Date: 20080603

Docket: IMM-4220-07

Citation: 2008 FC 687

Ottawa, Ontario, June 3, 2008

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

SHAB ZAIB

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review for a pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, 2001, c. 27, (the Act) for the purpose of obtaining a writ of *mandamus* directing the respondent to process the applicant's application for permanent residence and issue a final decision within 60 days of the Order.

ISSUES

[2] Only one issue divides the parties: based on the facts of the case, was the delay in processing the applicant's claim unreasonable?

FACTUAL BACKGROUND

[3] The applicant is a citizen of Pakistan, born on August 6, 1997. He made a claim for refugee protection in Canada, which was determined to be successful by the Immigration and Refugee Board on August 8, 2003.

[4] The applicant made an application for permanent residence in September 2003. The required fee was paid on August 28, 2003 and included in the application. The application for permanent residence as a protected person was received on September 30, 2003, at the Case Processing Centre (CPC) in Vegreville, Alberta.

[5] On May 18, 2004, a letter was sent to the applicant advising him that his application had been approved at the first stage, but that a valid passport was required for stage two processing, at which time it is determined whether an applicant meets the admissibility requirements of the Act. The applicant did not respond to this request, and a second request for the submission of a valid passport was made on November 10, 2004. The letter informed the applicant that he had 60 days to comply with this second request.

[6] On March 24, 2005, the CPC advised the applicant that the non-translated Pakistan National ID card which he had submitted was found not to meet the requirements of section 50 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227. He was advised that if he could provide a satisfactory ID document within 30 days, he should forward it to CPC Vegreville.

[7] On April 25, 2005, the applicant provided photocopies and translations of his new national ID card as well as a passport issued in March 2005.

[8] The applicant was advised that his file was sent to Etobicoke for further processing in 2006, but received no decision regarding his application. He retained counsel and two letters were sent on his behalf to the respondent on September 10, 2007 and September 20, 2007, requesting that a decision be communicated within 20 days, failing which an application for judicial review and *mandamus* would be commenced before this Court.

[9] The application for leave and judicial review was filed on October 12, 2007.

[10] On December 3, 2007, the respondent sent a letter to the applicant requesting that he forward original documentation in support of his identity.

[11] On December 10, 2007 Immigration Officer, Rosemarie Conte, swore an affidavit, on behalf of the respondent, based on her review of the Tribunal Record. At paragraph 9 of her affidavit, she stated that concerns were raised regarding the genuineness of the passport submitted in April 2005 because it was issued in Gujranwala, Pakistan in 2005, despite the fact that the applicant never returned to Pakistan following his refugee claim. The Pakistan embassy in Canada advised the respondent that passports issued in Gujranwala, are only issued if the application is made in person. These concerns were at no time communicated to the applicant.

[12] On the date of the hearing, the respondent submitted another affidavit from Rosemarie Conte (signed May 16, 2008) to which is attached a recent e-mail from the Visa Post in Islamabad concerning the documents submitted by the applicant in support of his permanent residence application. The e-mail mentions that "Response from the issuing authorities is still awaited for the documents…" It also adds that "[t]he passport office will not/not be issuing a passport to an individual who is residing abroad."

ANALYSIS

[13] The parties agree that the proper test which must be applied to determine whether a writ of *mandamus* should be issued is set out in *Dragan v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 211 at paragraph 39, [2003] 4 F.C. 189:

> [39] In *Apotex Inc. v. Canada (A.G.)*, [1994] 1 F.C. 742 (C.A.), aff'd [1994] 3 S.C.R. 1100, the Federal Court of Appeal conducted an extensive review of the jurisprudence relating to *mandamus* and outlined the following conditions that need to be satisfied for the Court to issue a writ of *mandamus*:
>
> (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 the 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) No other adequate remedy is available to the applicant.
> (5) The order sought will be of some practical value or effect.

> (6) The Court in the exercise of discretion finds no equitable bar to the relief sought.
> (7) On a "balance of convenience" an order in the nature of *mandamus* should issue.

See also *Khalil v. Canada (Secretary of State)*, [1999] 4 F.C. 661 (C.A.).

[14] The contentious issue for the parties is whether there was an unreasonable delay, arising under subparagraph (3)(*b*)(iii) of the above test, in processing the applicant's claim.

[15] The parties also agree on the requirements which establish the unreasonableness of a delay, as set out in *Conille v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 F.C. 33 (F.C.T.D.), at paragraph 23:

> [23] From the reasons of the Court, it appears that three requirements must be met if a delay is to be considered unreasonable:
>
> (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.

