Date: 20091109

Docket: IMM-4836-08

Citation: 2009 FC 1149

Montreal, Quebec, November 9, 2009

PRESENT: The Honourable Justice Johanne Gauthier

BETWEEN:

BOYZIE McBEAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] Mr. McBean seeks judicial review of the decision of the Immigration Appeal Division of the Immigration and Refugee Board (the IAD) to dismiss his appeal of a decision made by a Visa officer who refused his sponsorship application which sought permanent residence for his wife, Princess Octavia Baptiste.

[2] Although the decision under review is dated March 6, 2008 and was sent to him and his then-solicitor of record shortly thereafter,[1] Mr. McBean says that he only received the decision towards the end of July 2008 and, for various reasons that will be discussed later on and which include a lack of diligence on the part of his new solicitor, he filed his application for leave and judicial review on November 3, 2008.

[3] The judge who granted leave in this file did not deal with the request for an extension of time to file the said application. As recently reiterated by the Federal Court of Appeal in *Deng Estate v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 59, 79 Imm. L.R. (3d) 181, 387 N.R. 170 at paragraphs 15 to 18, one should not infer from the granting of the leave that the motion judge also granted an extension of time. Thus, the judge hearing the motion has jurisdiction to decide the issue.

[4] It is clear that life has not been easy for the 54-year-old applicant who came to Canada from Jamaica after being sponsored by his mother. He was married twice before meeting Princess Octavia Baptiste. His first wife lives in Jamaica with his daughter. As for his second wife, after he sponsored her to come to Canada, she divorced him stating that he was too old. In its decision, the IAD goes out of its way to say that it does not doubt the sincerity of this man who devotes much of his free time to his church and its food bank.

[1] It was mailed to his current address on March 11, 2008 as well as to his then-solicitor of record.

[5] It is evident that it would be easier for Mr. McBean to live in Canada with Princess Octavia Baptiste rather than alone or in his wife's country.[2] The Court is far from insensitive to his plight and wonders, in this case, who would be?

[6] While it would be "easier" for the Court to simply grant the application as urged by Mr. McBean's counsel, it would not, in my view, be right to do so. Canada does offer legal protection to all its citizens but in return they must all accept to be judged by the same rules.

[7] The test that the Court must apply to determine whether it should grant an extension of time in respect of this application is well-established and applies to all cases as indicated by the Federal Court of Appeal in *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41, 359 N.R. 156, 154 A.C.W.S. (3d) 1238 at paragraphs 32 and 33:

> 32 […] What is required is that
> 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 party's delay; and
> d) there is no prejudice to the other party in allowing the extension.
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> 33 This test is not in contradiction with the statement of this Court made more than twenty (20) years ago in *Grewal v. Canada (Min. of Employment and Immigration)*, [1985] 2 F.C. 263 that the underlying consideration in an application to extend time is to ensure that justice is done between the parties. The above stated four-pronged test is a means of ensuring the fulfillment of the underlying consideration. It ensues that an extension of time can still be granted even if one of the criteria is not satisfied: see *Grewal v. Canada, supra*, at pages 278-279.

[2] Princess Octavia Baptiste is a citizen of Trinidad and Tobago.

[8] As noted by Justice Gilles Létourneau in *Budisukma Puncak Sendirian Berhad v. Canada*, 2005 FCA 267, 338 N.R. 75, 141 A.C.W.S. (3d) 692 at paragraph 60, the time limit set for the filing of an application for judicial review is not whimsical; it brings finality to administrative decisions and ensures their effective implementation.

[9] Because the time limit serves the public interest, the respondent vigorously contests the granting of an extension of time in this case. He argues that the applicant has failed to provide a reasonable explanation for the lengthy delay in filing his application and that said application is not sufficiently meritorious to warrant the exercise of the Court's discretion. Also, it is not clear that the applicant had a continuing intention to pursue this remedy.

[10] To explain the long delay, Mr. McBean says that he did not act more quickly because he needed someone to explain the decision to him. Apparently, it is only when a friend, Marjorie Coke, came back from Jamaica or Florida at the end of August 2008 that she "explained everything and helped him find a lawyer." There is no evidence whatsoever to explain the applicant's lack of action during the period between March and the end of July 2008, apart from the allegation that he had not received the decision until the end of July.

[11] According the affidavit of Wendy Martinez,[3] a replacement for the secretary/receptionist who is said to be on vacation, it appears that Mr. Istvanffy's office was in a disorganized state in August/September 2008 and that, due to the absence of a secretary, Mr. McBean had difficulty obtaining an appointment.

[12] That said, it appears, however, from the written representations made on behalf of the applicant that he had given a clear mandate to his new solicitor on September 17, 2008 to file an application and request a time extension. At that time, there is little doubt that all concerned knew that the application was already out of time and ought to have known that the request for an extension should be filed as quickly as possible.

