Federal Court  Cour fédérale

Date: 20110609

Dockets: IMM-5329-10
IMM-431-11

Citation: 2011 FC 670

BETWEEN:

NITINKUMAR JAYANTIBHAI PATEL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDERS

HARRINGTON J.

[1] Mr. Patel finds himself in a procedural morass. His application from India for a Canadian permanent resident visa, based on a permanent job offer, led to two distinct negative decisions 25 September 2009. Each is in a different stage of judicial review.

[2] In one, rendered by S. Daya, First Secretary at the High Commission in New Delhi, he was only assessed 64 points. He needed 67. On 14 September 2010, almost a year later, he filed an

application for leave and judicial review of that decision under docket number IMM-5329-10. The application should have been filed within 60 days from notification of the decision. He applied for an extension of time under section 72(2) (c) of the *Immigration and Refugee Protection Act* [IRPA]. Rule 6(2) of the *Federal Courts Immigration and Refugee Protection Rules* provides that a request for an extension of time shall be determined at the same time and on the same materials as the application for leave itself. No decision has been rendered as yet on that request for an extension of time, or on the application for leave.

[3] Rule 10 goes on to provide that the application for leave is perfected by filing a record within 30 days of the application or, if reasons for the decision were not provided, from receipt thereof. Mr. Patel moved for an extension of time in order to perfect his record. On 8 February 2011, Prothonotary Lafrenière dismissed that motion. Mr. Patel's appeal from that order is now before me.

[4] In the other decision, rendered 25 September 2009, David Manicom, Minister/Councillor, found that Mr. Patel had made a misrepresentation with respect to his arranged employment and, therefore, was inadmissible for a period of two years, pursuant to section 40 of IRPA. On January 24, 2011, Mr. Patel filed an application for leave and judicial review of that decision under docket number IMM-431-11. In the application, he again applied for an extension of time under section 72(2) (c) of IRPA. He also stated that he had received written reasons from the Tribunal. This application record was filed within time.

[5] Mr. Justice Mosley bifurcated the extension request from the application for leave, and, taking note that Mr. Patel had moved to appeal Prothonotary Lafrenière's decision in IMM-5329-10, ordered that the application for an extension of time be heard at the same time and by the same judge hearing that appeal.

[6] For ease of reference, I shall refer to IMM-5329-10 as the points-decision, and IMM-431-11 as the misrepresentation-decision.

IMM-5329-10: THE POINTS-DECISION

[7] The Minister takes the position that I lack jurisdiction to entertain the motion in appeal of Prothonotary Lafrenière's decision, as it is an interlocutory order. Section 72(2) (e) of IRPA specifically provides that there is no appeal with respect to an interlocutory order under that Act. In my opinion, the Minister is correct. His position is supported by *Canada (Attorney General) v Hennelly* (1995), 185 NR 389, [1995] FCJ No 1183 (QL); *Yogalingam v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 540, [2003] FCJ No 697; *Khan v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1331, [2008] FCJ No 1704 (QL); and *Froom v Canada (Minister of Citizenship and Immigration)*, 2003 FCA 331, 312 NR 282.

[8] Mr. Patel's reply is two-fold. Since sections 72(2) (c) and (d) of IRPA provide that only a judge may extend time for serving and filing the application and dispose of the application, as a matter of statutory interpretation only a judge should be entitled to deal with motions to extend the time in which to file a record. The basis of this decision is *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42, [2002] 2 SCR 559, which confirms that a statutory provision must be read in its

entire context, taking into consideration not only the ordinary and grammatical sense of the words, but also the scheme and object of the statute, and the intention of the legislature. The same approach must also be followed, *mutatis mutandis*, in interpreting regulations (*Glykis v Hydro-Québec*, 2004 SCC 60, [2004] 3 SCR 285).

[9] There is, however, nothing in IRPA which equates an application to file an originating document, such as an application for leave and for judicial review, with a motion within that docket once opened, *i.e.*, for an order extending the time to file a record. Mr. Patel's submission runs contrary to rule 50 of the *Federal Courts Rules* and, more specifically, Rule 21(2) of the *Federal Courts Immigration and Refugee Protection Rules*, which provides that no time limit prescribed within the Rules may be varied, "except by order of a judge or prothonotary."

[10] The second argument is that the decision of Prothonotary Lafrenière is in effect a final decision. Although his decision will ultimately lead to a dismissal by a judge of the application for leave on the grounds that the record has not been perfected within the delays, his decision is an interlocutory one. One cannot look at the result of his decision and then retroactively determine whether or not it was interlocutory. On that basis, a decision extending time would be interlocutory and a decision refusing to extend time would be final. See the decision of Mr. Justice Nadon, as he then was, in *Symbol Yachts Ltd v Canada (Revenue Canada, Customs and Excise)*, [1996] 2 FC 391, [1996] FCJ No 101 (QL).

IMM-431-11: THE MISREPRESENTATION-DECISION

[11] During argument, I queried whether this application would be moot should Prothonotary Lafrenière's decision be upheld. In that scenario, even if an extension of time were granted, and the application for leave granted and judicial review granted, Mr. Patel would still have only 64 of the 67 points required.

