Federal Court  Cour fédérale

Date: 20200129

Docket: IMM-3231-19

Citation: 2020 FC 164

Ottawa, Ontario, January 29, 2020

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

ADAM THOMAS

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Adam Thomas is a citizen of the United States of America. He became a permanent resident of Canada in 2000, sponsored by his wife. His wife and son are both Canadian citizens, and live in Niagara Falls, Ontario.

[2] In 2004, Mr. Thomas pleaded guilty to a charge of extortion in Buffalo, New York, in connection with the collection of gambling debts, contrary to the *Extortionate Credit Transactions Act*, 18 USC § 894.

[3] In May 2014, Mr. Thomas was found to be inadmissible to Canada for serious criminality under s 36(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], and organized criminality under s 37(1) of the IRPA. He was issued a Direction to Report for removal from Canada. He left Canada on August 14, 2014. He currently lives apart from his family in Lewiston, New York.

[4] Mr. Thomas successfully applied for criminal rehabilitation under s 36(3)(c) of the IRPA, which was approved in June 2015.

[5] Mr. Thomas' rehabilitation alleviated his inadmissibility for serious criminality, but not for organized criminality. He therefore applied for ministerial relief pursuant to s 42.1(1) of the IRPA. He submitted his application to the Ministerial Relief Unit [MRU] of the Canada Border Services Agency [CBSA] in July 2015.

[6] Despite numerous enquiries, Mr. Thomas' application has not resulted in a decision by the Minister of Public Safety and Emergency Preparedness [Minister]. More than four years have passed since he submitted the application. It has yet to be assigned to an analyst, the first step of the MRU's process. The Minister estimates that it will be several more years before a decision is

made. Mr. Thomas asks this Court to issue a writ of *mandamus* requiring the Minister to render a decision on his request for ministerial relief within a specified timeframe.

[7] For the reasons that follow, the Minister's delay in deciding Mr. Thomas' application for ministerial relief is unreasonable. The administrative considerations advanced on behalf of the Minister are similar to ones that have repeatedly been held by this Court to be insufficient to justify exorbitant delay.

[8] The balance of convenience favours Mr. Thomas. A writ of *mandamus* will issue.

II. Background

[9] Mr. Thomas' counsel first requested a status update from the MRU regarding the application for ministerial relief by letter dated September 15, 2015. The MRU responded by letter dated October 5, 2015, indicating that applications are processed based on "the year they are received".

[10] Mr. Thomas' counsel again requested a status update from the MRU by letter dated January 12, 2016. He received a response dated January 18, 2016. The MRU indicated that the status of Mr. Thomas' application was unchanged, and the MRU could not provide an exact timeline for a decision.

[11] Mr. Thomas and his counsel made further enquiries on January 29, February 8 and March 14, 2016. They received a response from the MRU on March 18, 2016 indicating that Mr. Thomas' application was in the MRU's inventory, and would be processed by year of receipt. No time estimate was provided.

[12] On March 31, 2016, Vance Badawey, Member of Parliament for Niagara Centre, submitted an enquiry to the MRU on Mr. Thomas' behalf. The MRU responded by letter dated April 12, 2016, suggesting that Mr. Badawey advise Mr. Thomas that "it will likely be several years before a decision is made on his case".

[13] On August 17, 2017, Mr. Thomas was granted an Authorization to Return to Canada under s 52(1) of the IRPA. On September 20, 2017, he was granted a Temporary Resident Permit [TRP] until November 6, 2017. On September 21, 2017, he applied to extend his TRP for three additional years. His request was refused due to his inadmissibility under s 37(1)(a) of the IRPA.

[14] The office of Mr. Badawey again requested an update from the MRU on September 4, 2018. The MRU replied on September 6, 2018, stating that an exact processing timeline for Mr. Thomas' application was unavailable, and the information previously provided in 2016 remained valid.

[15] On January 31, 2019, Mr. Thomas' counsel again requested an update. The office of Mr. Badawey did the same on March 12, 2019. The MRU replied on March 13, 2019, confirming that there had been no developments since their previous correspondence.

[16] On April 10, 2019, Mr. Thomas' counsel again requested an update from the MRU. On April 12, 2019, the MRU advised Mr. Thomas that his application remained in queue to be assigned to an analyst, and it would be several years before it was processed.

III. Issue

[17] The sole issue raised by this application for judicial review is whether the circumstances warrant the issuance of a writ of *mandamus*.

