

Federal Court



Cour fédérale

Date: 20211215

Docket: IMM-2889-21

Citation: 2021 FC 1411

St. John's, Newfoundland and Labrador, December 15, 2021

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

SHADI MOKHTAR FRYEDI

Applicant

and

**THE MINISTER OF IMMIGRATION, REFUGEES
AND CITIZENSHIP CANADA**

Respondent

REASONS AND ORDER

[1] By a Notice of Motion filed on submitted for consideration without personal appearance pursuant to Rule 369 of the *Federal Courts Rules*, SOR/98-106 (the “Rules”), Mr. Shadi Mokhtar Fryedi (the “Applicant”) seeks an extension of time within which to file his Application Record in support of his Application for Leave and Judicial review that underlies his proceeding.

[2] The Applicant presented a Notice of Motion dated November 16, 2021. He referred to “Documentary Evidence” as follows:

- A. Copy of request to Crown for consent
- B. Copy of consent denial by the crown (*sic*)
- C. Judicial Review Application dated April 29, 2021
- D. Copy of ATIP Filing
- E. Proof of Vaccination of Counsel
- F. Quarantine proof of the client

[3] The Applicant also included Written Representations, but he did not file an affidavit in support of the Notice of Motion.

[4] The Applicant’s Motion Record is not in proper form; among other things, there is no supporting affidavit as required by Rule 364(2). However, the Motion Record was ultimately accepted for filing as of November 18, 2021.

[5] The Applicant named the Minister of Immigration, Refugees and Citizenship Canada as the Respondent (the “Respondent”). That is the name of the ministry, not of the Minister and the style of cause should be corrected.

[6] The Respondent filed a responding Motion Record. This Record includes the affidavit of Ms. Chantal Bourgon, legal assistant to Counsel for the Respondent. It also includes Written Representations.

[7] In her affidavit, Ms. Bourgon referred to the filing of the Application for Leave and Judicial Review on April 29, 2021, as well as to various steps taken by the Applicant to obtain an extension of time within which to file his Application Record. Those steps included an informal request to the Registry of the Court on September 27, 2021, in which Counsel for the Applicant said that the Respondent had consented to an extension of 15 days.

[8] Ms. Bourgon also deposed that the Applicant wrote to Counsel for the Respondent, by email on November 3, 2021. That request was refused.

[9] Ms. Bourgon attached various exhibits to her affidavit, including a copy of the Application for Leave and Judicial Review, the request of November 3, 2021 made on behalf of the Applicant and the response to that request from Counsel for the Respondent.

[10] In his Application for Leave and Judicial Review, the Applicant challenges a decision of a Visa Officer refusing his application for a work permit, sought pursuant to the provisions of the *Immigration and Refugee Protections Act*, S.C. 2001, c. 27 and the *Immigration and Refugee Protection Regulations*, SOR/2002-227. That decision was made on March 9, 2021 in Bucharest, Romania.

[11] According to the Federal Courts *Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, an applicant is to perfect an application for leave and judicial review within 30 days of service. In this case, the Applicant's Application for Leave and Judicial Review was served on April 29, 2021 and the date for perfection of the Application Record was May 31, 2021.

[12] In the Written Representations filed by the Applicant, reference is made to the fact that the Application for Leave and Judicial Review was filed on April 29, 2021 by a friend of the Applicant and the friend was “assured” by the Registry “on a verbal basis” that the time for filing the Application Record could be extended until June 15, 2021.

[13] The Written Representations also refer to contact by the Applicant with a COVID-19 positive person that required him to quarantine and delayed the formal retainer agreement with his lawyer.

[14] The Written Representations also refer to serious adverse reactions suffered by the Applicant’s Counsel after receipt of her second vaccination. This situation caused further delays.

[15] In the Written Representations, Counsel for the Applicant says that Counsel for the Respondent “arbitrarily refused” to accept the Applicant’s explanations for the delay. In response, the Applicant filed the Notice of Motion seeking an extension of time.

[16] The Written Representations contain the following submissions:

....The justification for the delay is misguided procedural advice by the registry on multiple occasions since June 15, 2021. The appellants had continuous intention to proceed with matter. The filing of ATIP is also evidence of continuous intention. The multiple e flinings (*sic*) are also continuous with intention to defend.

The moving party requests for the leave to file the application record on the grounds of natural justice and principles of fundamental justice in the constitution.

[17] The Respondent submits that the Applicant has not met the test for an extension of time, as set out in *Canada (Attorney General) v. Larkman* (2012), 433 N.R. 184 (F.C.A.), that is whether the moving party had a continuing intention to pursue the application; whether there is some potential merit to the application; whether there is prejudice to the opposing party from the delay; and whether the moving party has a reasonable explanation for the delay.

[18] It is not necessary for the moving party to establish all four elements, the overriding consideration is that justice be done; see the decision in *Larkman, supra* at paragraph 62.

[19] The Respondent argues that the failure of the Applicant to file a supporting affidavit means that the Court is unable to assess the reasonableness of the Motion for an extension of time. Otherwise, he submits that the Applicant has failed to meet any of the four elements of the test in *Larkman, supra*.

[20] I agree substantially with the position of the Respondent.

