Federal Court  Cour fédérale

Date: 20100910

Docket: IMM-6532-09

Citation: 2010 FC 899

[UNREVISED CERTIFIED TRANSLATION]

Ottawa, Ontario, September 10, 2010

PRESENT: The Honourable Madam Justice Bédard

BETWEEN:

HONG SHUN CHEN

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application under section 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) for judicial review of a decision by a visa officer at the Canadian Embassy in Beijing, China, dated September 22, 2009, refusing the applicant's application for a temporary work visa. The applicant, a Chinese national, wanted to come to work as a cook in a restaurant in Rimouski for a two-year period. The visa officer refused the applicant's application for a work permit on the ground that he had not demonstrated to the officer that he would leave Canada at the end of the authorized stay.

[2] The respondent raised two preliminary objections to the application for judicial review. In support of his first objection, the respondent argues that the application for leave and judicial review was filed beyond the sixty-day time limit prescribed by paragraph 72(2)(*b*) of the Act and was not accompanied by a request for an extension of time. The second objection is based on the lack of an affidavit signed by the applicant in support of his application for leave and judicial review.

[3] For his part, the applicant maintains that his application for leave and judicial review was not late and, in the alternative and subject to his primary position, he asked at the hearing that the Court grant him an extension of time. As for the objection about the lack of an affidavit signed by the applicant, he submits that the immigration consultant's affidavit is sufficient because he has a personal knowledge of the process that the visa officer followed.

Objection concerning time limit

[4] The visa officer's refusal letter is dated September 22, 2009. The applicant acknowledges receiving the letter on September 29, 2009. After receiving the decision, the immigration consultant requested the Computer Assisted Immigration Processing System (CAIPS) notes to find out the reasons for the refusal. The consultant received the CAIPS notes on November 13, 2009.

[5] On December 16, 2009, more than 60 days after receiving the refusal letter, the applicant attempted to file his application for leave and judicial review without a request for an extension of time.

[6] In a letter dated December 16, 2009, written at the request of the Registry officer of the Court, counsel for the applicant explained why, in his view, his application for leave and judicial review had been filed within the time limit. Following the Registry officer's request for directions, Mr. Justice Harrington authorized the filing of the application for leave and judicial review. The application for leave to file an application for judicial review was subsequently allowed by Mr. Justice Shore on June 2, 2010.

[7] The applicant contends that when he filed his application for judicial review on December 16, 2009, he was complying with the sixty-day time limit prescribed in paragraph 72(2)(*b*) of the Act since it began to run on the date he received the visa officer's CAIPS notes, i.e. November 13, 2009, not on the date he received the refusal letter, September 29, 2009.

[8] He maintains that it was only as of that date that he could assess the reasons why his application for a work permit was refused and evaluate whether he had a legal remedy.

[9] Section 72 of the Act sets out the time limit for filing an application for judicial review and how it is calculated. It reads as follows:

72.(1) Judicial review by the Federal Court with respect to any matter – a decision, determination or order made, a measure taken or a question raised – under this Act is commenced by making an application for leave to the Court.	72.(1) Le contrôle judiciaire par la Cour fédérale de toute mesure – décision, ordonnance, question ou affaire – prise dans le cadre de la présente loi est subordonnée au dépôt d'une demande d'autorisation.

Application (2) The following provisions govern an application under subsection (1): . . . (*b*) subject to paragraph 169(*f*), notice of the application shall be served on the other party and the application shall be filed in the Registry of the Federal Court ("the Court") within 15 days, in the case of a matter arising in Canada, or within 60 days, in the case of a matter arising outside Canada, after the day on which the applicant is notified of or otherwise becomes aware of the matter;	Application (2) Les dispositions suivantes s'appliquent à la demande d'autorisation: . . . *b*) elle doit être signifiée à l'autre partie puis déposée au greffe de la Cour fédérale – la Cour – dans les quinze ou soixante jours, selon que la mesure attaquée a été rendue au Canada ou non, suivant, sous réserve de l'alinéa 169*f*), la date où le demandeur en est avisé ou en a eu connaissance;

[10] The applicant submits that the decision without reasons that he received on September 22, 2009, constitutes a "matter" under section 72(1) of the Act and that the reasons for the decision, i.e. in this case, the CAIPS notes, also constitute a "matter" within the meaning of the same section. The matter is in the form of a "question" in this case.

