Federal Court  Cour fédérale

Date: 20100218

Docket: 09-T-53

Citation: 2010 FC 164

Montréal, Quebec, February 18, 2010

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

DANIEL JOLIVET

Applicant

and

THE MINISTER OF JUSTICE OF CANADA

and

THE CRIMINAL CONVICTION REVIEW GROUP

Respondents

REASONS FOR ORDER AND ORDER

[1] This is a motion brought by Daniel Jolivet (the applicant) for an extension of time to file an application for judicial review in order to contest a decision by the Minister of Justice (the Minister or the respondent) dismissing his criminal conviction review application.

Facts

[2] The facts are not in dispute. The applicant is currently imprisoned following a criminal conviction. On August 22, 2005, he submitted an application to the Minister of Justice under Part XXI.1 of the *Criminal Code*, R.S.C., 1985, c. C-46 (the Code) to have his criminal conviction reviewed. The Code empowers the Minister to review a conviction to determine whether there has been a miscarriage of justice. The Criminal Conviction Review Group (CCRG) is responsible for reviewing the applications, conducting investigations and making recommendations to the Minister.

[3] On September 24, 2007, the Minister rendered a decision dismissing the review application at the preliminary assessment stage. This initial refusal does not prevent the applicant from submitting further information and new evidence to have his case reconsidered (see SOR/2002-416, section 4). Following the refusal, the applicant and his counsel took a number of steps to provide the CCRG with information and submissions regarding that refusal. As a result, the CCRG reviewed the file and issued a second refusal on May 28, 2008.

[4] Despite that refusal, the CCRG stated on July 8, 2008, that following a meeting with the applicant on May 23, 2008, the assessment of the file was ongoing. On September 11, 2008, counsel for the applicant contacted the CCRG and was informed that as a result of the reconsideration, the application would be dismissed. On September 17, 2008, she wrote to the CCRG and informed it that the applicant considered his application conclusively dismissed.

[5] On October 7, 2008, the applicant then filed a motion for a writ of *mandamus* and a writ of *certiorari* for constitutional relief before the Superior Court of Québec. On November 7 of the same year, the respondent served a motion on the applicant for dismissal for want of jurisdiction.

[6] However, the Superior Court had already ruled on a similar dispute, *Bilodeau v. Canada (Ministère de la Justice)*, 2008 QCCS 1036, EYB 2008-131204. Justice Brunton of the Superior Court suspended the hearing of the applicant's case until the Court of Appeal delivered its final decision. On April 21, 2009, the Court of Appeal of Québec delivered its decision and confirmed that only the Federal Court had jurisdiction to hear disputes involving decisions made by the Minister (*Bilodeau v. Canada (Ministre de la Justice)*, 2009 QCCA 746, J.E. 2009-827 (*Bilodeau*)). On October 8, 2009, the Supreme Court dismissed the application for leave to appeal ([2009] S.C.C.A. No. 254). On October 19, 2009, the applicant filed the motion at bar.

[7] On December 4, 2009, counsel for the applicant received a letter from the respondent stating that the applicant's file was to be closed, given that one year had elapsed during which no further information had been received.

Relevant legislation

[8] *Federal Courts Act*, R.S.C. 1985, c. F-7.

18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.	18.1 (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.

(2) An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.	(2) Les demandes de contrôle judiciaire sont à présenter dans les trente jours qui suivent la première communication, par l'office fédéral, de sa décision ou de son ordonnance au bureau du sous-procureur général du Canada ou à la partie concernée, ou dans le délai supplémentaire qu'un juge de la Cour fédérale peut, avant ou après l'expiration de ces trente jours, fixer ou accorder.

Analysis

[9] Given the importance of the issue and the large amount of material and case law to be filed, Justice Pinard of this Court ordered that the motion be heard in the presence of the parties. I therefore had the advantage of hearing the oral arguments before delivering this decision.

