Federal Court  Cour fédérale

Date: 20170711

Docket: 17-T-20

Citation: 2017 FC 674

Montréal, Quebec, July 11, 2017

PRESENT: The Honourable Mr. Justice Locke

BETWEEN:

BRUCE ARCHIBALD
and GÉRARD ÉTIENNE

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS

[1] This is my third decision in relation to an effort by the applicants to obtain an extension of the deadline for commencing an application for judicial review. The applicants' effort began with a motion in writing filed on March 10, 2017. After receiving the respondent's motion record on March 29, 2017, the applicants filed a second motion on April 6, 2017, seeking leave to file a supplementary affidavit and an extension of the deadline for filing reply submissions.

[2] The applicants' second motion was not opposed by the respondent and I granted it on May 16, 2017, in a first decision in this matter. The applicants were given until May 23, 2017 to serve and file their supplementary affidavit and reply submissions. However, for reasons that were unexplained at the time, this deadline was not respected. On June 2, 2017, and without the applicants' supplementary affidavit and reply submissions, I rendered a second decision (2017 FC 544, or the June 2, 2017 decision), this one on the initial motion to extend the deadline to commence a judicial review application. I denied that motion; I was not satisfied that the applicants had established either (i) a reasonable explanation for their delay in commencing a judicial review application, or (ii) that the application had some potential merit.

[3] In this third motion, the applicants seek to have the June 2, 2017 decision set aside pursuant to Rule 399(1)(b) of the *Federal Courts Rules*, SOR/98-106 [*Rules*] on the basis that it was made "in the absence of a party who failed to appear by accident or mistake". In order to be successful in this motion, the applicants must also disclose a *prima facie* case why the June 2, 2017 decision should not have been made.

[4] To address the first requirement (that the June 2, 2017 decision was made in the absence of the applicants who failed to appear by accident or mistake), the applicants note that their counsel was aware of the deadline to serve and file the supplementary affidavit and reply submissions, and finalized these documents within the permitted time. The applicants explain that the deadline was missed because their counsel's assistant failed, through inadvertence, to serve and file the documents by the deadline despite counsel's instructions, and counsel did not notice this failure until after the Court's June 2, 2017 decision.

[5] To address the second requirement of Rule 399(1)(b) (a *prima facie* case why the June 2, 2017 decision should not have been made), the applicants point to additional evidence and submissions addressing the issues of (i) reasonable explanation for delay in commencing the application, and (ii) some potential merit in the application.

I. Analysis

A. *Whether the June 2, 2017 decision was made in the absence of the applicants who failed to appear by accident or mistake*

[6] The respondent argues that this requirement is not satisfied because the applicants did appear in the sense that their initial motion record was received and duly considered. The respondent also notes that the applicants' failure to file their reply submissions in time to be considered was not due to any error as to the deadline, but rather the failure to take any steps to ensure that they had been filed.

[7] Though the respondent cites several decisions of this Court in which Rule 399 was held not to apply where the moving party had commenced an application for leave and for judicial review but failed to perfect it (*Bergman v Canada (Citizenship and Immigration)*, 2006 FC 1082 [*Bergman*]; *Olivier v Canada (Citizenship and Immigration)*, 2006 FC 1384; *Boubarak v Canada (Citizenship and Immigration)*, 2003 FC 1239 [*Boubarak*]), I have not been shown any decision which directly addresses the question of whether an inadvertent failure to file reply submissions constitutes a failure to appear where submissions in chief were previously filed. As it turns out, it is not necessary for me to decide this question in the present case.

[8] With regard to the question of whether a failure to appear can be by accident or mistake when it results from a mistaken belief that the filing was actually done, the respondent cites *Ali v Canada (Citizenship and Immigration)*, 2013 FC 335 [*Ali*], which refused to apply Rule 399. In my view, this decision is distinguishable from the present case in that the Court in *Ali* cited several concerns other than simple confusion over the filing of documents.

[9] In the present circumstances, the excuse of the failure of the applicants' counsel to ensure that the supplementary affidavit and reply submissions had been filed would be easier to accept if it were not for the following issues.

[10] Firstly, the evidence of steps taken by the applicants' counsel is thin. The applicants have produced an e-mail from their counsel to counsel's assistant attaching the reply submissions in draft form and indicating the deadline for filing. However, there is no evidence of explicit instructions to file the supplementary affidavit and reply submissions. Moreover, subsequent exchanges of correspondence between counsel and assistant, which are referred to by the applicants, have not been produced. The absence of follow-up by counsel is even more difficult to understand because they knew that the signature of a solicitor would be required before the reply submissions could be filed (see Rule 66(3)). Not having signed the reply submissions, counsel should have understood that they had not been filed.

[11] Secondly, the missed deadline for the filing of the supplementary affidavit and reply submissions is not an isolated incident, but rather part of a pattern. At each stage of this proposed proceeding, the applicants have failed to respect the applicable deadline. This matter began with

a motion to extend the deadline to commence judicial review. The applicants' second motion (to file a supplementary affidavit in reply) was filed after the deadline for filing reply submissions had passed. And now, the applicants seek relief from a third missed deadline.