[11] He contends that this interpretation is even clearer in the English version of section 72, which refers to a "question raised". The applicant maintains that he did not become aware of the "question raised" until he was able to read the reasons for the visa officer's decision because it was only then that he could assess whether there were errors and whether he was entitled to make submissions against the decision.

[12] In his reply, the applicant also suggests that the fact that the direction issued by the Court authorized the filing of his application for leave and judicial review also means that it accepted his arguments as to when the time limit begins to run for filing an application for leave.

[13] The respondent, for his part, argues that interpreting section 72 of the Act does not raise any ambiguity. The time limit runs from the date the applicant is notified or otherwise becomes aware of the decision, not the date when the CAIPS notes are received.

[14] As regards the permission granted to file the application for leave, the respondent submits that there is no indication in the oral directive of the judge who dealt with the request that he affirmed the applicant's position, and that he left everything to the discretion of the judge who would hear the case on the merits.

[15] With respect, I do not share the applicant's position, and I find that his application for leave and judicial review was filed late.

[16] First, I would like to comment on my jurisdiction to determine the issue of time limits for filing the application. The Federal Court and the Federal Court of Appeal have recognized that the judge seized with an application for judicial review has jurisdiction to rule on a request for an extension of time where this issue was not determined or cannot be inferred from the decision allowing the application for leave (*Deng Estate v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 59; *McBean v. Canada (Minister of Citizenship and*

Immigration), 2009 FC 1149; *Villatoro v. Canada (Minister of Citizenship and Immigration*), 2010 FC 705).

[17] With respect to the directive, in authorizing the [TRANSLATION] "filing" of the application the judge did not determine the objection regarding the late filing of the application for leave, and there is no basis for inferring that he thereby affirmed the applicant's position.

[18] The same principle also applies to the decision of the judge who allowed the application for leave. It cannot be inferred that he affirmed the applicant's position. He was also not seized with the request for an extension of time since it was made subsequently, at the hearing.

[19] Regarding the applicant's submission as to when the time limit begins to run for filing an application for leave, it is my opinion that, although clever, it does not stand up to analysis. It appears clear to me that the time limit for challenging a decision refusing a temporary visa begins to run on the date the applicant becomes aware of the refusal decision, not on the date he or she receives the reasons for decision.

[20] There is no question that the letter refusing the temporary visa is a "decision" that, pursuant to section 72 of the Act, may be judicially reviewed. The CAIPS notes are, in a sense, incidental to the decision because they provide the reasons for it, but, in my view, they do not per se constitute a new "matter" that can be challenged independently.

[21] Moreover, absent Parliament's express indication to the contrary, I do not believe that a single decision can be subject to two different time limits for the purposes of a dispute. Where Parliament permits the time limits for disputing a decision to run from the date the reasons for decision are received, it states that explicitly.

[22] That is the case, for example, with section 169 of the Act, which sets out the provisions that apply to decisions made by different divisions of the Immigration and Refugee Board (the Board). Paragraph (f) of this section addresses the issue of time limits. It appears clear from this provision that Parliament wanted the period in which to challenge a decision to be calculated from the later of the giving of the notice of the decision and the sending of reasons:

169. In the case of a decision of a Division, other than an interlocutory decision: …	169. Les dispositions qui suivent s'appliquent aux décisions, autres qu'interlocutoires, des sections: (…)
(*f*) **the period in which to apply for judicial review with respect to a decision of the Board is calculated from the giving of notice of the decision or from the sending of written reasons, whichever is later.**	***f*) les délais de contrôle judiciaire courent à compter du dernier en date des faits suivants: notification de la décision et transmission des motifs écrits.**
[Emphasis added.]	[Je souligne.]

[23] Parliament did not see fit to make the same distinction with respect to a visa officer's decision. Absent an explicit reference, it may therefore be inferred that the point of departure for the

period in which to challenge this matter is the date on which the applicant was notified or became aware of the visa officer's decision.

