Date: 20081217

Docket: IMM-2353-08

Citation: 2008 FC 1392

Ottawa, Ontario, December 17, 2008

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

SIVASUSI MANIVANNAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for a writ of *mandamus* requiring Citizenship and Immigration Canada (CIC) to grant the Applicant's application to sponsor her husband, Manivannan Ambalavanar, within 90 days of the court's order or, alternately, to complete processing of her application within 30 days of the Court's order. The Applicant also seeks costs.

BACKGROUND

[2] The Applicant was born on October 7, 1981 and is a citizen of Sri Lanka. She is a factory worker at Estee Lauder cosmetics in Scarborough, Ontario and lives in Markam, Ontario. She was married on September 8, 2001 to Manivannan Ambalavanar, who was born January 3, 1974 in Northern Sri Lanka. They are both Tamil.

[3] The Applicant's husband fled from Sri Lanka on December 3, 2001 to Singapore. The Applicant fled Sri Lanka to Singapore on March 3, 2002. With the help of an agent, they travelled together to the United States. Their intention was to reach Canada and claim refugee status. However, because they were relying upon false passports provided by the agent, they were intercepted at the airport in Chicago by US immigration authorities and detained. The Applicant was released in June 2002 as she was pregnant. She continued to Canada and claimed refugee status while her husband was still detained by US authorities.

[4] The Applicant's child, Akshaiyan Manivannan, was born October 1, 2002 in Canada. The child is a Canadian citizen and has not been registered with the government of Sri Lanka.

[5] The Applicant's husband claimed refugee status in the United States, but was rejected and returned to Sri Lanka in April, 2003.

[6] The Applicant was accepted as a Convention refugee in Canada on June 26, 2003. She submitted a permanent residence application for her and her husband in August, 2003. The Applicant was granted permanent residence on March 9, 2005. Her husband's application, however, continued unresolved by the Canadian High Commission (CHC) in Colombo, Sri Lanka, until this application came before the Court.

[7] The Applicant's son has had two ear surgeries, in January 2005 and May 2007, as he could not hear properly. A further surgery was scheduled for June 2008.

[8] The Applicant's son has had slow social skill development and took a long time to learn how to speak. The Applicant is concerned about the negative impact the absence of his father has had upon him, particularly on his development. The child did not understand why his father could not be with him.

[9] The Applicant travelled to Sri Lanka with her son on September 21, 2007 to spend time with her husband in Colombo and returned to Canada on October 19, 2007. This was the first time the Applicant's husband had seen Akshaiyan since his birth.

[10] The Applicant says that her son became even more preoccupied with his father after they returned from Sri Lanka. Akshaiyan cried every night for a month after they came home because he missed his father so much and he constantly asked when his father would come to Canada.

[11] While visiting her husband in Sri Lanka, the Applicant and her husband registered their marriage with the civil authorities. A copy of the civil marriage registration and the Applicant's personal information form was given to the CHC in Sri Lanka in October 2, 2007. The Applicant's husband was interviewed by staff at the CHC on October 19, 2004. They accepted the relationship as genuine. In the FOSS and CAIPS notes the Applicant obtained, the CHC stated they intended to interview the Applicant's husband again, but no interview had been scheduled.

[12] The Applicant has been concerned for her husband's safety and did not believe that the CHC was reasonably processing her application or that there is any prospect that the CHC would grant her husband permanent residence without the intervention of the Court.

ISSUES

[13] When this application was initiated, the Applicant submitted the following issues for consideration:

1) Whether the Respondent has complied with the Act and Regulations, Canada's international law obligations, or the *Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11 (Charter) by failing to complete processing of the permanent residence application the Applicant submitted for her spouse;
2) Whether, in the circumstances of this case, the Court should accept ongoing jurisdiction to supervise the Respondent's resolution of this matter.

STATUTORY PROVISIONS

Non-accompanying family member	**Membre de la famille qui n'accompagne pas le demandeur**
141. (1) A permanent resident visa shall be issued to a family member who does not accompany the applicant if, following an examination, it is established that	**141.** (1) Un visa de résident permanent est délivré à tout membre de la famille du demandeur qui ne l'accompagne pas si, à l'issue d'un contrôle, les éléments suivants sont établis :
(*a*) the family member was included in the applicant's permanent resident visa application at the time that application was made, or was added to that application before the applicant's departure for Canada;	*a*) le membre de la famille était visé par la demande de visa de résident permanent du demandeur au moment où celle-ci a été faite ou son nom y a été ajouté avant le départ du demandeur pour le Canada;
(*b*) the family member submits their application to an officer outside Canada within one year from the day on which refugee protection is conferred on the applicant;	*b*) il présente sa demande à un agent qui se trouve hors du Canada dans un délai d'un an suivant le jour où le demandeur se voit conférer l'asile;
(*c*) the family member is not inadmissible;	*c*) il n'est pas interdit de territoire;
(*d*) the applicant's sponsor under subparagraph 139(1)(*f*)(i) has been notified of the family member's application and an officer is satisfied that there are adequate financial arrangements for resettlement; and	*d*) le répondant visé au sous-alinéa 139(1)*f*)(i) qui parraine le demandeur a été avisé de la demande du membre de la famille et l'agent est convaincu que des arrangements financiers adéquats ont été pris en vue de sa réinstallation;

(*e*) in the case of a family member who intends to reside in the Province of Quebec, the competent authority of that Province is of the opinion that the foreign national meets the selection criteria of the Province.

e) dans le cas où le membre de la famille cherche à s'établir au Québec, les autorités compétentes de cette province sont d'avis qu'il répond aux critères de sélection de celle-ci.

Division 5
Protected Persons — Permanent Residence

Section 5
Personne protégée : résidence permanente

Application period

175. (1) For the purposes of subsection 21(2) of the Act, an application to remain in Canada as a permanent resident must be received by the Department within 180 days after the determination by the Board, or the decision of the Minister, referred to in that subsection.

Délai de demande

175. (1) Pour l'application du paragraphe 21(2) de la Loi, la demande de séjour au Canada à titre de résident permanent doit être reçue par le ministère dans les cent quatre-vingts jours suivant la décision de la Commission ou celle du ministre visées à ce paragraphe.

Judicial review

(2) An officer shall not be satisfied that an applicant meets the conditions of subsection 21(2) of the Act if the determination or decision is subject to judicial review or if the time limit for commencing judicial review has not elapsed.

Contrôle judiciaire

(2) L'agent ne peut conclure que le demandeur remplit les conditions prévues au paragraphe 21(2) de la Loi si la décision fait l'objet d'un contrôle judiciaire ou si le délai pour présenter une demande de contrôle judiciaire n'est pas expiré.

Family members

176. (1) An applicant may include in their application to remain in Canada as a permanent resident any of their family members.

Membre de la famille

176. (1) La demande de séjour au Canada à titre de résident permanent peut viser, outre le demandeur, tout membre de sa famille.

One-year time limit	**Délai d’un an**
(2) A family member who is included in an application to remain in Canada as a permanent resident and who is outside Canada at the time the application is made shall be issued a permanent resident visa if	(2) Le membre de la famille d’un demandeur visé par la demande de séjour au Canada à titre de résident permanent de ce dernier et qui se trouve hors du Canada au moment où la demande est présentée obtient un visa de résident permanent si :
(*a*) the family member makes an application outside Canada to an officer within one year after the day on which the applicant becomes a permanent resident; and	*a*) d’une part, il présente une demande à un agent qui se trouve hors du Canada dans un délai d’un an suivant le jour où le demandeur est devenu résident permanent;
(*b*) the family member is not inadmissible on the grounds referred to in subsection (3).	*b*) d’autre part, il n’est pas interdit de territoire pour l’un des motifs visés au paragraphe (3).
Inadmissibility	**Interdiction de territoire**
(3) A family member who is inadmissible on any of the grounds referred to in subsection 21(2) of the Act shall not be issued a permanent resident visa and shall not become a permanent resident.	(3) Le membre de la famille qui est interdit de territoire pour l’un des motifs visés au paragraphe 21(2) de la Loi ne peut obtenir de visa de résident permanent ou devenir résident permanent.

ARGUMENTS

The Applicant

[14] The Applicant submits that the CHC has not given any written explanation for its non-compliance with the Regulations. Although the sponsorship application was submitted in August, 2003, the CHC only opened a file on May 17, 2004, nine months after submission.

[15] The CAIPS notes in relation to the Applicant's application for her husband's permanent residence on March 31, 2005 show that the CHC wanted to obtain the Applicant's PIF and further evidence regarding her husband's detention by US Immigration. Instead of obtaining the PIF from their own records, or verifying with US authorities, they wrote to the Applicant's husband asking for this information on April 4, 2005. He responded by April 11, 2005.

[16] Several years later, on January 28, 2008, the CHC noted that it would like to interview the Applicant's husband before deciding whether to grant him a visa. He had not been interviewed in 2004 about the Applicant's PIF, because the CHC had not requested a PIF from the Applicant in 2004.

[17] The CAIPS notes also reveal numerous pleadings from the Applicant, her husband, lawyers and a Member of Parliament. Other than noting these pleadings, the CHC took no action to move forward with granting the Applicant's husband permanent residence.

Delay

[18] The Applicant had fears for her husband's safely because the security situation for Tamils in Colombo was deteriorating. The war had resumed in Sri Lanka, and the Police and Army often took the Applicant's husband in for questioning. The Applicant feared he would be unlucky at some point and tortured, "disappeared," abducted or killed.

[19] The Applicant relied upon the United Nations High Commission for Refugees who declared in December 2006 that all Tamils are at risk of persecution in Sri Lanka. War resumed in Sri Lanka in January 2008 and international peace monitors left the country. Human Rights Watch reported in March 2008 that there had been extensive disappearances, abductions and extra-judicial killings of young Tamil men throughout Sri Lanka, including in Colombo. Tamils who are not from Colombo are often targeted and both Human Rights Watch and the president of Sri Lanka have stated that Tamils applying to immigrate through visa posts in Colombo have been targeted for abductions.

[20] The Applicant was not only worried about her husband's safety; she also feared the impact of his absence on her son. The Applicant believes the separation will have a lasting impact on her son's development and mental health. She was also depressed and anxious because of her separation from her husband.

[21] The Applicant points out that the language of s. 141 of the Regulations is mandatory, not discretionary, and that its purpose is to ensure fast family reunification in situations such as the one faced by the Applicant.

[22] The Applicant argues that the failure to grant concurrent processing to her spouse violated Canada's international law obligations under Article 23 of the *International Covenant on Civil and Political Rights*, adopted and opened for signature, ratification and accession by General Assembly resolution 220A (XXI) of 16 December 1966, entry into force 23 March 1976, acceded to by Canada May 19, 1976, Article 23. The Government of Canada enacted s. 141 of the Regulations in order to comply with Article 23. Article 23 reads as follows:

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
2. The right of men and women of marriageable age to marry and to found a family shall be recognized.

[23] The Applicant submits that the CHC in Colombo has been incompetent and illogical in its processing of her application. Her husband was interviewed without CHC first obtaining her PIF, which was already in the Respondent's possession from the Applicant's application. It is unclear why the PIF was requested years after the Applicant's husband was interviewed or why nothing was done once it was received. The Applicant feels that the CHC has conducted itself in a manner that implies a wilful disregard for s. 141 of the Regulations.

[24] The Applicant submits it should not take the CHC five years to complete security clearance for a Tamil immigrant or refugee. Officials in Canada are able to process admissibility and permanent residence in far less time.

[25] The Applicant goes on to state that the Applicant's husband's detention in the USA offers no clue as to why there has been such a delay. The Respondent had access to the USA Immigration records and had no difficulty processing the Applicant's case despite her detention in the USA. The CHC simply chose not to process the application.

