



IAD File No. / N° de dossier de la SAI: TC0-10821
Client ID No. / N° ID client: 8898-6608

2021 CanLII 60051 (CA IRB)

Reasons and Decision – Motifs et décision

RESIDENCY OBLIGATION

APPLICATION

| | | |
|-------------------------------------|--|--|
| Appellant(s) | FARHAT JABEEN | Appelant(e)(s) |
| and | | et |
| Respondent | The Minister of Citizenship and Immigration Le ministre de la Citoyenneté et de l'Immigration | Intimé(e) |
| Date(s) of Hearing | In Chambers | Date(s) de l'audience |
| Place of Hearing | Toronto, Ontario | Lieu de l'audience |
| Date of Decision | February 25, 2021 | Date de la décision |
| Panel | Z. Mia | Tribunal |
| Counsel for the Appellant(s) | Joel Sandaluk | Conseil(s) de l'appelant(e)/ des appelant(e)(s) |
| Designated Representative(s) | N/A | Représentant(e)(s) désigné(e)(s) |
| Counsel for the Minister | Vanessa Mayer | Conseil du ministre |

REASONS FOR DECISION

INTRODUCTION

[1] The Appellant, Farhat JABEEN, asks for an extension of time to file an appeal with the Immigration Appeal Division (IAD) against a negative determination by Canadian immigration officials in London, United Kingdom with respect to her residency in Canada.

[2] In cases involving residency obligation appeals arising outside Canada, the Notice of Appeal (NOA) must be received by the IAD “no later than 60 days after the appellant received the written decision.”¹ In this case, the NOA was received by the IAD a little more than one year following the date when the negative determination was sent to the Appellant.

[3] Through her present counsel, the Appellant alleges that her former counsel, Lubna TAHIR (Former Counsel), was “ineffective and/or incompetent”² and this is largely responsible for the delay in filing the NOA. The IAD’s process for raising allegations against former counsel was followed and Former Counsel was afforded an opportunity to reply to the allegations against her.³ Former Counsel denies the allegations.

[4] The issue to be determined is whether an extension of time to file an appeal is justified.

[5] This application was considered through written submissions made by the parties as allowed by the *Immigration Appeal Division Rules (IAD Rules)*.⁴

DECISION

[6] The application for an extension of time is allowed.

ANALYSIS

Context

[7] The Appellant, her spouse Waseem HAIDER and their four sons obtained permanent residence in Canada in 2014. The family was living in Saudi Arabia for many years, with Mr. Haider working there since the early 1990s. Based on the evidence, it appears that Mr. Haider

continued working in Saudi Arabia and did not settle in Canada; his sons appear to have come to this country to attend school. It is a matter of contention whether the Appellant substantially resided in Canada after obtaining status here.

[8] Mr. Haider began experiencing health problems in 2019 and was scheduled to visit a doctor in London in September 2019. The Appellant left Canada to attend the appointment with her spouse even though her Permanent Resident Card (PRC) had expired; she intended to apply for a Permanent Resident Travel Document (PRTD) when in London in order to return to Canada.

[9] The Appellant applied to renew her PRC in August 2019 (PRC 2019 Renewal).

[10] While in London, the Appellant applied for a PRTD. The visa officer reviewing the application concluded that the Appellant did not meet the residency obligation⁵ and there were insufficient humanitarian and compassionate considerations to justify retention of her status in Canada.⁶ The Appellant was eligible for a visa to return to Canada, but was otherwise in breach of the residency obligation. She was notified of the residency obligation determination by letter dated September 25, 2019 (Refusal Letter).⁷ The Refusal Letter also informed the Appellant of the right of appeal and the consequences of the determination becoming a final, which would result in her losing status in Canada. The window for appealing the visa officer's determination would close on November 24, 2019.

[11] The Appellant did not file the NOA within 60 days.