[24] Paragraph 72(2)(*b*) of the Act indicates that paragraph 169(*f*) is an exception when it states that the time limit begins to run "subject to paragraph 169(*f*)" 15 or 60 days "*after the day on which the applicant is notified of or otherwise becomes aware of the matter*." [Emphasis added.] If paragraph 72(2)(*b*) of the Act were interpreted as permitting the time limit for filing an application for leave and judicial review to be calculated from the date the reasons for decision are received, Parliament's express reference to paragraph 169(*f)* of the Act would not make sense.

[25] Moreover, Rules 9 and 10 of the *Federal Courts Immigration and Refugee Protection Rules* provide another indication that Parliament did not intend, absent an explicit reference, that the period for filing an application for leave and judicial review be calculated from the date the reasons for decision are received. In fact, those Rules provide a mechanism that permits applicants to complete their file where they have not received the written reasons for a decision at the time they file their application for leave. The Rules clearly state that applicants must file within the time allowed but that they may perfect their file later by completing it in light of the reasons received subsequently.

[26] Rule 9 states that where applicants have not received the written reasons of the tribunal, they may indicate that in their application for leave, and the Court Registry will take steps to ensure that the applicants obtain the reasons. Rule 10 then provides a mechanism for applicants to perfect their

application for leave once they receive the reasons for decision. Rules 9 and 10 would serve no purpose if the time limit for filing an application for leave and judicial review were calculated from the date the reasons for decision are received.

[27] Accordingly, it appears clear to me that the time limit for challenging a decision refusing a temporary visa begins to run on the date the applicant becomes aware of the refusal decision, not the date he or she receives the reasons for decision.

Request for extension of time

[28] The application for leave and judicial review was not accompanied by a request for an extension of time, and counsel for the applicant made the request for an extension of time in the alternative directly at the hearing.

[29] First, the applicant did not comply with Rule 6 of the *Federal Courts Immigration and Protection Rules*, which states that a request for an extension of time must be included in an application for leave, and he provided no explanation to justify his omission. Even if the applicant maintains that his application was filed within the time limit, nothing prevented him from requesting an extension of time in the alternative in his application for leave instead of waiting, as he did, until the hearing.

[30] In any event, I find that the applicant did not submit any ground that would justify granting an extension of time. The applicant did not give any explanation to justify the delays other than to

state that all the stakeholders in the file had acted diligently and in good faith. These explanations are not sufficient. The time limits for filing an application for leave and judicial review were prescribed by Parliament, which, moreover, provided for more time where decisions are issued outside Canada.

[31] These time limits cannot be extended at will, and complying with them is not optional. As the Federal Court of Appeal stated in *Canada v. Berhad*, 2005 FCA 267, time limits serve the public interest and bring finality to administrative decisions.

[32] A request for an extension of time should be granted only where the applicant has "special reasons" (paragraph 72(2)(*c*) of the Act). The jurisprudence has developed criteria that serve as a guide for assessing "special reasons". These factors were set out by the Federal Court of Appeal in *Grewal v. Canada (Minister of Employment and Immigration)*, [1985] 2 F.C. 263 (C.A.) and in *Canada (Attorney General) v. Hennelly*, [1999] F.C.J. No. 846 (QL) and have constantly been applied since. The applicant must demonstrate

a. a continuing intention to pursue his or her application;

b. that the grounds raised on the merits disclose an arguable case;

c. that a reasonable explanation for the delay exists; and

d. that no prejudice to the respondent arises from the delay.

[33] In this case, although the applicant has an arguable case on the merits of his application, he failed to provide any reasonable explanation to justify his delay.

[34] The application for judicial review was therefore filed late, and the circumstances of this case do not justify the Court granting an extension of time.

[35] Given my findings as to the late filing of the application for leave and judicial review, it is not necessary that I rule on the respondent's second objection or on the applicant's arguments against the impugned decision. The application for judicial review is therefore dismissed.

[36] Counsel did not suggest any question of general importance for certification.

JUDGMENT

THE COURT dismisses the application for judicial review. No question is certified.

"Marie-Josée Bédard"
Judge

Certified true translation
Mary Jo Egan LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6532-09
STYLE OF CAUSE:	**HONG SHUN CHEN and MINISTER OF CITIZENSHIP AND IMMIGRATION**
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	August 31, 2010
REASONS FOR JUDGMENT:	Bédard J.
DATED:	September 10, 2010

APPEARANCES:

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