Federal Court Cour fédérale

Date: 20101209

Docket: IMM-3081-10

Ottawa, Ontario, December 9, 2010

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

ROSALINE KARGBO, ABDUL KARGBO AND ALIMATU KARGBO

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER

UPON Motion in writing by the Respondent pursuant to Rule 369 of the *Federal Courts Rules* for an order extending the time permitted by Rule 346(2) of the *Federal Courts Rules* for the service and filing of the Respondent's memorandum of argument and affidavit (if any) in the Applicants' judicial review application;

AND UPON reviewing all materials filed and considering the relevant authorities;

AND UPON concluding and noting as follows:

1. As the Respondent points out, the underlying consideration on a motion to extend time is whether it is in the interests of justice to do so. However, in order to justify an extension of time, the Respondent must demonstrate:

   a. a continuing intention to respond;

   b. that there is merit in the response;

   c. that no prejudice arises to the Applicants from the delay;

   d. that a reasonable explanation for the delay exists.

See *Grewal v. Canada (Minister of Employment and Immigration)*, [1985] 2 FC 263 (C.A.); *Attorney General v. Hennely*, (1990), 244 N.R. 399 (F.C.A.), paragraph 3; and *Canada (Minister of Human Resources Development) v. Hogervost*, 2007 FCA 41, paragraphs 31-33.

2. On the present facts, after the Applicants served their Application Record on the Respondent, the Respondent instructed Respondent's counsel that the Respondent wished to settle the matter and acknowledged that factual and legal errors had been made by the Officer in decisions dated March 1, 2010;

3. As a consequence, the Respondent served a motion for judgment on the Applicant on October 6, 2010 and in written representations, the Respondent requested

> that the motion for judgment be granted and an order quashing the decisions of the Officer dated March 1, 2010, and referring the matter to a different officer for re-assessment in accordance with law, allowing the Applicants 60 days from the delivery of the order to supplement their application ....

4. The Applicants then served their response to the motion for judgment on the Respondent on October 15, 2010;

5. When preparing a reply to the response, Applicants' counsel then realized that the Respondent, instead of agreeing to the errors of fact and law and seeking a motion for judgment, could have dealt with this matter by seeking dismissal of the Applicants' judicial review by invoking the jurisdictional issue that forms the basis of this motion for an extension of time;

6. The Respondent has not demonstrated a continuing intention to respond. The facts show that the Respondent decided to deal with the judicial review application by way of a motion for judgment because the Respondent had concluded that the decisions in question contained factual and legal errors and needed to be reconsidered. The Respondent has changed his mind because he now thinks there may be a more advantageous way to deal with the Applicants' judicial review application;

7. There is no real explanation for the change of position and the delay except counsel's belated realization that, instead of conceding the errors of fact and law and sending the matter back for reconsideration, it might be more advantageous to try and have the judicial review dismissed on a jurisdictional point. This looks like inadvertence and there is jurisprudence in this Court that mere inadvertence is not a

reasonable explanation for delay. See, for example, *Cross-Canada Auto Body Supply (Windsor) Ltd. v. Hyundai Auto Canada, a division of Hyundai Motor America* (2005), 2005 CarswellNat 2819, 2005 FC 1266;

8. Because of the evidentiary complexities at play in the judicial review application, it is by no means clear to me at this stage that the Respondent has established real merit in the proposed response;

9. There is at least some prejudice to the Applicants in the delay because it means they would have to wait longer to be united because of the Respondent's inadvertence;

10. In addition to the above, on the evidence available for the motion before me, it appears somewhat unseemly to me that the Respondent would concede factual and legal errors and communicate with the Applicants that their concerns are valid and the decisions will be reconsidered and then, in effect, simply change his mind upon the discovery that the conceded errors might be avoided if some other procedural argument is raised. This is particularly the case when the only explanation offered for the delay amounts to inadvertence. I do not think the Applicants should have been placed in the position of having to defend this motion and that "special reasons" require an award of costs and disbursements in favour of the Applicants in the amount of $2,000.00;

11. Whether the Respondent's conduct requires an award of costs for the judicial review application depends upon what happens next and will be up to the reviewing judge.

THIS COURT ORDERS that

1. The motion is dismissed;
2. The Applicants shall have their fees and disbursements for the motion fixed at $2,000.00 and payable forthwith irrespective of the result in the judicial review application.

"James Russell"
Judge