[12] Following the visit to London, Mr. Haider returned to work in Saudi Arabia and the Appellant was scheduled to come to Canada in early October 2019. Prior to her departure from London, Mr. Haider experienced a serious health crisis and fell into a coma. Worried and stressed, the Appellant went to Saudi Arabia instead of coming to Canada. Mr. Haider was released from hospital on October 16, 2019⁸ and the Appellant stayed with him for about two months as he recovered. She travelled to Canada in mid-December 2019.

[13] Upon return to Canada, the Appellant met with Former Counsel to discuss immigration matters. Former Counsel claims that the Refusal Letter was not raised at that time as the

Appellant came in to discuss her and her sons' citizenship applications that were submitted in 2018. In support of this contention, Former Counsel provided an intake form pertaining to the Appellant.⁹ The intake form indicates the matter for which the Appellant was seeking advice as: "DELAY IN CITIZENSHIP GRANT/COMPLICATION". No detailed retainer or contract for services was provided by Former Counsel or the Appellant. Former Counsel asserts that she first learned of the Refusal Letter in February 2020, when dealing with a letter from immigration officials regarding a second PRC renewal (PRC 2020 Renewal) filed by Appellant in January of that year.¹⁰ As well, Former Counsel indicated that in April 2020 she began assisting Mr. Haider with an appeal of a negative residency obligation determination he received.¹¹ Former Counsel claims that she impressed upon the Appellant the importance of appealing the Refusal Letter, but the Appellant wanted to wait for the outcome of her other immigration processes.

[14] The documentary evidence contrasts with the narrative put forth by Former Counsel. Appellant's counsel disclosed an email purporting to be sent from Former Counsel to the Appellant on December 19, 2019 (December Email).¹² In that email, Former Counsel addresses two items, including "PR Matter's Requirements" and "Citizenship Application". Former Counsel appears to be asking for additional information regarding the "PR" matter as follows:

1- PR Matter's Requirements:

- Farhat's Husband's medical reports between September till the date of arrival in Canada.
- A detailed story of events in point form *about specifics of events and circumstances that has forced the delay in reply to the letter CIC sent in September regarding PR eligibility.*
- Required the date line of all personal ongoing stress and responsibilities to justify the delay.
- Provide me all the copies of supporting documentation that were sent with *PR renewal application and above mentioned delay in reply.* [italics added]

[15] The content of the December Email excerpted above indicates that Former Counsel was likely aware of a letter pertaining to the Appellant's permanent resident status sent in September 2019, which the circumstances of this case indicate was likely the Refusal Letter. As well, it appears that Former Counsel could have read the Refusal Letter as relating to the Appellant's PRC 2019 Renewal. Indeed, she describes the letter as being sent by "CIC" (Citizenship and Immigration Canada) rather than Canada's High Commission in London.

[16] Furthermore, documents disclosed by Former Counsel in her submissions indicate that she contacted the Case Processing Centre for PRC renewals regarding the PRC 2019 Renewal and the PRC 2020 Renewal (February Correspondence).¹³ The February Correspondence was triggered by a letter to the Appellant from Immigration Refugees and Citizenship Canada about her two PRC renewal applications. The documentary evidence suggests that Former Counsel likely viewed the Refusal Letter as pertaining to PRC renewal and not PRTD refusal.

[17] In August 2020, an official with Citizenship and Immigration Canada wrote to the Appellant about her PRC renewal application indicating that she was no longer a Permanent Resident because the determination in the Refusal Letter was not appealed and therefore the determination was final.¹⁴ Thereafter, on September 29, 2020, the Appellant filed her NOA with the present application for an extension of time.

Hennelly Test

[18] The *IAD Rules* allow this tribunal to “extend or shorten a time limit, before or after the time limit has passed”.¹⁵ This provision in the *IAD Rules* does not outline particular criteria for the exercise of the IAD’s authority when extending or shortening a time limit. Therefore, I am guided by the Federal Court of Appeal’s decision in *Canada v. Hennelly*¹⁶ (*Hennelly*), which outlines the relevant test to be considered when determining whether to grant an extension of time. *Hennelly* indicates that the party requesting the extension of time must demonstrate:

- i) A continuing intention to pursue the claim;
- ii) The claim has some merit;
- iii) No prejudice to the responding party arises from the delay; and,
- iv) A reasonable explanation for the delay exists.