[12] In my view, the failure of the applicants to respect the deadline for filing the supplementary affidavit and reply submissions is not the result of an excusable accident or mistake, but another manifestation of a general lack of diligence by the applicants in this matter. I note also that it is only in the narrowest of circumstances that the *Rules* permit an Order setting aside an earlier dismissal of a proceeding: *Bergman* at para 7; *Boubarak*; *Fernandez v Canada (Citizenship and Immigration)*, 2001 FCT 909. For these reasons, I conclude that the applicants do not meet the requirements of Rule 399, and the applicants' motion should be dismissed.

B. *Whether the applicants have disclosed a* prima facie *case why the June 2, 2017 decision should not have been made*

[13] Even if I were inclined to conclude that the first requirement of Rule 399 was met in the present case, I would still dismiss the applicants' motion because I am not satisfied that the new evidence and arguments in the applicants' supplementary affidavit and reply submissions are sufficient to make a *prima facie* case that my June 2, 2017 decision should not have been made.

[14] In the paragraphs below, I consider how the applicants' new evidence and arguments might have affected my conclusions that they had failed to establish either (i) a reasonable explanation for the delay in commencing the application, or (ii) potential merit in the application.

(1) Reasonable explanation for delay in commencing the application

[15] In their initial motion record, the applicants argued that they had concerns about flaws in the report by the Public Security Integrity Commissioner (which is the subject of the proposed judicial review) but they elected not to pursue judicial review because they understood, based on discussions with representatives of their employer (Canadian Food Inspection Agency or CFIA), that their names would not be publicly associated with it.

[16] My June 2, 2017 decision acknowledged that the applicants may have had a good faith belief that their names would not be publicly associated with the Commissioner's report. However, having heard the respondent's arguments on the initial motion, I concluded that such a belief was not reasonable as an explanation for the delay. In the decision, I noted that the applicants had relied on representations from CFIA staff as to what the Commissioner would do, even though the Commissioner acts independently of CFIA and is governed by a statute that permits the naming of individuals.

[17] The applicants' reply submissions address the genuineness of their belief, but are light as to its reasonableness. Mr. Étienne's supplementary affidavit indicates that, even on February 1, 2017, when he was advised that his name was mentioned in the Commissioner's report and that the report would be made public, he understood that the mention was tangential and that no findings or recommendations were made against him. This is another in a line of unnecessary misunderstandings by the applicants.

[18] As with the issue of the reason for the failure to file the supplementary affidavit and reply submissions on time, I am struck here by the applicants' lack of diligence. In 2016 they had seen a draft of the Commissioner's report which proposed to make findings of gross mismanagement against them. They made comments thereon, and profess to have been very concerned about being identified in a negative way in the report. Then they received letters dated January 10, 2017 from the Commissioner confirming that his report contained these findings of gross mismanagement and indicating that such findings would be tabled in Parliament. The letters also identified a representative of the Commissioner to contact should the applicants have any questions or concerns about the process. Despite the applicants' professed concerns, there is no evidence that they contacted the Commissioner's representative. Surprisingly, despite the professed importance of this matter to the applicants, they relied heavily on discussions with CFIA staff as to what the Commissioner would do. I disagree with the applicants' assertion (at paragraph 16 of their written representations) that Mr. Étienne (one of the applicants) "was required to rely on the representations provided by CFIA regarding the contents of the report."

[19] I remain of the view that any belief the applicants had that their names would not be publicly associated with the Commissioner's report in more than a tangential way was unreasonable, and not a reasonable explanation for their delay in commencing judicial review. In my view, such a belief appears to have been no more than wishful thinking.

(2) Potential merit in the application

[20] In my June 2, 2017 decision, I concluded that the applicants had not shown that their application had some potential merit since their submissions did "not go beyond mere assertions

to provide details of their proposed arguments in sufficient detail to allow me to conclude that they have some merit."

[21] The applicants' submissions remain unparticularized in their reply submissions. As in their submissions in chief, they cite some arguments that they intend to make, but do not provide adequate particulars. For example, they have not even submitted the impugned report and identified the portions thereof that they assert contain reviewable errors. Neither have they identified any of the witnesses they assert should have been interviewed before issuance of the Commissioner's report.

[22] As in my June 2, 2017 decision, I have not been given arguments in sufficient detail to permit me to conclude that they have some potential merit.

II. Conclusion

[23] I am not convinced that the applicants' new submissions are sufficient to show a *prima facie* case that my June 2, 2017 decision should not have been made.

ORDER in 17-T-20

THIS COURT ORDERS that the applicants' motion to set aside the Judgment and Reasons dated June 2, 2017, is dismissed.

"George R. Locke"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	17-T-20
STYLE OF CAUSE:	BRUCE ARCHIBALD AND GÉRARD ÉTIENNE v ATTORNEY GENERAL OF CANADA

MOTION IN WRITING CONSIDERED AT MONTRÉAL, QUÉBEC PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*.

ORDER AND REASONS:	LOCKE J.
DATED:	JULY 17, 2017

APPEARANCES:

James Cameron Morgan Rowe	FOR THE APPLICANTS
Tara DiBenedetto	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Raven, Cameron, Ballantyne & Yazbeck LLP Barristers and Solicitors Ottawa, Ontario	FOR THE APPLICANTS
Nathalie G. Drouin Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT