

Federal Court



Cour fédérale

**Date: 20160217**

**Docket: IMM-3539-15**

**Citation: 2016 FC 211**

**Toronto, Ontario, February 17, 2016**

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

**BETWEEN:**

**ABDIKARIM YUSUF HUSSEIN**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

[1] The Applicant, a citizen of Somalia, claims refugee protection in Canada on the ground of ethnicity; as a member of the minority Madhibaan clan he maintains subjective and objective fear of targeting by members of the larger Hawiye clan should he be required to return to Somalia. The Refugee Protection Division (RPD) dismissed the Applicant's claim due to lack of corroborating documents. The Applicant received the RPD's reasons on March 31, 2015, and filed a Notice of Appeal with the Refugee Appeal Division (RAD) on April 8, 2015, being within

the required 15 days. The Applicant was required to perfect his appeal within 30 days, being by April 30, 2015. The Applicant missed this filing date, but on June 2, 2015, filed a completed Appeal Record together with a request for an extension of time to perfect his Appeal.

[2] In rejecting the Applicant's request, the RAD Member (Member) concerned provided the following statements in a decision dated July 17, 2015:

In an accompanying affidavit, the Applicant concedes that his appeal record was due on April 30 but states that "I was unable to retain counsel due to financial difficulties" (Application Record, Affidavit, para. 2). He explains that he was denied financial assistance from Legal Aid; he took a part-time job, and borrowed money from a friend in order to retain counsel.

[...]

Section 159.91(2) of the [*Immigration and Refugee Protection*] Regulations states:

If the appeal cannot be filed within the time limit set out in paragraph 1(a) or perfected within the time limit set out in paragraph 1(b), the Refugee Appeal Division may, for reasons of fairness and natural justice, extend each of those time limits by the number of days that is necessary in the circumstances.

This provision contains three requirements. First, it must not be possible for an appeal to be filed and perfected within the time limits set out. Under this element, the Appellant must provide an explanation for the delay and must show a continuing intention to appeal during the delay. RAD Rule 37(4) requires the evidence to be in the form of an affidavit or statutory declaration. Second, any extension must be only for the number of days necessary in the circumstances. This requirement suggests that the delay should be as short as possible or, in other words, that every day of delay should be justified. The reference to "circumstances" implies an individualized assessment of the circumstances in each particular request for an extension of time. Third, any extension must be for reasons of fairness and natural justice.

The Applicant was four weeks late in perfecting his appeal. In the RAD's view, the denial of legal aid and the subsequent inability to retain counsel are not acceptable explanations for the delay (Pistan, *Javier Francisco v. MCI* (F.C.T.D., no.IMM-512-01), MacKay, July 6, 2001, para. 6; *Shokri, EvetteEmil Zaky v. MCI* (F.C.T.D., no.IMM-1768-01), Blanchard, July 12, 2002, para. 10).

There is no requirement that an appeal to the RAD be filed by counsel. The Applicant has not established, as required by Section 159.91, that his appeal could not have been perfected as required by the Regulations.

This application is therefore denied, and this appeal is dismissed.

[Emphasis added]

[3] I find that the decision under review is unreasonable because the Member did not apply the established approach for determining an extension request pursuant to s.159.91(2).

[4] In *687764 Alberta Ltd. v Canada*, [1999] F.C.J. No. 545, 166 F.T.R. 87, at paragraphs 14 and 15, Justice Sharlow states the approach established in the case law with respect to doing justice on an extension request:

There are no hard and fast rules that will determine in any particular case whether leave will be granted to extend a time limit for the commencement of a legal proceeding. The purpose of the time limit is to give effect to the principle that there must be an end to litigation. On the other hand, giving the court the discretion to extend the time limit recognizes that an extension of time may be necessary to do justice between the parties. These competing considerations must be borne in mind in considering whether to grant the extension (*Grewal v. Minister of Employment and Immigration*, [1985] 2 F.C. 263 (F.C.A.); *Consumers' Ass'n (Can.) v. Ontario Hydro* [No. 2], [1974] 1 F.C. 460 (F.C.A.)).

The cases set out the factors to be taken into account. The most important of these is that the applicant must demonstrate an arguable case for the remedy sought or, as is said in some cases, a reasonable chance of success. In addition, the delay should be explained or justified, and there should be evidence that the

applicant exercised reasonable diligence in asserting its rights. Usually this consists of evidence of a bona fide intention, in existence within the statutory time limits, to seek redress for the impugned decision, and evidence of the steps taken to pursue the matter. Any prejudice to the respondent or third parties must be taken into account.