[13] Mr. McBean's counsel urged the Court to grant the extension stating that thereafter he went on holiday and that, when he came back, he had to take care of urgent stays. Therefore, he could not get around filing the application before November 3, 2008. According to counsel, his client should not be penalized for his own lack of diligence.

[14] There are a number of cases where the Court held that an alleged solicitor's error or negligence is not a reasonable explanation for not pursuing one's right (*Chin v. Canada (Minister of Employment and Immigration)* (1993), 69 F.T.R. 77, 22 Imm. L.R. (2d) 136, 43 A.C.W.S. (3d) 1141 (F.C.) (*Chin*); *Williams v. Canada (Minister of Employment and Immigration)* (1994), 74 F.T.R. 34, 24 Imm. L.R. (2d) 167, 46 A.C.W.S. (3d) 1116 (F.C.) (*Williams*); *Cove v. Canada*

[3] There is no indication that this affiant was in Mr. Istvanffy's office at the relevant time and no details are given as to how she can attest to these facts.

(Minister of Citizenship and Immigration), 2001 FCT 266, 104 A.C.W.S. (3d) 761, [2001] F.C.J. No. 482 (QL) (*Cove*)). There are obvious policy reasons for this. In fact, as mentioned in *Williams* at paragraph 20, "[t]he system cannot operate if this is not so."

[15] However, other authorities such as *Washagamis First Nation v. Ledoux*, 2006 FC 1300, 152 A.C.W.S. (3d) 970, [2006] F.C.J. No. 1639 (QL) (*Washagamis*) at paragraphs 31 and 32 note that there are cases where the Court has been more open to excuse a litigant for the failings of its counsel.

[16] Like Justice Robert L. Barnes in *Washagamis*, the Court believes that the better approach is not to look only at the behaviour of the solicitor on a case-by-case basis but also at the behaviour of the client which, in this case, is the applicant. The Court should consider whether both the legal counsel and the client were diligent in remedying the alleged mistake. Only a very careful application of such an approach will avoid the pitfall noted in cases such as *Chin*, *Williams* and *Cove* – namely, giving counsel a green light to forget about deadlines by pleading their own negligence (see *Chin* at paragraph 10).

[17] There is little evidence as to what Mr. McBean or others, on his behalf, did to ensure that Mr. Istvanffy was diligent between September 17 and November 3, 2008. That said, if this was the only problem in the present case, the Court would probably have overlooked it, given Mr. McBean's particular difficulties (he is illiterate). However, this is not the only issue for, as previously mentioned, there is no explanation for the delay between March and the end of July

2008. Furthermore, from his brief comment contained in his affidavit in support of his application with respect to his former lawyer asking for too much money, one can reasonably infer that he was well aware of the decision and what had to be done, but decided to do nothing.

[18] Moreover, the Court does not accept that Mr. McBean had to wait for the return of Ms. Coke. Why could he not get proper information from his other friends in the community, particularly from his pastor or the pastor's wife, before the end of August 2008? This explanation is simply not reasonable. The applicant's counsel argued that his client may have been reluctant to admit his illiteracy. However, the Court considers that this is pure speculation especially considering the affidavit of his pastor, Reverend Adlam, who attests that he was well aware of this problem.[4]

[19] In respect of Mr. McBean's intention to pursue his remedy, the only evidence is contained in paragraphs 31 and 32 of his affidavit. There, he states that he always had the intention of challenging the decision. As mentioned earlier, he also notes that his previous lawyer had asked him for so much money that he could not do anything. Does this mean that he had abandoned the idea of seeking judicial review until he discussed the matter with Ms. Coke at the end of August?

[20] It is also worth noting here that the case law is consistent; even when waiting for legal aid, one is not relieved from respecting the delays: *Espinoza v. Canada (Minister of Employment and Immigration)* (1992), 142 N.R. 158, 33 A.C.W.S. (3d) 1116, [1992] F.C.J. No. 437 (QL) (F.C.A.),

[4] Also, in the decision itself, the IAD notes that the pastor learned about this disability when Mr. McBean decided to sponsor his wife (see paragraph 18).

Kiani v. Canada (Minister of Citizenship and Immigration) (1996), 124 F.T.R. 299, 68 A.C.W.S. (3d) 326, [1996] F.C.J. No. 1692 (QL) (F.C.), *Pistan v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 774, 107 A.C.W.S. (3d) 106, [2001] F.C.J. No. 1132 (QL). Thus, taking no steps due to a lack of money certainly cannot be considered a better explanation.

[21] Coming now to the merits, the last factor of this analysis, the Court is satisfied that Mr. McBean has an arguable case even though it is not particularly meritorious. In that respect, the Court will only make a few comments and will not deal with the arguments raised that were not supported by any evidence and that were clearly without merits, such as bias or racism.