IV. Analysis

[18] The criteria for the issuance of a writ of *mandamus* were confirmed by the Federal Court of Appeal in *Apotex v Canada (Attorney General)*, [1994] 1 FC 742 (FCA), aff'd [1994] 3 SCR 1100, at paragraph 55:

> 1. There must be a public legal duty to act;
>
> 2. The duty must be owed to the applicant;
>
> 3. There is a clear right to performance of that duty, in particular:
>
> > (a) the applicant has satisfied all conditions precedent giving rise to the duty;
> >
> > (b) there was (i) a prior demand for performance of the duty; (ii) a reasonable time to comply with the demand unless refused outright; and (iii) a subsequent refusal which can be either expressed or implied, *e.g.* unreasonable delay;
>
> 4. Where the duty sought to be enforced is discretionary, the following rules apply:

> (a) in exercising a discretion, the decision-maker must not act in a manner which can be characterized as “unfair”, “oppressive” or demonstrate “flagrant impropriety” or “bad faith”;
>
> (b) *mandamus* is unavailable if the decision-maker's discretion is characterized as being “unqualified”, “absolute”, “permissive” or “unfettered”;
>
> (c) in the exercise of a “fettered” discretion, the decision-maker must act upon “relevant”, as opposed to “irrelevant”, considerations;
>
> (d) *mandamus* is unavailable to compel the exercise of a “fettered discretion” in a particular way; and
>
> (e) *mandamus* is only available when the decision-maker's discretion is “spent”, *i.e.*, the applicant has a vested right to the performance of the duty;
>
> 5. No other adequate remedy is available to the applicant;
>
> 6. The order sought will be of some practical value or effect;
>
> 7. The Court in the exercise of its discretion finds no equitable bar to the relief sought; and
>
> 8. On a “balance of convenience” an order in the nature of *mandamus* should (or should not) issue.
>
> [Citations omitted.]

[19] Delay in performing a statutory obligation may be deemed unreasonable if the following criteria are met (*Conille v Canada (Minister of Citizenship and Immigration)*, [1999] 2 FC 33 (TD) at para 23):

> (1) the delay in question has been longer than the nature of the process required, *prima facie*;
>
> (2) the applicant and his counsel are not responsible for the delay; and

> (3) the authority responsible for the delay has not provided satisfactory justification.

[20] The dispute between the parties is limited to whether the delay in processing Mr. Thomas' application for ministerial relief has been unreasonable, and where the balance of convenience lies.

A. *Unreasonable Delay*

[21] Mr. Thomas says that his circumstances are comparable to other cases where this Court has issued a writ of *mandamus* to compel the Minister to make a decision on a request for ministerial relief within a specified timeframe:

(a) in *Douze v Canada (Citizenship and Immigration)*, 2010 FC 1337 [*Douze*], a delay of almost three years was held to be unreasonable (at paras 31-34);

(b) in *Tameh v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 288 [*Tameh*], four years was held to be the "outer limit" of a reasonable period of time for a ministerial decision in similar circumstances (at para 57); and

(c) in *Esmaeili-Tarki v Canada (Public Safety and Emergency Preparedness)*, 2010 FC 697 [*Esmaeili-Tarki*], a delay of five years was held to be unreasonable (at para 15).

[22] Mr. Thomas says that his case bears the closest resemblance to *Yassin v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 423 [*Yassin*], where this Court issued a writ of *mandamus* when nothing had been done to process the applicant's request for ministerial relief for two years and ten months. Mr. Thomas notes that four years have passed since he submitted his application, nothing has been done to process it, and the MRU estimates it will be "several more years" before a decision is made.

[23] There is no suggestion that Mr. Thomas or his counsel are responsible for the delay, or that the delay is justified by external factors or exceptional circumstances. The MRU has offered no explanation beyond its adherence to its usual practice of assessing applications on a first-come, first-served basis.

[24] The Minister relies on the Affidavit of Naureen Ismail, Acting Manager of the MRU. According to Ms. Ismail, applications for ministerial relief are complex. They involve voluminous reading material, and the Minister's decision cannot be delegated. The process entails the following steps:

(a) an application is assigned to an analyst, who collects documents, compiles data, and then makes a recommendation in consultation with other CBSA employees and the Departmental Legal Services Unit;

(b) this consultation results in a draft recommendation, which must be approved by CBSA senior management, and is then disclosed to the applicant, who must respond within 60 days;

(c) the CBSA must then re-assess and amend its recommendation if necessary—the amended recommendation is disclosed to the applicant, more consultations occur, the final recommendation is approved by the President of the CBSA, and is then referred to the Minister for a personal decision;

(d) this process typically takes approximately nine months from the time an application is assigned to an analyst until it is delivered to the Minister for decision; and

(e) the processing of applications may be complicated by intervening factors, such as changes in jurisprudence (*e.g.*, *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36)—while the MRU has made some progress in processing applications, 252 cases remain pending as of August 15, 2019.

[25] There is nothing about this case to distinguish it from the circumstances that gave rise to writs of *mandamus* in *Douze*, *Tameh*, *Esmaeili-Tarki* and *Yassin*. This Court has held repeatedly that administrative considerations similar to the ones advanced on behalf of the Minister in this case do not justify exorbitant delays *(Esmaeili-Tarki* at paras 14-15; *Douze* at para 33; *Yassin* at paras 27-28 & 31-32).

[26] Furthermore, it appears likely that the delay in Mr. Thomas' case may well exceed that in all the other cases cited above. Ms. Ismail says there were 321 cases in queue as of March 2017, and 252 as of August 15, 2019. This suggests that the MRU was able to process 69 cases in a 29-month period, or fewer than 35 in a single year. The Minister has indicated that there are 187 files ahead of Mr. Thomas' application in the queue.

