Federal Court  Cour fédérale

Date: 20200622

Docket: IMM-5105-19

Citation: 2020 FC 717

Ottawa, Ontario, June 22, 2020

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

OSKAR PAUL SCHULZ

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of the decision of the Immigration Appeal Division [IAD] of the Immigration and Refugee Board, issued on July 19, 2019 [the Decision], refusing the Applicant's application for an extension of the time to file an appeal against a removal order made against him. On August 2, 2017, a removal order had been issued against

the Applicant, a permanent resident of Canada, for non-compliance with the residency obligation under the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] As explained in more detail below, this application is granted, because I find the Decision does not demonstrate a line of analysis consistent with the applicable test for granting an extension of time. The Decision is therefore unreasonable.

II. **Background**

[3] The Applicant is a German citizen who obtained permanent residence in Canada, along with his parents, in 2001 when he was 17 years old. His parents subsequently divorced, and his father returned to Germany. His father's health deteriorated to the point where the Applicant moved to Germany in 2012 to help take care of him.

[4] The Applicant returned to Canada on May 27, 2017, a time at which his father's health had improved. The Canada Border Services Agency examined him at the port of entry at the Halifax International Airport in Halifax on that date, and a report was issued under s 44(1) of IRPA. The report states there were grounds to believe the Applicant was inadmissible to Canada for failing to comply with the residency obligation applicable under s 28 of IRPA (requiring permanent residents to be in Canada for at least 730 days in every 5-year period).

[5] A removal order was subsequently issued against the Applicant on August 3, 2017. Pursuant to the *Immigration Appeal Division Rules*, SOR/2002-230 under IRPA, the Applicant had 30 days from that date (i.e. until September 2, 2017) to initiate an appeal to the IAD. The

Applicant filed his notice of appeal, including a request for an extension of time, on April 26, 2019. The appeal he wishes to initiate does not challenge the legal validity of the removal order made against him. Rather, he seeks to invoke the jurisdiction of the IAD to allow the appeal on humanitarian and compassionate grounds – i.e. that his absence from Canada and resulting failure to comply with the residency obligation were the result of his responsibility to care for his father in Germany.

[6] While the Applicant prepared a notice of appeal immediately after receiving the removal order, he did not file it. Instead, he took steps to do what he describes as perfecting his appeal, including attempting to obtain a copy of his complete immigration file. In 2018, he retained counsel, who advised that he seek a psychological assessment. A registered psychologist named Jason Roth subsequently prepared two reports, dated August 7, 2018 and January 2, 2019 [the Roth Reports]. Mr. Roth diagnosed the Applicant with Avoidant Personality Disorder and as being on the Autism spectrum at level 1. The Applicant's application to the IAD to extend the time to file his appeal included the Roth Reports and asserted that his failure to file on time was a function of his medical conditions.

III. **Decision under Review**

[7] The IAD stated that in order to grant an extension of time for the filing of an appeal, it was necessary to determine whether the Applicant met the criteria set out in *Canada (Attorney General) v Hennelly*, [1990] FCJ No 846 (QL) [*Hennelly*]: namely, a continuing intention to pursue the proceeding, the proceeding having some merit, the absence of prejudice to the Respondent arising from the delay, and the existence of a reasonable explanation for the delay.

The IAD found that the first three criteria were met. However, in relation to the fourth criterion (the existence of a reasonable explanation for the delay), the IAD found that the Applicant had not provided a reasonable explanation.

[8] The IAD referred to the Roth Reports and to the Applicant's submissions that he was psychologically incapable of sending the notice of appeal. However, it found that several aspects of the Applicant's life directly contradicted the statement that he is unable to act when he is under stress. The IAD referred to the Applicant's activities, including writing university examinations, answering questions in his immigration interview, caring for his father, as well as taking measures such as writing to immigration authorities and his provincial legislator and contacting lawyers. The IAD stated that, without questioning Mr. Roth's findings regarding the Applicant's various psychological issues, analyzing his behaviour was within the scope of the IAD's role. In the opinion of the IAD, the Applicant's claim, that he was unable to respond when faced with a stressful situation, was not a reasonable explanation for submitting the notice of appeal nearly 20 months after the prescribed deadline.

[9] The IAD also observed that, although the Roth Reports were produced in August 2018 and January 2019, the Applicant did not file his application for an extension of time until April 2019. Noting the Applicant's explanation that his father died in February 2019 and that his counsel's mother died on an unspecified date, the IAD found these events did not justify the additional delay of nearly four months.

[10] Concluding that the Applicant had provided no reasonable explanation for the delay in filing his notice of appeal, the IAD refused the Applicant's request for an extension of time, because he did not meet the *Hennelly* criteria.

IV. **Issues and Standard of Review**

[11] The Applicant submits the following issues for the Court's consideration:

a) Did the IAD err in relation to the test applied to assess whether an extension of time was warranted?

b) Did the IAD err by failing to properly consider all evidence before it, specifically the Roth Reports?

[12] The parties agree, and I concur, that the standard of review applicable to both issues is reasonableness.

V. **Analysis**

[13] As a brief procedural aside, I note this application for judicial review was initially assigned to Justice Boswell, who conducted an oral hearing on February 13, 2020. However, while his decision in these matters remained on reserve, Justice Boswell commenced a medical leave, and the date of his return to judicial duties is presently uncertain. As such, on May 19, 2020, Chief Justice Crampton issued an Order, re-assigning this matter to another judge, as contemplated by Rule 39.

