclude that their application has not been shown to have potential merit and that there is no reasonable justification for the delay incurred. The Applicant has failed to satisfy two of the four *Hennelly* factors.

e) The Interests of Justice Being Served by an Extension of Time

[33] As set out in *Canada (Attorney General) v Larkman*, 2012 FCA 204, I must consider whether the interests of justice are being served by granting an extension of time in this case

[34] In my view, that the underlying application has not been shown to have any potential merit is determinative of this motion. It would not serve the interests of justice to have the parties and the Court expend time and resources to prepare and argue an application that has not been shown to have any potential merit.

[35] It follows for the foregoing reasons that the Applicant's motion is dismissed.

THIS COURT ORDERS that:

1. The Applicant's motion for an Order revoking the deemed discontinuance of their ALJR, reopening the proceeding and granting an extension of time *nunc pro tunc* for the perfection of their ALJR is dismissed.

"Benoit M. Duchesne"
Associate Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-8156-22
STYLE OF CAUSE:	MUDASHIRU ISHOLA ABIKAN v MINISTER OF CITIZENSHIP AND IMMIGRATION

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

REASONS FOR JUDGMENT AND JUDGMENT:	ASSOCIATE JUDGE DUCHESNE
DATED:	FEBRUARY 1, 2023

SOLICITORS OF RECORD:

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