Federal Court  Cour fédérale

Date: 20240619

Docket: IMM-5417-24

Citation: 2024 FC 955

Ottawa, Ontario, June 19, 2024

PRESENT: Associate Judge Benoit M. Duchesne

BETWEEN:

Dafne Georgina PAT MARTINEZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER

[1] The Applicant has made a motion in writing pursuant to Rule 369 of the *Federal Courts Rules* (the "*Rules*") and Rule 21 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-for (the "*FCCIRPR*"), for an Order pursuant to Rules 8, 75 and 82 of the *Rules:*

a) extending the time for the Applicant to serve and file his Applicant's Record as contemplated by Rule 10 of the *FCCIRPR* to no fixed date;

b) granting the Applicant leave to amend his Applicant's Record so that the commissioner of the Applicant's affidavit included therein be the same as the commissioner of the exhibits attached to the Applicant's affidavit included therein; and,

c) granting leave to the Applicant's solicitor of record to be both the deponent of affidavit evidence before the Court on this motion as well as the solicitor presenting argument on the basis of the said affidavit;

[2] The Court has reviewed and considered the Applicant's Notice of Motion, the affidavit of Morgan Folkerson sworn May 23, 2024, and the exhibits attached thereto, the affidavit of Sohana Sara Siddiky and the exhibits attached thereto, and the Applicant's written representations as contained in the Applicant's motion record. The Court has also reviewed the Respondent's written representations dated May 31, 2024.

[3] The applicable legal test for an Order extending a time period fixed by the *Rules*, the *FCCIRPR* or by an Order of the Court is well established. The Federal Court of Appeal's 2024 decision in *Greenblue Urban North America Inc. v. Deeproot Green Infrastructure*, LLC., 2024 FCA 19 (CanLII) (*"Greenblue"*), describes the applicable test as follows at para 6:

> [6] Although Rule 8 of the *Federal Courts Rules* allows the Court to extend the time limits provided in the Rules, such an extension is not appropriate here. The case law establishes that extensions may be granted in circumstances where the party seeking the extension shows that granting it is in the interests of justice. The relevant circumstances to establish this include whether: (1) the party had a continuing intention to pursue the matter, which commenced before the relevant time limit expired; (2) there is a reasonable explanation for the delay; (3) there is some

> merit to the party's application; and (4) there is no prejudice to the opposite party: *Rafique v. Canada (National Revenue)* 2023 FCA 112, 2023 A.C.W.S. 2239 at paras. 2-3; *Canada (Attorney General) v. Larkman*, 2012 FCA 204, [2012] 4 C.N.L.R. 87 at paras. 61 and 62; *Canada (Attorney General) v. Hennelly*, 1999 CanLII 8190 (FCA), [1999] F.C.J. No. 846, 224 N.R. 399 at para. 3.

[4] The core parameters of this test were set out and explained in *Grewal v. Minister of Employment and Immigration (1986)*, 1985 CanLII 5550 (FCA), 63 N.R. 106 (F.C.A.) (*"Grewal"*). As summed up by Mr. Justice Strayer, as he then was, in *Beilin v. Minister of Employment and Immigration* [1994] F.C.J. 1863, at para 6, the *Grewal* decision stands for the proposition that "[a]s the condition for obtaining such an extension of time an applicant must show that there was some justification for the delay throughout the whole period of the delay and that he has an arguable case".

[5] In *Clinique Gascon Inc. v. Canada*, 2023 FC 1757 (CanLII), at para 37, Justice Gascon articulated what the interests of justice are on a motion for an Order extending time as follows:

> [37] I acknowledge that the interests of justice remain the paramount consideration in granting an extension of time. But the interests of justice do not exist in a vacuum and do not absolve applicants from their duty to satisfy the burden of proof. In this case, to exercise my discretion in favour of Clinique Gascon would require me to ignore all of the established criteria regarding an extension of time and turn a blind eye to the lack of evidence supporting each of the factors set out in case law to consider granting such an extension. The rule of law is based on the fundamental principles of certainty and predictability. Discretion must be based on the law. Exercising such a power would not be appropriate or judicious, or in the interests of justice, if it ignored the minimum requirements of the applicable law.

[6] These principles are to be kept front of mind when considering the evidence on this motion. The Court notes that none of these principles are referred to or pleaded in the Applicant's written representations or alluded to in the Notice of Motion.

[7] Although it is not included in the motion record or otherwise led as evidence despite being referred to in the Notice of Motion, the Applicant's Application for Leave and Judicial Review was filed on March 25, 2024. The Court has accessed the Court file to review the Application for Leave and Judicial Review despite that it has no duty to do so and that it is the moving party's responsibility to include in their motion record all of the documents they intend to rely on for the purposes of their motion (*Ewert v. Assistant Commissioner Policy and Programs*, 2022 CanLII 117825 (FC), at para 3). Pursuant to Rule 10 of the *FCCIRPR*, the Applicant was required to serve and file her Applicant's Record within 30 days thereof, that is by April 24, 2024.

