Federal Court Cour fédérale

Date: 20120625

Docket: IMM-5582-11

Citation: 2012 FC 811

Ottawa, Ontario, June 25, 2012

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

ROBEN CORPUZ LEDDA

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 26 (hereafter IRPA) of a decision rendered by the Immigration Appeal Division of the Immigration and Refugee Board (hereafter the Board) denying the applicant's application for an extension of time to file an appeal.

[2] For the reasons that follow, the application for judicial review is granted.

BACKGROUND

[3] The applicant, Mr. Roben Corpuz Ledda, is a citizen of the Philippines and has been a permanent resident of Canada since 1990. His mother and siblings also live in Canada. He is divorced and has a teenage daughter born in Canada.

[4] In 2004 he was charged with causing a bank to act upon a forged cheque in the amount of $485.67. He was convicted in 2005. From that point until 2010 he was represented by a criminal lawyer, Mr. Allen, in criminal and immigration matters.

[5] On April 19, 2010, the applicant was served with a letter indicating that he had 15 days to make submission as to why he should not be found inadmissible. No submissions were made. On June 28, 2010, the Immigration Division found the applicant inadmissible based on his 2005 conviction and ordered him removed. No appeal was filed. Mr. Allen never forwarded the appeal form to the applicant.

[6] Mr. Allen signed a statutory declaration in May 2011 stating that he had no knowledge of immigration law, had never read the IRPA or related legislation, had never independently researched immigration law, had never consulted an lawyer well versed in immigration law, had not advised the applicant to consult a lawyer familiar with immigration law, and had advised the applicant to comply with immigration officials in order to receive a more lenient sentence on an unrelated offence.

[7] The applicant, in his statutory declaration, stated that he relied on the advice of Mr. Allen in both criminal and immigration matters. He believed he could avoid jail by returning to the Philippines, and he thought that compliance with immigration officials would help him obtain a more lenient sentence. In June 2011, the applicant filed a notice of appeal to the Board and asked for an extension of time to file an appeal or to reopen the matter.

DECISION UNDER REVIEW

[8] The Board found that the proper application before it was for an extension of time, and not an application for reconsideration. In determining whether an extension of time was required in the interest of justice, the Board considered: (1) whether counsel's act or omissions constituted incompetence; (2) whether prejudice was caused to the applicant by counsel's incompetence ; and (3) whether, in the result, a miscarriage of justice occurred.

[9] The Board found that the applicant's previous counsel had acted incompetently. However, the Board found that the applicant's failure to file an appeal within time did not arise from counsel's incompetence but rather from a strategy to obtain a lenient sentence. Holding that the delay in filing the application was a deliberate choice, the Board refused to exercise its discretion to grant the extension.

ISSUES

[10] The sole issue in this application is the reasonableness of the Board's decision to deny an extension of time to file an appeal.

RELEVANT LEGISLATION

Section 58 of the *Immigration Appeal Division Rules*, SOR/2002-230 is relevant to this application:

58. The Division may	58. La Section peut :
(*a*) act on its own initiative, without a party having to make an application or request to the Division;	*a*) agir de sa propre initiative sans qu'une partie n'ait à lui présenter une demande;
(*b*) change a requirement of a rule;	*b*) modifier une exigence d'une règle;
(*c*) excuse a person from a requirement of a rule; and	*c*) permettre à une partie de ne pas suivre une règle;
(*d*) extend or shorten a time limit, before or after the time limit has passed.	*d*) proroger ou abréger un délai avant ou après son expiration.

STANDARD OF REVIEW

[11] The power of the Immigration Appeal Division to grant an extension of time is discretionary: s.58(d) of the *Immigration Appeal Division Rules*, SOR/2002-230. It is also a factual determination done on a case by case basis. The standard of review is reasonableness: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 53; and *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53 at para 16.

ANALYSIS

[12] The Board correctly stated the test for determining incompetence. The applicant had to demonstrate that: 1) the counsel's acts or omissions constituted incompetence; 2) that a prejudice was caused by the incompetence; and 3) that a miscarriage of justice occurred as a result: *R v GDB*, 2000 SCC 22 at paras 26-29; *Hallatt v Canada*, 2004 FCA 104 at para 20-21; and *Robles v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 374 at paras 31-34.

[13] In this instance, the Board had no difficulty in finding that incompetence was demonstrated by the evidence submitted by the applicant including his former counsel's statutory declaration. Counsel's incompetence clearly prejudiced the applicant's ability to obtain advice about the options available to him in dealing with the inadmissibility finding. In my view, the Board erred in concluding that no miscarriage of justice resulted from the incompetence and prejudice. The applicant could not make an informed decision on the options available to him in the immigration proceedings when the deadline for filing the appeal passed.

[14] Miscarriage of justice can mean a breach of natural justice that has had some effect on the proceedings. The denial of a hearing will constitute a miscarriage of justice: *Rodrigues v Canada (Minister of Citizenship and Immigration)*, 2008 FC 77 at para 39; and *Gomez Bedoya v Canada (Minister of Citizenship and Immigration)*, 2007 FC 505 at para 19.

[15] The British Columbia Court of Appeal offers some help in the interpretation of “miscarriage of justice” in the context of incompetence of counsel in *R v Dunbar*, 2003 BCCA 667 at paragraph 26:

> [26] The prejudice component requires the appellant to show that the incompetence of trial counsel resulted in a miscarriage of justice. Doherty J.A. discussed the meaning of "miscarriage of justice" in this context in *Joanisse, supra* at 64. He explained that a miscarriage of justice can result where the appellant establishes a reasonable probability that but for counsel's errors, the result of the proceedings would have been different. A reasonable probability is one that is "sufficient to undermine confidence in the outcome" and "lies somewhere between a mere possibility and a likelihood": *Joanisse, supra* at 62; *R. v. Strauss* (1995), 61 B.C.A.C. 241, 100 C.C.C. (3d) 303 (B.C. C.A.), at 319.

[16] Here the Board was satisfied that the applicant’s previous counsel’s actions and omissions constituted incompetence and that the applicant was prejudiced by the incompetence of his counsel. It is, therefore, surprising that the Board found that Mr. Allen’s incompetence did not result in a miscarriage of justice. The applicant was not advised that he had a right of appeal from the inadmissibility finding. Given his long residence in Canada, his family ties to this country and the nature of the criminal conviction an appeal could have been successful. It was unreasonable for the Board to conclude that no miscarriage of justice resulted from the incompetence and prejudice. In the particular circumstances of this case, the interests of justice called for an extension of time to be granted: *Groupe Westco Inc v Nadeau Poultry Farm Limited*, 2011 FCA 13 at para 10.

[17] Although the decision to grant an extension of time is discretionary, the Board could not ignore the role of counsel in this case. The Board’s finding that the applicant’s “strategy” – stemming from his counsel’s incompetence– cannot result in a miscarriage of justice falls outside the range of acceptable outcomes justifiable on the facts and the law.

[18] The application is granted. No question for certification was proposed by the parties.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. the applicant is granted;
2. the matter is remitted for consideration by a differently constituted panel in accordance with the reasons provided; and
3. no question is certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5582-11
STYLE OF CAUSE:	ROBEN CORPUZ LEDDA AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
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APPEARANCES:

Bjorn Harsanji	FOR THE APPLICANT
Rick Garvin	FOR THE RESPONDENT

SOLICITORS OF RECORD:

BJORN HARSANI Barrister & Solicitor Calgary, Alberta	FOR THE APPLICANT
MYLES J. KIRVAN Deputy Attorney General of Canada Edmonton, Alberta	FOR THE RESPONDENT