[Emphasis added]

[5] The RAD has followed the established approach to extension requests as further stated in *Canada (Attorney General) v Pentney*, 2008 FC 96 (*Pentney*). For example, the September 11, 2013 decision in *RAD File No. TB-04414* at paragraph 6 states the criteria to be applied adapted from paragraph 18 of *Pentney*:

- (a) there was and is a continuing intention on the part of the party presenting the motion to pursue the appeal;
- (b) the subject matter of the appeal discloses an arguable case;
- (c) there is a reasonable explanation for the defaulting parties delay; and
- (d) there is no prejudice to the other party in allowing the extension.

(Applicant's Book of Authorities, Tab 5)

[6] Further, in the October 13, 2013 decision in *RAD File No. TB-04221* the criteria set out in *RAD File No. TB-04414* is repeated. It is important to note that this decision was decided by the same RAD Member who rendered the decision presently under review.

[7] In the decision under review, it appears that the established approach was overshadowed by the notion that, on the basis of case authority, "the denial of legal aid and the subsequent inability to retain counsel are not acceptable explanations for the delay" (Decision, para. 8 as quoted above). The reason and consequently the extension request were dismissed in reliance upon the two cited decisions of this Court. In my opinion, that reliance was misplaced. Each case

turns on its own merits. Thus, to find that in other cases the excuse that a delay in filing to obtain a lawyer was not sufficient to gain an extension must not be viewed as precedential.

[8] Indeed, in response to Counsel for the Applicant's reliance on a decision in which an extension was granted by the RAD in similar circumstances to those in the present case, Counsel for the Respondent replied: "the fact that other panels of the RAD may have granted an [extension of time] is not binding on other RAD panels" (Respondent's Memorandum of Argument, para. 20). I agree with this submission: the fact is neither binding nor precedential. But, of course, it works in both directions as I have explained.

[9] The Appeal Record before the RAD in the present case supplied evidence and argument with respect to, not only the reasons for delay in filing the Appeal Record, but also the merit of the appeal. The Applicant's affidavit provides the following explanation for late filing:

I affirm that I intended to file my appeal record from the outset. My intention to proceed with a RAD appeal is reflected in my behaviour, as I filed the Notice of Appeal from a Refugee Protection Division Decision within the 15 day deadline. It was my intention to retain counsel to assist me in filing the RAD appeal record, however I was financially unable to do so and it has taken me until now to be able to save and borrow money to do so.

I affirm that it took me some time to find employment. I began to work-part time in May 2015 as a laborer in a cake factory through Selective Consultants Employment Agency. It is only after I started working that I was able to save some money to retain counsel. Also, it is only after I began working that my friend Mustafa Hassan was willing to lend me some money to retain counsel, as he knows I will soon have the means to pay him back through my earnings.

I affirm that I applied for legal aid immediately after the refusal of my refugee claim, however my application for funding towards my RAD appeal was denied. My application to legal aid further demonstrates my continuing intention to pursue my RAD appeal.

I affirm that I received the reasons for the negative RPD decision on March 31, 2015. My RAD appeal record was due on April 30, 2015. I submit that the one month delay will not prejudice the respondent in this case should the RAD grant the extension to file my appeal record.

(Certified Tribunal Record, pp. 15 - 18)

The Member's failure to consider the entirety of the evidence in providing the necessary "individualized assessment" of the Applicant's extension request renders the decision under review unreasonable.

[10] I wish to add that, in reaching a decision on the extension request, the RAD is required to engage fairness and natural justice considerations in applying s. 159.91(2) of the *Regulations*.

The message is that all care and understanding should be given and applied before barring a person's access to justice by denying an extension request. There is no evidence that the message was heard, understood, and followed in the present case.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the decision under review is set aside and the matter is referred back for redetermination by a differently constituted panel. There is no question to certify.

“Douglas R. Campbell”  
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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-3539-15  
**STYLE OF CAUSE:** ABDIKARIM YUSUF HUSSEIN v THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION  
**PLACE OF HEARING:** TORONTO, ONTARIO  
**DATE OF HEARING:** FEBRUARY 11, 2016  
**JUDGMENT AND REASONS:** JUSTICE CAMPBELL  
**DATED:** FEBRUARY 17, 2016

**APPEARANCES:**

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