[26] The Applicant argues that the human rights situation in Sri Lanka is well-known, and this should have compelled the CHC to act in accordance with the principle of family reunification and the humanitarian aims of the legislation.

[27] The Applicant cites section 25 of the Act which allows the CHC to extend humanitarian considerations to an applicant for permanent residence. The Applicant submits, however, that in any event, her husband met all the statutory requirements.

[28] The Applicant further alleges that section 7 of the Charter was engaged in this case. She says that state action has impacted psychological integrity: *New Brunswick (Minister of Health and Community Services) v. G. (J.) [J.G.]*, [1999] 3 S.C.R. 46 at paragraphs 58-60.

[29] The Applicant refutes the Respondent's contention that her personal information form was "missing" until she delivered another copy. The Applicant submits that her personal information form was already on file with the Respondent as part of her own application for permanent residence.

[30] The Applicant points out that the Respondent has insisted on receiving documents over which the Applicant had no control in order to confirm information the Applicant had already provided to the Respondent, and which the Respondent could readily confirm. The Applicant's refugee claim was accepted, which means that her testimony was accepted as credible and she was determined to be admissible. There was no basis to presume her spouse was detained for any reason other than the one she gave.

[31] The Applicant disagrees with the Respondent's contention that there has been "no refusal to act" and that the CHC continued to work on the file by demanding USA records from the Applicant's spouse. The Applicant points out that the Respondent has remained silent on the obvious question of why, when it has the cooperation of the US government and ready access to US criminal records, it has refused to verify that the Applicant's spouse has no record of incarceration other than his detention by US Immigration.

[32] The Applicant concludes that the Respondent has not honoured Parliament's intention with respect to the priority to be given in processing applications by Convention refugees for their own and their spouse's permanent residence. Without the intervention of the Court, the Respondent

would have been content to leave this application in abeyance forever, by making demands which could not be met, and noting to itself that it has repeated these demands.

The Respondent

[33] The Respondent says the security clearance for the Applicant's application could not be completed because the Applicant failed to provide a police clearance certificate and records in regards to her spouse's 13-month incarceration in Texas. The Applicant and her spouse were asked multiple times over the past four years by CIC to provide these documents.

[34] The Respondent maintains that there was no unreasonable delay or a refusal to process the application; rather, the delay was entirely attributable to the Applicant's failure since July 26, 2004 to provide documents needed to complete her husband's background clearance. The Respondent submits there has been no refusal to act and continuous steps were taken to process the Applicant's application, such as arranging for a further interview despite the outstanding documents.

Delay

[35] The Respondent submits that the Applicant has failed to show unreasonable delay.

[36] The Respondent submits that there has not been any unreasonable delay in the present case, since any delay is entirely attributable to the Applicant's failure to provide documents that were requested one and a half months after the Applicant's application was received.

[37] The Respondent submits that the Applicant was given several indications that her spouse's application for permanent residence is incomplete. These indications included a letter from the CIC, dated July 26, 2004, which indicated that U.S. clearance certificates were necessary for the application to be processed. Although the applicant's spouse's August 2, 2004 letter indicates that he was aware that a Texas police clearance certificate was needed, this document was not provided. On August 4, 2004, a second letter was sent to the Applicant's spouse indicating that his U.S. police clearance certificates were still outstanding. This August 4, 2004 letter also informed him of an interview scheduled on October 19, 2004.

[38] The Respondent goes on to point out that a third letter from CIC was sent on October 19, 2004 indicating that an Illinois clearance certificate was still outstanding. Approximately one year following CIC's first letter on April 4, 2005, a fourth letter was sent to the Applicant's spouse regarding his failure to provide the Texas records associated with his 13-month detention in Texas. CIC also requested the Applicant's PIF in this April 4, 2005 letter.

[39] The Respondent submits that, nearly three and a half years later, the Applicant and her spouse had provided neither the Texas record, nor the Applicant's PIF. As a result, on September 5, 2007, CIC sent a second letter requesting the PIF before the Applicant finally provided it.