[12] The case most cited with respect to extensions of time is that of the Federal Court of Appeal in *Canada (Attorney General) v. Hennelly*, 244 N.R. 399, [1999] F.C.J. No. 846 (QL), which held that an applicant seeking an extension must establish: a) a continuing intention to pursue the application; b) that the application has some merit; c) that no prejudice arises from the delay; and d) that a reasonable explanation for the delay exists. That case, however, must be read with the earlier decision of the Federal Court of Appeal in *Grewal v Canada (Minister of Employment and Immigration)*, [1985] 2 FC 263, 63 NR 106, which makes it clear that the underlying consideration is that justice be done. Regard should be had to the reasons for the delay and whether there is an arguable case.

[13] I am prepared to assume that there is some merit to Mr. Patel's case. There may well be some legitimate confusion among Service Canada, which issued the arranged employment opinion, Mr. Patel, and his putative employer. The arranged employment opinion was for a mechanical maintenance engineer. The First Secretary at the High Commission, expressed the view that the duties required by the employer were actually those of a heavy-duty mechanic. This ultimately led to the misrepresentation finding, notwithstanding that the employer reiterated that it did not need a heavy-duty mechanic but needed someone with greater training and skill sets.

[14] However, no satisfactory explanation has been given for the delay. Indeed, there are a number of reasons for different parts of the delay, some of which may well be justified, as shown by the following timeline:

a. 25 September 2009: negative decision;
b. 8 October 2009: decision mailed to Mr. Patel;
c. 17 November 2009: Mr. Patel's brother approaches counsel to represent him;
d. 23 December 2009: Mr. Patel signs a use of representative form and an access to information form;
e. 9 January 2010: counsel requests CAIPS notes;
f. 15 February 2010: CAIPS notes mailed;
g. 14 September 2010: application for leave and for judicial review in the points-decision, IMM-5329-10;
h. 9 October 2010: Mr. Patel swears his affidavit; and
i. 24 January 2011: application for leave and for judicial review filed in the misrepresentation-decision, IMM-431-11.

[15] It seems to me that an application for leave and judicial review could have been filed within time in November or early December 2009. There appear to be two reasons why that was not done. One is that counsel wished to have his mandate personally confirmed by Mr. Patel. This was only done in late December, beyond the 60 days. The second is that counsel requested and obtained the CAIPS notes before filing the application.

[16] In my opinion, this latter point was unnecessary. Federal Court Form IR-1, which is used to launch applications for leave and judicial review in immigration matters, requires the applicant to state that he has, or has not, received written reasons from the tribunal. If the form states that written reasons were not received, the Court Registry calls upon the decision maker to provide them. In this case, Mr. Patel had received the decision, but insufficient reasons there for. It is well established that the CAIPS notes, the computer entries maintained by the visa officers, may form part of the reasons, as in this case, since the letter announcing the decision did not adequately explain the basis thereof (*Veryamani v Canada (Minister of Citizenship and Immigration*, 2010 FC 1268, [2010] FCJ No 1668 (QL), and cases cited therein). The CAIPS notes were received in February 2010. Had the application for leave and judicial review been filed at that time, I certainly would have extended time as the *Hennelly* test had been met.

[17] However, there is nothing thereafter other than Mr. Patel's brother's tardiness, and no reason is given why the application was not filed in IMM-5329-10 until September 2010 and in IMM-431-11 until January 2011. As a matter of public policy, judicial review of decisions of federal boards and tribunals must be initiated promptly. The general rule under section 18.1 of the *Federal Courts Act* is that an application must be filed within 30 days.

[18] In *Berhad v Canada*, 2005 FCA 267, 338 NR 75, Mr. Justice Létourneau, speaking for the Court of Appeal, explained the reason for these short time limits for the commencement of challenges of decisions of federal boards and tribunals. He said at paragraph 60:

> In my view, the most important reason why a shipowner who is aggrieved by the result of a ship safety inspection ought to exhaust the statutory remedies before asserting a tort claim is the public interest in the finality of inspection decisions. The importance of that

> public interest is reflected in the relatively short time limits for the commencement of challenges to administrative decisions - within 30 days from the date on which the decision is communicated, or such further time as the Court may allow on a motion for an extension of time. That time limit is not whimsical. It exists in the public interest, in order to bring finality to administrative decisions so as to ensure their effective implementation without delay and to provide security to those who comply with the decision or enforce compliance with it, often at considerable expense. In this case, the decision of the Chairman was not challenged until, a year and a half after it was made, the respondents filed their claim for damages.

[19] Although *Berhad* and other cases which stated that an action in damages against the federal Crown related to a decision of a federal board or tribunal must be preceded by an application for judicial review have been overcome in some instances by the Supreme Court (*Canada (Attorney General) v TeleZone Inc*, 2010 SCC 62, [2010] 3 SCR 585), in my opinion Mr. Justice Létourneau's underlying rationale for short delays in which to apply for judicial review still holds true.

[20] Come September, Mr. Patel will be eligible to reapply for a permanent resident visa. By then, the aura of misrepresentation may have faded somewhat in light of these reasons.

[21] A copy of these reasons is to be placed in docket numbers IMM-5329-10 and IMM-431-11.

"Sean Harrington"
Judge

Ottawa, Ontario
June 9, 2011

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	IMM-5329-10 AND IMM-431-11
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