Federal Court  Cour fédérale

Date: 20120104

Docket: IMM-5582-11

Citation: 2012 FC 14

Ottawa, Ontario, January 4, 2012

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

ROBEN CORPUZ LEDDA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

I. Introduction

[1] On October 14, 2011, I granted a temporary stay from the scheduled removal of the Applicant on Monday, October 17, 2011 to the Philippines.

[2] In the context of the irreparable harm argument an issue arose which I felt needed further submissions. That issue was whether, if removed, his application to the Immigration Appeal Division (IAD) to re-open his appeal/extending time to do so, would become moot because the IAD

would have lost jurisdiction to rule on the matter if the Applicant's outstanding leave and judicial review from an earlier refusal to re-open/extend was successful. I asked for further submissions on the point.

[3] Counsel for the Applicant principally relying on the Federal Court decision in *Canada (Citizenship and Immigration) v Rumpler*, 2008 FC 1264 (*Rumpler 2008*), argued that the central issue which this Court raised during the stay hearing was not the loss of the Applicant's status as a permanent resident *per se* which was the problem but the fact that the deportation will have been executed. In his view, the IAD cannot take jurisdiction over his case if the removal order aimed at him is executed. As a result, his appeal is rendered nugatory and he will suffer irreparable harm.

[4] Counsel for the Minister took the opposite view. He submitted that the Applicant's argument is based on an incorrect assessment of the Applicant's current status and also on an incorrect reading of *Rumpler 2008*. He further submitted the IAD retains jurisdiction over the Applicant's application to re-open and for an extension of time to appeal for the simple reason that his motion to the IAD came before the date of his removal. As a result, Counsel for the Minister argued the IAD's discretionary and continuing jurisdiction was engaged while the Applicant was still in Canada. Based on the Federal Court of Appeal's decision *in Tesoro v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 148 (*Tesoro*) according to Counsel for the Minister the IAD does retain jurisdiction; it would not have jurisdiction if as in *Rumpler 2008*, the Applicant had not applied to that tribunal <u>until after he had been removed</u> (my emphasis).

[5] Counsel for the Minister, relying on the Federal Court of Appeal's decision in *Canada (Minister of Citizenship and Immigration) v Toledo*, [2000] 3 FC 563, stated this case stood for the proposition that there is no reason to delay the removal after Mr. Toledo had applied for a re-opening of his appeal but before that motion has been finally determined.

[6] Counsel for the Applicant submitted in reply the jurisprudence cited by counsel for the Minister was inapplicable because the proceeding which the applicant engaged the IAD was an application to re-open/extend time to appeal which was refused by the IAD and hence unfortunately never became a live appeal before that tribunal. As a result, he submitted the IAD's discretionary and continuing jurisdiction has never been engaged while the Applicant is in Canada and remains not engaged today. He submits if it were otherwise the Minister would not be in a position to remove him from Canada (my emphasis).

[7] In his submission, it was due to the incompetence of his former counsel that the Applicant never filed a notice of appeal within thirty days of the Immigration Division (ID) hearing which issued his deportation order. In other words, the IAD when it denied the applicant's motion to re-open/extend time, refused to take jurisdiction.

II. Background facts

[8] The Applicant is a citizen of the Philippines, born there in June 1961. He became a permanent resident of Canada in October 1990 after his mother's successful sponsorship.

[9] Not having run afoul of the law in Canada since 1990, he was, however, charged for the first time on December 8, 2004 of uttering on November 12, 2003 a forged cheque in the amount of $485.67.

[10] He was convicted on that charge on March 10, 2005, after a plea of guilty; he received probation and a suspended sentence of nine months. Under the *Criminal Code* (R.S.C., 1985, c. C-46) the charge of uttering a forged document is punishable by a maximum term of imprisonment not to exceed ten years.

[11] On August 3, 2007 he was charged for an incident (sexual assault) which occurred on April 22, 2007. He entered, on June 8, 2010, a guilty plea on this charge. That plea was confirmed on October 14, 2010; he was convicted and received a jail sentence of one year.

[12] In respect of both convictions, the Applicant was represented by the same lawyer specializing in criminal law.