[10] Case law has established that four criteria are to be considered in deciding whether a motion for an extension of time should be allowed or dismissed: the applicant must have had a continuing intention to pursue his claim, the case must be arguable, there must be a reasonable explanation for the delay and there must be no prejudice to the respondent if the extension is allowed (*Grewal v. Canada (Minister of Citizenship and Immigration)*, [1985] 2 F.C. 263). This test is flexible and must be applied in such a way as to ensure that justice is served. It ensues that an extension of time can still be granted even if one of the criteria is not satisfied (*Canada*

(Minister of Human Resources Development) v. Hogervorst, 2007 FCA 41, [2007] F.C.J. No. 37 (QL), paragraph 33).

Continuing intention

[11] Here, the applicant has clearly shown that he has always had the intention to contest the Minister's decision. That intention has been shown by the action taken on an ongoing basis. For example, he has been in regular contact for a number of years and followed up on his file with the CCRG. The applicant expressed his disagreement with the refusals. His motion before the Superior Court of Québec was filed within the prescribed time, and he acted quickly following the Supreme Court's dismissal of the application for leave in the *Bilodeau* case. The courses of action he has taken are detailed at pages 5 and 6 of his Reply Record. I consider this to be clear evidence that the applicant has always had the intention of contesting the Minister's decision.

Defendable case

[12] The applicant alleges that procedural fairness was breached numerous times, both in terms of the assessment of the evidence and the time limits to assess his file. He also submits that there are several errors of law. Last, he submits that there has been infringement of his rights under section 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[13] Without ruling on the merits or lack thereof of the Minister's decision, I consider that the applicant may raise Charter arguments and allege breaches of procedural fairness. The merits of

his case are certainly not “so slight that it should be dismissed at this stage” (*Marshall v. Canada*, 2002 FCA 172, [2002] F.C.J. No. 669 (QL) at paragraph 24).

Prejudice

[14] A feature that favours the motion, or at least does not militate against it, is that no prejudice to the respondent will result from the grant of the extension (*Grewal*, page 279). In this case, the respondent’s argument did not satisfy me that the respondent would be prejudiced if the motion is granted.

Reasonable explanation for the delay

[15] The respondent notes that the applicant has always been represented by counsel. The respondent submits that, despite the unequivocal jurisdiction conferred by the *Federal Courts Act*, the applicant chose to file a motion before the Superior Court of Québec without knowing whether that court had jurisdiction to hear his motion. That omission or negligence as such cannot provide a ground to obtain an extension.

[16] First, it must be noted that no similar dispute had been decided before the ruling in *Bilodeau*. Second, there was a strong dissent in the Court of Appeal of Québec’s decision. It is true that it would have been preferable for the applicant to protect his rights before the Federal Court, but I do not think it can be said that he failed to act with diligence.

[17] The respondent rightly points to a certain line of case law wherein the client must bear the errors of his or her counsel (see *Muhammed v. Canada (Minister of Citizenship and*

Immigration), 2003 FC 828, 237 F.T.R. 8). However, this Court states at paragraph 21 of *Muhammed* that it is important to keep in mind the objective set out in *Grewal*, that is, that justice be done.

[18] In *Construction Gilles Paquette ltée v. Entreprises Végo ltée*, [1997] 2 S.C.R. 299, the Supreme Court held as follows: "[the] party must not be deprived of his rights on account of an error of counsel where it is possible to rectify the consequences of such error without injustice to the opposing party". Therefore, even if I were to agree that the proceedings before the Superior Court resulted from an error of counsel for the applicant, I do not believe that it is a determining factor here.

[19] Instead, I believe that the interest of justice takes precedence.

[20] In the case at bar, the applicant has always closely followed the developments in his case and often acted proactively. In September 2008, there was no official refusal from the Minister; instead, the applicant assumed that his application had been refused. Once the *Bilodeau* decision was confirmed, he acted quickly by filing this motion.

ORDER

THE COURT ORDERS that the motion for an extension of time be allowed. The applicant shall serve and file his application for judicial review within 30 days of the date of this order. Without costs.

"Michel Beaudry"
Judge

Certified true translation
Sarah Burns

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	09-T-53
STYLE OF CAUSE:	DANIEL JOLIVET v. THE MINISTER OF JUSTICE OF CANADA ET AL.
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