[8] The evidence led for the Applicant does not entirely reflect the grounds raised in the Notice of Motion. The Court has inferred from the Notice of Motion and from the affidavits filed that the following sequence of events occurred, only some of which is clearly deposed to in the evidence in the record. The Applicant's solicitor of record delegated the task of diarizing the date upon which the Applicant's Record was to be served and filed to her office secretary. The office secretary mis-diarized the due date by one day because, she deposes, she is still familiarizing herself with the *Rules.* The solicitor of record's affidavit permits the Court to infer by its absence of any statement in this regard and by its insistence that the secretary should know the *Federal Court Rules* that the solicitor of record gave little or no meaningful direction or instructions to the secretary on this issue and did not follow up with the secretary to ensure that the date calculation was accurate. As a result, the Applicant's Record was served upon the Respondent and presented for filing on April 26, 2024, rather than on April 25, 2024.

[9] The court registry, the Court infers, refused to accept the Applicant's Record for filing because it was being presented for filing out of time and perhaps also because the exhibits attached to affidavits included in the Applicant's Record were not sworn by the same lawyer who took the deponent's oath in connection with the same affidavit. The result was that the affidavit evidence in the Applicant's Record was contrary to Rule 80(3) of the *Rules* because the exhibit was not accurately identified by an endorsement on the exhibit or on a certificate attached to it signed by the person before whom the affidavit was sworn.

[10] Precisely when in time the secretary learned that the Applicant's Record was rejected by the Court for filing is not set out in the evidence on this motion.

[11] The Court notes that there is a related but different issue with the use of exhibits attached to the affidavits served on behalf of the Applicant on this motion that suggest a misunderstanding of the rules regarding the administration of evidence before this Court: although an exhibit may be duplicated in separate affidavits, it is not appropriate to use a single exhibit with a Rule 80(3) certificate that refers to the exhibit being attached to two affidavits at the same time. Each affidavit should have its own exhibit(s) attached to it, despite that reference may be made to an exhibit(s) from another affidavit in the body of an affidavit itself with appropriate language that reflects and pinpoints the exhibit being referred to.

[12] On May 3, 2024, the secretary in the Applicant's solicitor of record's office sought the Respondent's consent to an extension of time within which the Applicant could serve and file her Applicant's Record, and to correct the non-compliance with Rule 80(3). Why the secretary took this step as opposed to the solicitor of record taking this step is not addressed in the motion materials, but it suggests a potential miscomprehension of what is work that is within the

preserve of members of the Bar as opposed to being properly delegated to their non-lawyer staff. In any event, the Respondent refused to consent to an extension of time on May 8, 2024.

[13] The evidence and argument filed on behalf of the Applicant is that the service and filing error, as well as the error resulting from the non-compliance with Rule 80(3), is entirely the secretary's fault and that the Applicant should not be visited with the consequence of the secretary's lack of attention to detail.

[14] The Applicant's burden on this motion is to establish that an extension of time should be granted to her in the circumstances. She has not done so.

[15] As indicated above, the jurisprudence applicable to requests for an extension of time requires that the moving party to establish that: 1) they had a continuing intention to pursue the matter, which commenced before the relevant time limit expired; 2) there is a reasonable explanation for the delay; 3) there is some merit to the their proceeding; and, 4) there is no prejudice to the opposite party.

[16] No evidence has been led of the Applicant's continuing intention to pursue this proceeding. Affidavit content by the solicitor of record that reads "the Applicant has a genuine threat to her life, and I pray that her rights to Natural Justice will not be hindered due to our secretary's oversight", is a bald statement that contains no evidence in support of the underlying motion. It is also combined here with a statement of hope that is not admissible as evidence at all. The evidence led does not satisfy the continuing intention criterion. Similarly, affidavit evidence by non-lawyer staff in a solicitor of record's office that "the Applicant's claims are legitimate and there is an undisputed risk to her life and safety. I hope that the errors I have made

do not impeach her rights to Natural Justice" are inadmissible statements of opinion from a lay person and inadmissible statements of hope that are not evidence.

[17] There is also no evidence led to explain the Applicant's delay in bringing her motion before the Court. As noted in *Grewal* and *Beilin*, there must be some justification for the whole period of delay. None is offered here. The evidence is silent as to the explanation for not moving before the Court at any time between May 8, 2024, and May 23, 2024, at least, particularly so when the solicitors were or ought to have been aware that a motion for an extension of time was required in the circumstances. In my view, considering that the Applicant was represented by a solicitor of record who represents to the Court by virtue of their office and call to the Bar that they have sufficient competence and knowledge to know to move with alacrity when a critical filing deadline has passed, the delay between May 8 and May 23, 2024, is not reasonable and is in any event not explained (*Greenblue*, at para. 9). The Applicant does not satisfy the reasonable explanation criterion.

[18] No Applicant's Record, whether in draft form or otherwise, and no copy of the Application for Leave and Judicial Review are included in the Applicant's motion record. As such, there is no evidence before me regarding whether there is any merit to the Applicant's underlying proceeding (*Abikan v. Canada (Citizenship and Immigration)*, 2023 FC 149 (CanLII), at paras 22 to 24). There being no evidence before the Court on this issue, it is clear that the Applicant has not discharged her burden of proof. The Applicant has not satisfied the third criterion for an Order extending time.