[13] In the interval, his immigration problems evolved in the following way:

a. On May 24, 2010 the Applicant received a letter from the Canada Border Services Agency (CBSA) indicating that a report under section 44(1) of the *Immigration and Refugee Protection Act*, 2001, c. 27 (*IRPA*) may be prepared alleging his inadmissibility to Canada under paragraph 36(1)(a) of *IRPA* as a result of his 2005 conviction. He was warned, if a report was prepared, that an admissibility hearing may be held resulting in the issuance of a removal order. The letter invited written submissions why a removal order should not be sought. The Applicant states he

consulted the lawyer who had and was representing him on the criminal charges. No submissions were made to CBSA on the issue.

b. On May 24, 2010 CBSA advised the Applicant that it had referred a report to the Immigration Division (ID) for an admissibility hearing to determine his right to remain in Canada.

c. That hearing was held on June 30, 2010 in Vancouver with a video conference feed to Edmonton where the Applicant and his previously mentioned counsel were present. The Applicant's counsel admitted Mr. Ledda was not a Canadian citizen, he is a permanent resident and was convicted of the offence as detailed, i.e. the 2005 conviction. The Tribunal indicated given these concessions it did not need further submissions unless either party would like to add. The Applicant's counsel and the Minister's counsel indicated they had nothing further to add. The Tribunal then issued its decision which was that it was required to issue a deportation order. It advised the Applicant of his appeal rights to the Immigration Appeal Division (the IAD). The Tribunal had previously told the participants that, as a permanent resident, the Applicant had the right to appeal the deportation order to the IAD "which had a broader jurisdiction than I have". The Tribunal explained that the IAD had more power, and could consider all circumstances of his case and humanitarian and compassionate considerations. The Applicant told the Tribunal he understood all of that. In fact, that same day, the Tribunal sent by fax to this lawyer's office a copy of the deportation order and a copy of a Notice of Appeal form to the IAD which stated in boldface that the time limit to appeal was within 30 days. No appeal to the IAD was filed within the prescribed time (my emphasis). As will be seen the aforementioned lawyer did not send the forms to his client.

[14] In November 2010, the Applicant was reported to CBSA for the sexual assault conviction in October 2010 but no referral for an admissibility proceeding was made as he was already under a removal order.

[15] On May 4, 2011 he was offered a Pre-Removal Risk Assessment which was rejected June 14, 2011. No leave application was sought.

[16] In May 2011 the Applicant retained his current counsel for his immigration matters (the Immigration Counsel). On May 27, 2011 his Immigration Counsel sent a letter to CBSA asking for a deferral of his removal indicating that he was making an application to the IAD "to reopen Mr. Ledda's removal appeal on the 2005 conviction due to incompetent representation that has caused prejudice or a miscarriage of justice." He attached a copy of the reopening application. [Emphasis added] He asked for a deferral of removal until the outcome of the IAD application.

[17] On June 2, 2011 the IAD received the application pursuant to section 71 of the *IRPA* on behalf of the Applicant to reopen removal order due to a failure of natural justice. That application to re-open noted that Mr. Ledda had appeal rights under subsection 63(3) of the *IRPA*. Counsel submitted that the reasons why the IAD should exercise its power to reopen were set out in the enclosed statutory declaration from Mr. Ledda's criminal law counsel who frankly admitted he had never practiced in the area of Immigration law, had no knowledge of that law or of immigration procedures or institutions. The Immigration Counsel mentioned that Mr. Ledda's criminal law counsel was trying to negotiate a lesser sentence on the 2007 assault charge and, as part of that negotiation, suggested to the Applicant that if he did nothing to oppose his immigration proceedings he might receive a lesser sentence or avoid jail time. The Immigration Counsel noted that Mr. Ledda "was very worried about going to jail and told the Immigration authorities that he would pay for his own ticket back to the Philippines and leave as soon as possible." [Emphasis added]. He

noted that criminal law counsel had received the Notice of Appeal form to the IAD from the ID Tribunal but did not forward this to the Applicant. His criminal law Counsel admitted he lacked experience in immigration and that he never advised the Applicant to consult an immigration lawyer. In his statutory declaration, he also admitted he himself did not consult an immigration lawyer in order to advise his client nor did he independently research the law on IAD appeals. He admitted he never filed a notice of appeal to the IAD on behalf of Mr. Ledda.

[18] On June 10, 2011 the IAD received the Applicant's Notice of Appeal filed by his Immigration Counsel.