[40] Over four years after the original request for the Texas police clearance certificate was made, CIC sent a fifth request to the Applicant's spouse for this document on July 29, 2008.

[41] The Respondent concludes on this point that there is a satisfactory explanation for the delay: security clearance could not be completed until the documents associated with the 13-month incarceration of the Applicant's spouse in Texas were provided.

[42] The Respondent submits that continuous steps were taken to complete the processing of the Applicant's application even though the Applicant failed to provide the requested documents on time. The Respondent continued to review the file, despite the outstanding documents, and noted on July 30, 2007 that an additional security clearance was required. A further interview was scheduled and conducted on June 25, 2008 as a result of the additional security clearance needed.

[43] The Respondent has not purposely delayed or declined to perform any legal duty.

[44] The Respondent reminds the Court that the Minister has an explicit statutory duty to protect the security of Canadian society and must ensure that potential immigrants do not fall under sections 34-39 of the Act. An application for permanent residence cannot be granted unless the Applicant has fulfilled all of the obligations under the Act. Security investigations are necessary to establish whether or not the Applicants are admissible under the Act.

[45] The Respondent submits that the Minister has be actively trying to finalize the Applicant's Application but could not complete the security clearance until documents associated with the 13-month detention of the Applicant's spouse in Texas were provided. It is clear from the correspondence between the CIC and the Applicant and her spouse that they were duly informed of the need to provide these documents to complete the security clearance.

ANALYSIS

[46] At the hearing of this matter in Toronto there were indications that a decision concerning the husband's visa would be made in the near future. Consequently, the Court adjourned the hearing to allow time for that decision to be made, fixing counsel with on-going reporting obligations to the Court.

[47] As expected, the husband was issued with a permanent resident visa by the CHC in Colombo early in November, 2008.

[48] The Applicant indicated that, with this result, the litigation before the Court was resolved with the exception of her request for costs.

[49] The Applicant is a working class person with a young child. She earns $9.10 an hour. She says she could not realistically afford the litigation and yet she has been compelled to undertake these proceedings in order to have her husband's status resolved. The cost of the litigation is in

addition to the $1,100.00 processing fee paid to the government and other costs incidental to the processing delays. She feels that she has been forced to litigate in order to draw attention to her file and, even then, that the Respondent resisted resolving this matter until the Court communicated its concerns and gave directions at the hearing.

[50] At the hearing of this matter, there was indication from Respondent's counsel that everything was in place for a decision to be made and that a decision could be expected in the fairly near future. So I do not think it can be said that, at that stage, it was the Court who secured the decision to issue the visa. That does not mean, of course, that the litigation itself was not necessary to draw attention to the file and that the threat of Court-ordered *mandamus* was not instrumental in finally resolving what was, really, a non-contentious application for status.

[51] It is well-established that, pursuant to Rule 22 of the *Federal Court Immigration and Refugee Protection Rules,* SOR/2002-232, special reasons must exist for the Court to award costs on an application for judicial review. My review of the case law leads me to conclude that special reasons include situations where one party has acted in a manner that may be characterized as unfair, oppressive, improper or actuated by bad faith. But special reasons can also include conduct that unnecessarily or unreasonably prolongs the proceedings. See *Platonov v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1438, Docket No. IMM-4446-99, September 12, 2000; *Singh v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 669, 2005 FC 544, Docket No. IMM-1864-04, April 21, 2005; *John Doe v. Canada (Minister of Citizenship and*

Immigration) 2006 FC 535; and *Johnson v. Canada (Minister of Citizenship and Immigration)* 2005 FC 1262 (Can LII), Docket No. IMM-8446-04, at paragraph 26.

[52] In the present case, my review of the file suggests that there can be no criticism of the way the file was handled in Canada and I would like to make it clear that Respondent's counsel, Mr. Todd, has been meticulous, forthright and extremely helpful in bringing this matter before the Court and achieving a resolution.