[19] The Respondent has not led evidence to suggest that it is suffering prejudice or would suffer prejudice should the sought extension of time be granted to the Applicant. This factor weighs in favour of granting an extension of time.

[20] Weighing the factors required to be considered by the jurisprudence for an Order extending the time for the service and filing of the Applicant's Record as described above, I must conclude that the Applicant has failed to satisfy the burden of proof incumbent upon her.

[21] It would be contrary to the interests of justice to extend the time as sought by the Applicant on this motion as it would require the Court to ignore the Applicant's absence of justificatory evidence that has been consistently required by the jurisprudence otherwise.

[22] The motion as it concerns an Order extending the time for the Applicant to serve and file his Applicant's Record will therefore be dismissed.

[23] The motion for leave to amend the Applicant's Record to correct the non-compliance with Rule 80(3) is without object as the motion for an extension of time to perfect the application is dismissed; there is no point in considering an amendment to an Applicant's Record that cannot be perfected.

[24] Although it is not necessary for the disposition of this motion, some clarification is necessary with respect to two arguments advanced on behalf of the Applicant: the first is that a client or party should not suffer from the errors of their solicitor, while the second, properly understood, is that the errors of a secretary or other office staff are not as serious as a solicitor's mistake or error and do not implicate the solicitor. Both are unmeritorious arguments.

[25] This is not a case where the axiom that litigants ought not to be punished for the inadvertence or faults of their solicitors applies (*Barrette v. The Queen*, 1976 CanLII 180 (SCC), [1977] 2 SCR 121). Solicitor inadvertence, negligence, error or fault in the face of their client's diligence and effort to ensure that timelines are met is a different situation than the situation before the Court here. There is no evidence before me that the Applicant had been diligent in connection with his proceeding or with respect to this motion (*Virk v. Canada (Citizenship and Immigration)*, 2023 FC 143 (CanLII), at para 44). It follows that the axiom cannot find application even without considering whether there may have been an improper and potentially negligent action on the part of his solicitor of record. I note that I make no finding in this Order on whether any action taken or omitted by the Applicant's solicitor of record was negligent or not.

[26] The responsibility for the errors of staff in a law firm lays with the solicitors who operate the practice and direct the staff in the law firm. It is wholly unreasonable and unacceptable for a solicitor of record to blame their secretary or other staff members for their lack of knowledge, understanding or familiarity with the *Rules* in situations as the one before the Court here. Staff members and secretaries are not in the usual course graduates of law schools or members of the Bar and in the usual course have no legal duty to learn the *Rules* as would a solicitor engaged in the practice of law. They do not have the obligation to act as a "competent lawyer" as defined in section 3.1-1 of Ontario's *Rules of Professional Conduct*; the solicitors of record who are members of a law society do. As "competent lawyers", solicitors of record who are members of the Law Society of Ontario, as is the case here, have the duty to apply relevant knowledge, skills, and attributes in a manner appropriate to each matter undertaken on behalf of a client including

performing all functions conscientiously, diligently, and in a timely and cost-effective manner. They are also duty bound to manage their practice effectively.

[27] They also have the duty pursuant to section 6.1-1 of the same *Rules of Professional Conduct* to assume complete professional responsibility for their practice of law and to directly supervise non-lawyers to whom particular tasks and functions are assigned. This rule of professional conduct recalls former US President Harry Truman's desk sign that said "the buck stops here" – with the "here" being the solicitor of record, not their non-lawyer secretary or non-lawyer staff.

[28] The Applicant's solicitor of record's evidence and argument that their young secretary who is not a member of the Bar is to blame for the Applicant's Record being served and filed late and in non-conformity with Rule 80(3) without the solicitors taking any responsibility for their staff certainly strikes one as being wholly inconsistent with Rules 3.1-1 and 6.1-1 of the *Rules of Professional Conduct* that bind the Applicants' solicitor of record. As with the negligence issue, however, I make no finding in this Order as to whether the solicitor of record's conduct is in breach of Ontario's *Rules of Professional Conduct* or not.

[29] The Applicant's motion is dismissed for the reasons set out above. As this proceeding will not be continuing because of this Order, it will be dismissed pursuant to Rule 168.

THIS COURT ORDERS that:

1. The Applicant’s motion is dismissed.

2. This proceeding is dismissed pursuant to Rule 168 of the *Rules.*

3. The whole, without costs.

"Benoit M. Duchesne"
Associate Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5417-24
STYLE OF CAUSE:	DAFNE GEORGINA PAT MARTINEZ v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	JUNE 19, 2024 (IN WRITING)
REASONS FOR ORDER:	ASSOCIATE JUDGE B.M. DUCHESNE
DATED:	JUNE 19, 2024

SOLICITORS OF RECORD:

Me Sohana Sara Siddiky Montreal, QB	FOR THE APPLICANT
Me Chantal Chatmajian Attorney General of Canada Montreal, QB	FOR THE RESPONDENT