[19] On June 15, 2011, the IAD wrote to Counsel for the Applicant, the subject matter is identified as "Re: Roben Corpuz Ledda; Application to Extend time to file a Removal Order Appeal" The first paragraph of that letter reads:

> This will acknowledge receipt, on June 2, 2011 by courier and again on June 9, 2011 by facsimile, of your Application dated May 27, 2011. This will acknowledge receipt on June 10, 2011 of the Notice of Appeal signed June 10, 2011. We will treat your Application dated May 27, 2011 as an "Application for Extension of Time to File a Removal Order Appeal".
>
> [Emphasis added]

III. The IAD's decision

[20] In its August 5, 2010 decision the IAD member wrote the following:

> Roben Corpuz LEDDA (the "appellant") seeks an extension of time to file his Notice of Appeal in this matter or in the alternative applies to reopen the appeal. The proper application is to extend time, as no appeal was withdrawn, declared abandoned or dismissed such that a reopening application is appropriate.

> …
>
> The appellant's Notice of Appeal was received by the IAD on June 10, 2011 although the application to "reopen" was received on June 2, 2011. I have considered this application along with the other submissions of counsel to constitute an application to extend time and thus there was a lapse of about 11 months between the decision and the ID and the attempt to commence this appeal.
>
> [Emphasis added]

[21] The IAD denied the Applicant's motion on the ground "that the applicant has not shown that the interests of justice require that he be afforded an opportunity to pursue his appeal." It denied an extension of time to file the appeal.

[22] The IAD observed that the extension of time application was grounded in allegations that the former counsel was incompetent in representing the Applicant and because of that he was denied natural justice invoking the Supreme Court of Canada decision in *R v G.D.B.*, 2000 SCC 22, [2000] 1 SCR 520. It quoted paragraphs 26 – 28 of Justice Major's reasons for judgment on behalf of the unanimous Supreme Court. I would quote paragraph 29 of that decision:

> The approach to an ineffectiveness claim is explained in *Strickland v. Washington*, 466 U.S. 668 (1984), *per* O'Connor J. The reasons contain a performance component and a prejudice component. For an appeal to succeed, it must be established, first, that counsel's acts or omissions constituted incompetence and second, that a miscarriage of justice resulted.
>
> Incompetence is determined by a reasonableness standard. The analysis proceeds upon a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. The onus is on the appellant to establish the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The wisdom of hindsight has no place in this assessment.
>
> Miscarriages of justice may take many forms in this context. In some instances, counsel's performance may have resulted in

> procedural unfairness. In others, the reliability of the trial's result may have been compromised.
>
> In those cases where it is apparent that no prejudice has occurred, it will usually be undesirable for appellate courts to consider the performance component of the analysis. The object of an ineffectiveness claim is not to grade counsel's performance or professional conduct. The latter is left to the profession's self-governing body. If it is appropriate to dispose of an ineffectiveness claim on the ground of no prejudice having occurred, that is the course to follow (*Strickland*, *supra*, at p. 697).
>
> [Emphasis added]

[23] The IAD then wrote the following at paragraph 5 of its reasons for decision:

> The reason I have gone to the original quote [of the reasons for judgement in *GDB*] is due to the use by counsel for the appellant, in his submissions, of the disjunctive "or", whereas the G.D.B. decision uses the conjunctive "and". In this instance, this distinction matters because, in reviewing the litany of allegations of incompetence, which are not challenged by the Minister and one supported by a statutory declaration from the appellant's former counsel, I have no doubt that the appellant has demonstrated, on the balance of probabilities, that there was incompetence by his former counsel. If the appellant's current circumstances were as a consequence of that incompetence and he was an innocent victim of that incompetence, then the prejudice element would surely be met and likely there would be a miscarriage of justice. I note, however that there must be both incompetence of counsel causing prejudice and a miscarriage of justice.
>
> [Emphasis added and footnote excluded]

[24] After examining the evidence and, in particular, Mr. Ledda's affidavit where he mentions his former counsel's advice that:

> …he should comply with what immigration authorities told him to me to do and not to oppose my removal from Canada on the 2005 conviction in the hopes that I would not have to go to jail for the 2007 charges. I was very worried about going to jail and listened to my lawyer." [Emphasis added]

[25] Mr. Ledda further deposed in his affidavit that on May 10, 2010:

> I told immigration authorities that I would pay my own ticket back to the Philippines and that I would leave Canada as soon as possible. I believed, based on the advice…. that if I agreed to being removed from Canada as soon as possible that I would not have to go to jail on the 2007 charges.
>
> [Emphasis added]

[26] The IAD then wrote:

> Thus the appellant, in consultation with his counsel, effected a strategy designed to lessen the sentence in relation to the 2007 offence (the materials do not appear to disclose what that conviction was for) in exchange for him; abandoning his appeal rights, leaving Canada "as soon as possible" and paying for his own passage. In this context, the alleged incompetence of counsel in failing to pursue the appellant's appeal rights in the IAD appears more a strategy which may or may not have reduced his sentence, than incompetence.
>
> [Emphasis added]

[27] The IAD then went on to consider the Federal Court of Appeal's decision in *Grewal v Canada (Min of Employment & Immigration)*, [1985] 2 FC 263 as to the factors to be taken into account on an extension of time to file a judicial review application which it summarized to include:

i. whether there is any satisfactory explanation by the applicant for not bringing the application within the prescribed time limit;

ii. whether the applicant intended within the time frame to bring the application and had that intention continuously thereafter;

iii. whether there was any abandonment of that intention on the part of the applicant or failure by the applicant to pursue his intention as diligently as could reasonably be expected of him which would mitigate against the grant of such extension;

iv. whether the respondent would suffer any prejudice were the extension to be granted; and

> v. whether the applicant has an arguable case for setting aside the decision in question.
>
> [9] The above factors are neither exhaustive nor are all factors required for an extension to be granted and the existence or absence of a factor may be ascribed weight according to what is appropriate in all circumstances.

[28] The IAD member concluded that he did not find Mr. Ledda's explanation for the delay in filing the appeal satisfactory. In its view the delay was incurred in order to negotiate a lesser sentence; it was pursued by a strategy of agreeing to return to his country of citizenship to avoid or lessen jail time. In sum, Mr. Ledda's failure to file his appeal on time was by choice rather than as a consequence of counsel incompetence. Moreover, he did not demonstrate he had an intention to appeal within the allotted time frame. It concluded Mr. Ledda had clearly failed to diligently pursue his appeal rights and arguably abandoned them as part of his strategy in relation to his criminal sentencing.

[29] The IAD did find however that:

> (1) since he had a Canadian born child and family in Canada "he does have an arguable case for the exercise of humanitarian and compassionate discretion to stay the removal order on terms and conditions";
>
> (2) the Minister had not advanced any prejudice if the extension of time was granted.
>
> [Emphasis added]

[30] The IAD member concluded his analysis stating:

> In this matter, the appellant has not shown that the interests of justice require that he be afforded an opportunity to pursue this appeal and the application to extend time to file the appeal is denied.

NOTICE OF DECISION

> The Appellant's application dated June 1, 2011 requesting an extension of tie to file his Notice of Appeal is denied.
>
> [Emphasis added]

IV. Analysis

[31] The tri-partite test to obtain a stay is well-known. In my view, the applicant has met the serious question to be tried test. The serious issue is whether the IAD member properly took into account the relevant factors to extend time for the Applicant to commence an appeal when he found that the Applicant's former counsel was incompetent, particularly in not filing a notice of appeal from the ID decision to issue a deportation order against him and also finding he did have an arguable case for a discretionary stay on conditions.

[32] I agree with counsel for the Applicant the IAD's jurisdiction has yet to be engaged given that the member refused to extend time for him to engage in the IAD's discretionary jurisdiction by refusing time to file a notice of appeal from the ID's decision. His removal prior to leave being granted and if granted until the judicial review application is decided would cause the loss of the IAD jurisdiction under section 71 of the *IRPA*.

[33] In short, there is no present appeal to the IAD by the Applicant. None of the cases cited by Counsel for the Respondent deal with the specific factual circumstances of this case. Justice Blanchard's decision in *Rumpler v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1485, [2007] 3 FCR 702 (*Rumpler 2006*) did not turn on section 71 of the *IRPA* and the issue of mootness was not decided (see paragraphs 12 and 13) and Justice Pinard expressed the view at

paragraph 13 of *Rumpler 2008* that the IAD had not continuing jurisdiction despite the fact he had left Canada and had executed the removal order before he filed a notice of appeal.

[34] In the circumstances, the balance of convenience favours the Minister.

ORDER

THIS COURT ORDERS that a stay of the Applicant's removal is granted until leave is decided and if granted until the judicial review application is determined.

"François Lemieux"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5582-11
STYLE OF CAUSE:	ROBEN CORPUZ LEDDA v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Ottawa (conference call in chambers)
DATE OF HEARING:	October 13, 2011
REASONS FOR ORDER AND ORDER:	LEMIEUX J.
DATED:	January 4, 2012

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