See also *Debora Bhatnager v. Canada (Minister of Employment and Immigration and Secretary of State for External Affairs)*, [1985] 2 F.C. 315 (F.C.T.D.); *Mohamed v. Canada (Minister of Citizenship and Immigration)*, 195 F.T.R. 137, at paragraph 12; *Kalachnikov v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 777, at paragraph 12, 236 F.T.R. 142; *Hanano v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 998, at paragraph 10, 257 F.T.R. 66.

[16] It is clear from the language employed by Justice Tremblay-Lamer in *Conille*, above, that the requirements are conjunctive, and therefore must all be met if the Court is to find the delay to be unreasonable and therefore order a writ of *mandamus*.

[17] It is my opinion that the applicant and his counsel cannot claim to be free of responsibility for the delay. The applicant failed to provide a valid passport within the required time pursuant to requests made on May 18, 2004 and November 10, 2004. The applicant therefore contributed to the overall delay.

[18] However, the applicant argues that he was never advised of the respondent's concerns regarding the genuineness of the ID documents provided. The record demonstrates that the respondent's concerns were not communicated to the applicant following his submission of new documents in April 2005. The failure of the respondent to notify the applicant of its concerns regarding the validity of the documents and translations submitted by the applicant in April 2005 cannot be attributed to the applicant. On December 3, 2007, over a month following the filing of the present application and close to three months after being put on notice by counsel for the applicant, the applicant was requested that he submit his original ID in support of his identity. It appears from the note at page 61 of the Tribunal Record that steps were taken internally as of November 15, 2007 to verify the genuineness of the identity documents provided.

[19] It is my opinion that the delay of over two and a half years, from April 2005 until December 2007, meets all three requirements set out in *Conille*, above. First, the delay is longer than the nature

of the process required; there can be little question that two and a half years are not necessary to take any action to advise the applicant of the insufficiency of his identity evidence.

[20] Second, the delay cannot be attributed to the applicant. It is noteworthy that the last letter received by the applicant advising him of the insufficiency of the documentation referred to the failure to provide translated documents. It states: "The id card with no translation that was submitted with your application has been examined and it does not meet the requirement of providing a valid passport, travel document or other satisfactory identity document as required by the Immigration legislation." In the circumstances, it seemed that the letter took issue with the fact that the ID card was not translated. It was therefore reasonable that the applicant submitted an ID card with a translation. Without further communication from the respondent detailing the concerns raised, the applicant cannot be faulted for the delay.

[21] Finally, nothing in the respondent's submissions or in the Tribunal Record provides a satisfactory justification for the delay. While it is certainly open to the respondent to undertake the identity and security checks in processing applications for permanent residence, it is incumbent upon the respondent not to let the file stagnate indefinitely. I note that the respondent communicated with the applicant on two occasions between April 2005 and December 2007. On March 28, 2006, a letter was sent from Vegreville notifying the applicant that his case was being transferred to Etobicoke, and on April 26, 2006, St. Clair office sent a letter advising him that his file had been received from Etobicoke for further processing. The respondent could have notified the applicant of the lacunas in his proof of identity on either of these occasions, but failed to do so.

[22] The delay between April 2005 and December 3, 2007 was unreasonable in not notifying the applicant of the concerns over the identity documents. However, because of the action taken by the respondent on December 3, 2007 and on February 20, 2008 (e-mail from Rosemarie Conte to Mission-Islamabad asking for assistance in obtaining verification of the Birth Register Municipal Corporation, School Leaving Certificate, and Pakistan Passport No KE848628), I am of the opinion that a writ of *mandamus* is not appropriate at this time.

[23] I would therefore adopt the solution espoused by my colleague Justice Kelen in *Rousseau v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 602, at paragraph 8, 252 F.T.R. 309:

> [8] Since the respondent has recently taken action on this file so that the purpose of the *mandamus* action has been accomplished, no writ of *mandamus* is appropriate at this time. However, the Court will retain jurisdiction and invite the parties to make further submissions in two months if the Minister has not taken action by that time frame. In two months, the Court will render its order either granting the writ of *mandamus* or dismissing the action.

[24] In the case at bar, the Court will retain jurisdiction and invite the parties to make further submissions if the respondent has not taken action within three months following this decision.

[25] The parties did not submit questions for certification and none arise.

JUDGMENT

THIS COURT ORDERS that the Court retains jurisdiction and invites the parties to make further submissions if the respondent has not taken action within three months following this decision.

"Michel Beaudry"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-4220-07
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APPEARANCES:

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