[22] First, the applicant's counsel insisted on the fact that paragraph 20 of the decision contains an error of fact, for the IAD says that the applicant gave no explanation as to why Princess Octavia Baptiste did not know that he had a daughter or was married twice before when she was questioned at her interviews in March 2006 and February 2005. In fact, although it appears that Princess Octavia Baptiste was made aware of those facts prior to her interview in March 2006,[5] it is clear that she had no knowledge of them in February 2005. It is also acknowledged that no explanation was provided with respect to her lack of knowledge during the February 2005 interview.

[23] The Court is not satisfied that this is an error that could impact the decision and therefore justify voiding the whole decision. It was one of many issues considered and raised by the decision-

[5] During the period between February 2005 and March 2006, Princess Octavia Baptiste did not live in Canada but she was in contact with the applicant.

maker and it is, as mentioned, for the most part accurate.

[24] Second, the applicant says that insufficient weight was given to the fact that his marriage has the full support of the community, including his pastor and the pastor's wife. Also, he submits that the IAD should not have used the various inconsistencies and contradictions in his own testimony and his wife's testimony as to when or where they met since it is clear, as it appears from the evidence, that it was through their church activities.

[25] The IAD refers, on more than one occasion, to the evidence of Reverend Adlam and his wife. In fact, the IAD first reviews the basis of their opinion as to the applicant and Princess Octavia Baptiste's intentions before giving cogent reasons as to why it was not persuaded by this evidence. In the circumstances, the weight given to this evidence, in the overall context of the file, is within the range of possible acceptable outcomes.

[26] It is clear that the IAD was fully aware that the applicant and his wife met through their church activities and it never raised any doubt in that respect. However, in order to ascertain the length of the couple's relationship prior to their marriage, the IAD had to determine when they met (see paragraph 13 of the decision), a factor that is clearly relevant to a determination pursuant to section 4 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the *Regulations*).

[27] As was agreed by both parties at the hearing, this issue is one that is reviewable on the standard of review of reasonableness. The Court's role is thus to determine if the outcomes, or the

decision, taken fall within a range of possible acceptable outcomes which are defensible in respect of the facts and the law: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, 164 A.C.W.S. (3d) 727 at paragraph 47; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, 304 D.L.R. (4th) 1 at paragraph 59. It is not open to the reviewing Court to substitute its own view or its own appreciation of the evidence.

[28] This brings me to the core argument of the applicant, namely, that the decision is meant to punish Princess Octavia Baptiste for her prior attempts to come to Canada and her illegal stay in the country. The applicant says that it is unfair as it constitutes a breach of the applicant's fundamental rights to family life,[6] which is a protected right in Canadian law as well as in international law. He further alleges that Mr. McBean has the right to marry whom he wishes and to live with his chosen wife in Canada.

[29] Although at the hearing the representation of the applicant's counsel appeared to go beyond the particular facts of this case, it is worth mentioning that the applicant does not contest the validity of section 4 of the *Regulations*, but only its application here. This is important for the IAD must apply the law as it stands and thus make the determination required by section 4 of the *Regulations*.

[30] The Court cannot agree with the applicant's counsel that the IAD wrongly relied on the immigration history of Princess Octavia Baptiste. In fact, the visa officer and the IAD have a very

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[6] *De Guzman v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436, [2006] 3 F.C.R. 655, 262 D.L.R. (4th) 13, at para 56, 58; *Akhter v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 481, 290 F.T.R. 149, 148 A.C.W.S. (3d) 127, at para 23.

difficult task to perform. As mentioned by Justice Eleanor Dawson in *Roopchand v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1108, 162 A.C.W.S. (3d) 312, [2007] F.C.J. No. 1430 (QL) at paragraph 4, with respect to the intent and purpose of the sponsored spouse, the IAD is unlikely to successfully test them "by a grilling cross-examination designed to elicit an admission of fraud or dishonesty. Rather, in the usual case, the trier of fact will draw inferences from such things as inconsistent or contradictory statements made by the parties, the knowledge the parties have about each other and their shared history, […] and any previous attempt by the applicant spouse to gain admission to Canada." (Emphasis added.) This factor has repeatedly been found to be relevant by the Court.

[31] The IAD's decision does not mean that Mr. McBean cannot marry or live with Princess Octavia Baptiste. Rather, it means that he cannot do so in Canada as his wife has no status in this country.

[32] In view of the foregoing, it appears that Mr. McBean meets one or, at most, two of the four criteria set out in the test. Despite the flexibility of this test, the Court cannot conclude that it would be in the interest of justice to grant him the extension sought.

ORDER

THIS COURT ORDERS that the application is dismissed.

"Johanne Gauthier"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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