[21] There is scant evidence that the Applicant had a “continuing intention” to pursue the Application for Leave and Judicial Review. It is not clear when he retained Counsel, although Exhibit E to the affidavit of Ms. Bourgon contains an email dated November 4, 2021 which itself includes an email, dated June 18, 2021, from Counsel for the Applicant to “fc_reception_cf” to the attention of “Visa Officer”. In the email of June 18, 2021, Counsel for the Applicant said the following:

I have been requested to provide representation in the above matter.

I have not received the detailed documents from the client being outside of Canada.

I have called the Visa Officer on phone no 6134047268 to request an extension and left a voicemail on the matter.

[22] Counsel for the Respondent answered the email of November 4, 2021 by an email sent on November 5, 2021. Among other things, Counsel said that he was unaware that the Applicant was represented by Counsel until he was contacted by the Registry of the Court following the informal request for an extension of time on September 29, 2021.

[23] Counsel for the Respondent referred to an entry on the Index of Recorded Entries, by the Registry, on September 29, 2021 that the informal request for an extension of time had not been sent to the Respondent and the request was non-complying, in any event.

[24] In the email of November 5, 2021, Counsel for the Respondent said that he had not received any communication from the Applicant or his Counsel prior to the email of November 3, 2021.

[25] In these circumstances, I agree with the Respondent, that the course of conduct does not show a continuing intention of the Applicant to pursue his Application for Leave and Judicial Review.

[26] The next element is whether the Application for Leave and Judicial Review has some merit.

[27] Again, the Applicant said nothing in this regard. He seeks leave to judicially review a decision of a Visa Officer refusing his application for a work permit. The Written Representations are silent about the nature of the alleged error made by the decision maker.

[28] The Written Representations filed on behalf of the Applicant do not address the lack of prejudice to the Respondent, resulting from the delay in filing the Application Record. The Applicant speaks in general terms about natural justice and the “principles of fundamental justice in the constitution”.

[29] In my opinion, prejudice to an opposing party can be presumed when timelines are disrespected. The presumption of prejudice can be rebutted or diminished. However, in order to do so, the Applicant had to at least raise an argument. He did not do so.

[30] The Applicant is represented by Counsel. Nonetheless, he is responsible for providing instructions and ensuring that time-lines are met.

[31] The references in the Written Representations about the Applicant’s contact with a COVID-19 positive person and his Counsel’s negative reaction to a COVID-19 vaccination do not provide a reasonable explanation for the delay, especially when these statements are not supported by evidence, that is by one or more affidavits.

[32] The email of November 4, 2021, found as part of Exhibit E to the affidavit of Ms. Bourgon, written by Counsel for the Applicant to Counsel for the Respondent, contains the following statements:

The notice of extension was filed on July 23, 2021 not in September 2021. There is some delay on the part of the applicant due to lack of representation and his unfortunate circumstances. The lawyer also suffered from health issues. The delay from July 23, 2021, onwards is due to lack of guidance from the registry office.

[33] These statements cannot pass without comment.

[34] First, the record does not show that a “notice of extension” was filed on July 23, 2021. There is nothing in the Index of Recorded Entries to show such a filing.

[35] Second, the Applicant was responsible for engaging legal representation if he wanted such assistance. His “unfortunate circumstances” apparently relate to his exposure to a COVID-19 positive person. While that exposure may have required the Applicant to quarantine, there is no evidence to show that any quarantine impeded his ability to retain and instruct counsel in a timely manner.

[36] Third, there is no evidence that the personal health issues of Counsel for the Applicant prevented her from obtaining instructions and information, in order to prepare the Application Record.

[37] Finally, and most importantly, the attribution of responsibility to the Registry of the Court is improper.

[38] I refer to the decision in *Gyimah v. Canada (Minister of Citizenship and Immigration)* (2002), 24 IMM. L.R. (3d) 161 where the Court ruled that responsibility for compliance with the Rules lies with the party and counsel, in spite of any conversations with a Registry officer.

[39] I also refer to the decision in *Lamptey-Drake v. Canada (Minister of Employment and Immigration)*, [1980] 1 F.C. 64 (C.A.) where, at paragraph 8, the Federal Court of Appeal said that while Registry officers are encouraged to be as helpful as possible, they cannot provide legal advice.

[40] Finally, I acknowledge that the overriding consideration upon a motion for an extension of time is that the interests of justice be served; see *Larkman, supra* at paragraph 62.

[41] I am not persuaded that the interests of justice would be served by granting an extension of time, in this case. The “interests of justice” are not limited to the interests of the Applicant. As noted above, the Applicant has failed to meet any of the four factors that are to be considered in a motion for an extension of time.

[42] In the result, the motion is dismissed, no order as to costs.

ORDER in IMM-2889-21

THIS COURT'S ORDER is that the motion is dismissed, no order as to costs.

"E. Heneghan"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2889-21

STYLE OF CAUSE: SHADI MOKHTAR FRYEDI v. THE MINISTER OF
IMMIGRATION, REFUGEES AND CITIZENSHIP
CANADA

**MOTION IN WRITING CONSIDERED AT ST. JOHN'S, NEWFOUNDLAND AND
LABRADOR PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES***

REASONS AND ORDER: HENEGHAN J.

DATED: DECEMBER 15, 2021

WRITTEN REPRESENTATIONS BY:

Navdeep Kaur Virk FOR THE APPLICANT

Yusuf Khan FOR THE RESPONDENT

SOLICITORS OF RECORD:

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