[19] Moreover, it is important to keep in mind that “[a]ny determination of whether or not the applicant’s explanation justifies the granting of the necessary extension of time will turn on the facts of each particular case.”¹⁷

Is there a continuing intention to pursue the appeal?

[20] The Appellant acknowledges that she should have filed the appeal in a timely manner and accepts responsibility for the initial delay, prior to retaining Former Counsel.

[21] As outlined above, the Appellant alleges that Former Counsel is responsible for the delay after mid-December 2019.

[22] There is a paucity of reliable evidence showing what transpired between the Appellant and Former Counsel, especially in December 2019. There is no detailed retainer or contract for services and no clear paper trail of instructions and advice.

[23] I do not accept Former Counsel's assertion that she only learned of the Refusal Letter in February 2020 because the December Email refers to a CIC letter from September pertaining to permanent residence. In my view, Former Counsel was likely aware of the Refusal Letter in mid-December 2019. However, knowledge of the Refusal Letter does not shed light on what discussions took place between the Appellant and Former Counsel about that letter and the course of action they might have agreed to. It is possible, even though unwise and ill-advised, that a tactical decision was taken between them not to pursue the appeal in the hope that the citizenship or PRC renewal processes would be successful. All told, there is insufficient evidence to show that Former Counsel unilaterally made the decision not to appeal the determination in the Refusal Letter. Having said that, Former Counsel did not act diligently because she does not appear to have properly reviewed the Refusal Letter and appreciated which arm of government was responsible for it.

[24] At the end of the day, while it is unclear why decisions were taken not to appeal in December 2019, I am satisfied that the Appellant took some steps to obtain advice and provided the Refusal Letter to Former Counsel. While the evidence is not compelling, it suggests a possible intent to pursue the appeal and I will give the Appellant the benefit of the doubt.

Does the appeal have some merit?

[25] The visa officer undertook a thorough assessment of the Appellant's PRTD application.¹⁸ The Appellant was afforded more than sufficient procedural fairness, with the visa officer asking

for additional information to support residence in Canada on at least two occasions. The visa officer also turned their mind to humanitarian and compassionate considerations and found them insufficient.

[26] The visa officer concluded that the Appellant's claims of presence in Canada were unreliable. The supporting evidence provided did not reasonably show that the Appellant was in Canada. Moreover, there were substantial inconsistencies between the Appellant's PRTD application, passport, citizenship application, and PRC 2019 Renewal application regarding presence in Canada.

[27] I do not have sufficient evidence or submissions before me showing that there are compelling humanitarian and compassionate considerations that might be relevant in an appeal to the IAD. In any event, at first glance it seems that the Appellant's sons in Canada could be a positive factor. However, if the Appellant was residing for significant periods of time with Mr. Haider in Saudi Arabia during the period under review, the positive aspect of having family in Canada would be diminished.

[28] Taken together, the deficiencies noted above detract from the potential merit in this appeal.

Will the Respondent suffer prejudice from the delay?

[29] While it could be argued that there is no substantial prejudice to the Respondent by allowing an extension of time, it is important to consider these applications in light of the broader context, including fairness, integrity of the immigration system, finality of process, and efficiency such that they are consistent with the rule of law and natural justice. It is also important to keep in mind that this tribunal operates using public resources and indeed, the Respondent, as an institutional litigant, also operates using public resources. Public resources are not unlimited and therefore, the broader public interest, as well as those of other appellants having appeals before this tribunal must be considered when assessing the issue of prejudice.

Is there a reasonable explanation for the delay?