[27] It seems unlikely that Mr. Thomas' application will be referred to an analyst for at least another three years, following which there will no decision for another nine months. This may result in a total processing time of eight years or more, which is clearly unreasonable.

B. *Balance of Convenience*

[28] The Minister asks the Court to refrain from issuing a writ of *mandamus* for the following reasons:

(a) the Minister has many duties and should be allowed to prioritize them as he thinks best;

(b) forcing the Minister to decide Mr. Thomas' application within a specified timeframe may divert him from emergencies or negatively affect other decisions;

(c) Mr. Thomas' application is a matter implicating the national interest, and requires nuanced and careful analysis;

(d) the relief Mr. Thomas seeks is discretionary; and

(e) it would be unfair to permit Mr. Thomas to jump the queue and displace older files.

[29] The Minister notes that the Federal Court of Appeal has never sanctioned the analytical framework adopted by this Court in the cases cited above, or confirmed an outer time limit for

processing applications for ministerial relief. However, the Minister has not asked the Court to certify a question for appeal in this case.

[30] I am not persuaded by the Minister's arguments. The Minister is essentially reiterating the administrative constraints that have repeatedly been found by this Court to provide insufficient justification for exorbitant delay. It is implausible, and needlessly melodramatic, to suggest that the Minister will be diverted from emergencies if he is required to render a decision on Mr. Thomas' application within a reasonable time. If, as the Minister suggests, Mr. Thomas is attempting to jump the queue, this will not change the volume of the Minister's backlog; only the order in which cases are decided.

[31] In response to the allegation of queue-jumping, Mr. Thomas says simply that he is entitled to pursue his rights to the best of his ability. Others may not have the tenacity or resources to pursue a similar remedy, but if a ruling from this Court prompts greater efficiency in the processing of requests for ministerial relief, then ultimately all applicants will benefit. I agree.

[32] For all of these reasons, the balance of convenience favours Mr. Thomas.

V. Conclusion

[33] The application for judicial review is granted. A writ of mandamus will be issued requiring the Minister to decide Mr. Thomas' application for ministerial relief within a specified timeframe.

[34] The Minister does not take serious issue with the terms of the order sought by Mr. Thomas, which are derived from the one approved by this Court in Yassin. However, the Minister asks the Court to extend some of the proposed deadlines.

[35] Having considered the submissions of counsel, I conclude that the following is a reasonable timetable for the completion of the steps leading to a decision by the Minister on Mr. Thomas' application for ministerial relief:

(a) Mr. Thomas will provide any additional submissions and supporting materials to the MRU within 30 days from the issuance of the writ of *mandamus*;

(b) The MRU will disclose its draft ministerial relief recommendation to Mr. Thomas within 180 days thereafter;

(c) Mr. Thomas will submit to the MRU any response to the draft ministerial relief recommendation within 30 days;

(d) If no amendments are required, the MRU will provide its final ministerial relief recommendation and any supporting materials to the Minister within 60 days of Mr. Thomas' submissions;

(e) In the event that the MRU amends its draft ministerial relief recommendation and these amendments necessitate further disclosure to Mr. Thomas, the MRU will provide its amended draft ministerial relief recommendation to Mr. Thomas within 45 days. Mr. Thomas will provide any further submissions within 30 days thereafter. The MRU will then provide its final ministerial relief recommendation and any supporting materials to the Minister within 60 days of Mr. Thomas' submissions;

(f) The Minister will render a decision on Mr. Thomas' application for ministerial relief within 90 days of receipt of the MRU's final ministerial relief recommendation.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed, and a writ of *mandamus* is hereby issued requiring the Minister of Public Safety and Emergency Preparedness to render a decision on Adam Thomas's request for ministerial relief in accordance with the following timeframe.

2. Mr. Thomas will provide any additional submissions and supporting materials to the Ministerial Relief Unit [MRU] of the Canada Border Services Agency within 30 days from the issuance of this writ of *mandamus*;

3. The MRU will disclose its draft ministerial relief recommendation to Mr. Thomas within 180 days thereafter;

4. Mr. Thomas will submit to the MRU any response to the draft ministerial relief recommendation within 30 days;

5. If no amendments are required, the MRU will provide its final ministerial relief recommendation and any supporting materials to the Minister within 60 days of Mr. Thomas' submissions;

6. In the event that the MRU amends its draft ministerial relief recommendation and these amendments necessitate further disclosure to Mr. Thomas, the MRU will provide its amended draft ministerial relief recommendation to Mr. Thomas within 45 days. Mr. Thomas will provide any further submissions within 30 days thereafter. The MRU will then provide its final ministerial relief recommendation and any supporting materials to the Minister within 60 days of Mr. Thomas' submissions;

7. The Minister will render a decision on Mr. Thomas' application for ministerial relief within 90 days of receipt of the MRU's final ministerial relief recommendation.

"Simon Fothergill"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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