[53] The problems and delays appear to emanate from the visa post in Colombo. The Applicant applied for permanent residence and relied upon section 176 of the IRP Regulations to include her husband. The application was submitted in August 2003 and the visa post opened the file on May 17, 2004.

[54] The Court recognizes that time was required to investigate the husband's admissibility, particularly from the aspect of security, and that background checks needed to be made, but my review of the record suggests illogical and unnecessary delays in dealing with the Applicant's PIF and in not making it clear to the husband that he had to provide a "police certificate from Texas."

[55] For example, in her affidavit, Ms. Piyatissa, who reviewed the file in Colombo for purposes of this application, was not entirely forthcoming in providing the Court with the complete picture and sought to blame the Applicant and her spouse for any delays:

> The reason for the 13-month incarceration of the Applicant's spouse in Texas remains unknown. Despite making numerous requests over

> the past 4 years to provide the Texas clearance certificate and all records in regards to Texas incarceration, the Applicant and her spouse still have not submitted these documents.

[56] But the fact is that the visa post, even though it requested "all records concerning your incarceration in Texas" in an April 4, 2005 letter, did not make clear that it wanted a "police clearance form Texas" until July 29, 2008. Had the Applicant and her husband known what was needed, they would have obtained it immediately. The history of the file shows them cooperating and replying promptly. As soon as they knew that a police clearance from Texas was needed, it was obtained. The clearance was issued in Texas on August 13, 2008 and was given to the visa post on September 4, 2008.

[57] The file was handled by different officers and has been mired in delay. Errors have occurred that have just not been explained. For example, at page 5 of the visa post record there is a CAIPS entry that on April 11, 2005:

> PI came in hand over the requested the details copies of PIF, and certified copies of all records concerning his incarceration. Put it to the Registry tray.

Yet, the Respondent's affiant swore in her affidavit on August 12, 2008 that "After two requests that were made over 3 years, the Applicant finally provided her PIF on November 2, 2007." As well as the Regulatory obligation's for concurrent processing (the Applicant was granted permanent residence on March 9, 2005) there were significant humanitarian pleas in this case that appear to have fallen up on deaf ears. In particular, the Applicant and her husband have a young son who has suffered from social and emotional problems and who has been separated from his father for longer

than it is reasonable to expect given the circumstances of this case. All of this has led to litigation that should not have been necessary.

[58] The visa post's records are sloppy and the Court has no confidence they are complete.

[59] I do not see evidence of bad faith in this case, but there has been unreasonable delay at the visa post in Colombo. The file has been allowed to drag on for reasons that have not been adequately explained and it has required litigation before the visa post has finally provided the husband's visa. The visa post has chosen to blame the Applicant and her husband for the delays, but the general pattern of exchanges suggests otherwise. The Applicant and her husband have provided documentation whenever it has been made clear to them what was needed.

[60] As Justice Harrington pointed out in *Singh* (paragraph 24) this "Court has considered undue delay in processing a claim to be a special reason which would justify costs." In the present case I believe the record shows that there has been undue and unreasonable delay on the part of the visa post in Colombo in a situation that gave rise to significant humanitarian considerations and which has thwarted the family reunification principles that are an essential part of our immigration legislation. The Applicant has been forced to litigate in order to force a resolution to what was a relatively straight-forward application.

[61] The Applicant has requested a lump sum award of "$4,000.00 or costs awarded based on an hourly rate determined by the Court." This suggests that the Applicant is seeking solicitor-client

costs which I do not think can be justified on the facts of this case. I do, however, believe that costs are justified on a party and party basis and that, pursuant to Rule 400(4) of the *Federal Courts Rules*, they should be fixed at $2,000.00.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The Application for *mandamus* is denied on the grounds of mootness but is granted with respect to costs which are fixed at $2,000.00.
2. There is no serious question of general importance to be certified.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	*SIVASUSI MANIVANNAN v. MCI*
PLACE OF HEARING:	TORONTO, ONTARIO
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APPEARANCES:

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Mr. Jamie Todd	FOR THE RESPONDENT

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