[30] I am satisfied that the Appellant's circumstances, while attending to Mr. Haider during the fall of 2019, amount to a reasonable excuse for why she failed to file the NOA prior to retaining Former Counsel.

[31] As for the delay between mid-December 2019 and September 2020, I am not satisfied that Former Counsel is entirely responsible for the delay because there is a lack of reliable evidence about what transpired between the Appellant and Former Counsel, the tactical decisions taken, and the intentions of Appellant. It is not clear that appeal of the Refusal Letter was top of mind for the Appellant and that she was motivated to act diligently in that regard because she was pursuing a citizenship application and PRC renewal at the same time. However, due to the lack of clarity on critical events, I am willing to give the Appellant the benefit of the doubt in finding that she did disclose the Refusal Letter to Former Counsel and it is possible that Former Counsel unilaterally decided not to file an appeal in December 2019.

CONCLUSION

[32] This is a weak application that tips slightly in favour of Appellant.

[33] The Respondent opposes the Appellant's application for an extension of time. Counsel for the Respondent argues that the Appellant retained Former Counsel for various immigration matters and, during the latter part of 2019 and early part of 2020, the Appellant was actively pursuing her family's immigration interests. This pattern of activity, it is submitted, shows that Mr. Haider's health condition did not prevent the Appellant from attending to immigration matters. The bottom line, in Respondent's counsel's view, is that that the Appellant tried to retain her status in Canada by other means despite the negative determination in the Refusal Letter and she only opted to pursue an appeal to the IAD when the other doors closed.

[34] Furthermore, Respondent's counsel submitted that, contrary to the characterization by Appellant's counsel, the Appellant is not unfamiliar with immigration matters because she has filed citizenship applications, applied for PRC renewals, and applied for a PRD.

[35] I do not disagree with the substance of Respondent's counsel's submissions, however, as explained in these reasons, there is sufficient lack of clarity regarding critical events involving the Appellant and Former Counsel and I am willing to give the Appellant the benefit of the doubt in that regard. Therefore, while the balance of factors does not weigh significantly in the Appellant's favour, I find that it tips in her favour because of the uncertainty surrounding the actions of Former Counsel.

[36] The application for an extension of time is allowed.

NOTICE OF DECISION

The appellant's application requesting for extension of time to file his Notice of Appeal is allowed.

Z. Mia

Z. Mia

February 25, 2021

Date

Judicial Review – Under section 72 of the *Immigration and Refugee Protection Act*, you may make an application to the Federal Court for judicial review of this decision, with leave of that Court. You may wish to get advice from counsel as soon as possible, since there are time limits for this application.

¹ *Immigration Appeal Division Rules*, SOR/2002-230, s. 9(3).

² Written submissions of Appellant's Counsel, December 18, 2020.

³ Written submissions of Lubna Tahir, December 31, 2020.

⁴ *Immigration Appeal Division Rules*, SOR/2002-230, s. 25(1).

⁵ *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, s. 28.

⁶ Written submissions of Respondent's counsel, October 30, 2020, pp. 1-4 of supporting documents.

⁷ Affidavit of Farhat Jabeen, September 28, 2020, Exhibit A.

⁸ *Ibid.*, Exhibit G.

⁹ *Supra*, footnote 3, pp. 5-6.

¹⁰ *Supra*, footnote 3,

¹¹ *Supra*, footnote 3.

¹² Letter from Appellant's counsel, January 29, 2021.

¹³ *Supra*, footnote 3, pp. 12-15.

¹⁴ *Supra*, footnote 3, p. 16.

¹⁵ *Immigration Appeal Division Rules* (SOR/2002-230), s. 58(d).

¹⁶ *Canada v. Hennelly*, 1999 [CanLII 8190](#) (FCA), 244 NR 399 (C.A.), at para. 3.

¹⁷ *Ibid.*, para. 4.

¹⁸ Written submissions of Respondent's counsel, October 30, 2020, pp. 1-4 of supporting documents.