[14] As the judge to whom the matter was re-assigned, I convened a special sitting on June 16, 2020, to afford the parties to this proceeding an opportunity to make representations regarding the appropriateness of determining these matters on the basis of the written and oral submissions that had already been made. The parties jointly advised that they agreed that such a process was appropriate, although I would also have the opportunity to seek further submissions in writing in the event I had any questions for counsel. I have reviewed the written materials and oral submissions and, having no questions for counsel, the following is the analysis underlying my decision.

[15] My decision to allow this application for judicial review turns on the first issue set out above. The Applicant submits the IAD erred in relation to the test applied to assess whether an extension of time was warranted. The Applicant notes that, under the test prescribed by *Hennelly* for consideration of an extension request, it is not necessary that all four factors set out in *Hennelly* be satisfied. Rather, the overriding consideration is to see that the interests of justice are served (see *Canada (Attorney General) v Larkman*, 2012 FCA 204 [*Larkman*] at para 62). As such, it is possible for an extension of time to be granted even if the tribunal finds the justification for the delay unsatisfactory (see *Grewal v Canada (Minister of Employment and Immigration)*, [1985] 2 FC 263 (CA)).

[16] The Applicant observes that the IAD found the first three factors satisfied and rejected the request for an extension solely based on the fourth factor, i.e. the IAD's dissatisfaction with the explanation for the delay. He argues that this demonstrates the IAD treating the *Hennelly* test as conjunctive, i.e. as requiring that all factors be satisfied in order to grant an extension. The

Applicant submits that the IAD was instead required to weigh the positive factors against the sole negative factor and then determine whether the totality of the circumstances justified an extension of time in this instance. He submits that, in the absence of such an analysis, the Decision is unreasonable.

[17] The Respondent does not take issue with the Applicant's description of the relevant test and how it is intended to operate. However, the Respondent argues that the Decision demonstrates the IAD applied that test in a reasonable manner. It submits there is no indication in the Decision that the IAD applied the test conjunctively. Rather, the IAD has the discretion to determine the weight to be given to the evidence, in order to determine the ultimate issue under consideration (see *Nekoie v Canada (Minister of Citizenship and Immigration)*, 2012 FC 363 at para 33). The Respondent argues that the Applicant is simply dissatisfied with the Decision and is asking the Court to re-weigh the evidence.

[18] There is no disagreement between the parties as to the test the IAD was obliged to employ. The question for the Court's determination is whether the Decision demonstrates a reasonable application of that test to the evidence before the IAD. The reasonableness standard, applicable to the Court's role in this application for judicial review, is informed by the requirement that the Court be able to trace the decision-maker's reasoning without encountering any fatal flaws in its overarching logic. The Court must be satisfied that there is a line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived (see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 102).

[19] As the Respondent interprets the Decision, the IAD weighed the absence of a reasonable explanation for the delay against the other positive *Hennelly* factors and concluded that the absence of an acceptable explanation carried the day, such that an extension should not be granted. In the case of such an analysis, the Respondent would be correct to argue that it is not the Court's role to interfere with the IAD's weighing of the evidence. As noted in *Lesley v Canada (Minister of Citizenship and Immigration)*, 2018 FC 272 at paragraph 21, failure to pursue an application as diligently as could reasonably be expected will weigh strongly against the granting of an extension.

[20] The difficulty with the Decision currently under review is that it does not set out such an analysis, or indeed any analysis weighing the *Hennelly* factors. The Respondent notes that, while it is not permissible for the reviewing Court to guess at a tribunal's reasoning, it is permissible for it to "connect the dots on the pages" (see *Vavilov* at para 97). However, while the dots could possibly be connected in the manner the Respondent advocates, it is at least equally available to interpret the Decision as demonstrating the IAD interpreting the *Hennelly* test as conjunctive, as the Applicant submits. The IAD conducts no express weighing of the factors. Moreover, in expressing its conclusion that the Applicant does not meet the criteria established by the case law, the IAD states only that he provided no reasonable explanation for the delay in filing his notice of appeal. The portion of the Decision reads as if the IAD arrived at its conclusion because the absence of a reasonable explanation was determinative, not because it outweighed the positive factors.

[21] While the Court is permitted to connect the dots in the decision, the dots in this particular Decision are capable of being connected in more than one way and, in my view, the most likely interpretation is that offered by the Applicant. Of course, once a decision-maker's line of reasoning has been identified, the Court need only be satisfied that such analysis could reasonably lead the tribunal to arrive at its conclusion. The reasonableness standard contemplates that there can a range of possible results, and it is not the Court's role to interfere with a decision that arrives at such a result. However, if the decision is capable of multiple interpretations, and it is not possible for the Court to be satisfied that an acceptable line of reasoning has been employed, the deference inherent in the reasonableness standard does not protect the decision from review.

[22] I find the Decision does not demonstrate a line of analysis consistent with the applicable test for granting an extension of time. The Decision does not meet the reasonableness standard as informed by *Vavilov* and therefore must be set aside. Having reached this conclusion, I will grant the application for judicial review, and it is unnecessary for me to consider the other issue raised by the Applicant. Neither party proposed any question for certification for appeal, and none is stated.

JUDGMENT IN IMM-5105-19

THIS COURT'S JUDGMENT is that this application for judicial review is granted and this matter is returned to a differently constituted panel of the Immigration Appeal Decision for re-determination. No question is certified for appeal.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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