Federal Court  Cour fédérale

**Date: 20100721**

**Docket: IMM-6156-09**

**Citation: 2010 FC 767**

**Ottawa, Ontario, July 21, 2010**

**PRESENT: The Honourable Mr. Justice Boivin**

**BETWEEN:**

**DIUBEL SENCIO HECHAVARRIA**

**Applicant**

**and**

**THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant seeks judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, R.S. 2001, c. 27 (the Act) for Ministerial relief pursuant to s. 34(2) of the Act alleging that there has been no decision made to process, consider, and grant or deny his application. The applicant is also seeking an order of *mandamus* against the Minister and its designated officers, to fully process, consider, and grant or deny his application.

Factual background

[2] The applicant, Diubel Sencio Hechavarria, is a citizen of Cuba. On November 16, 2005, he married Cheryl Hixt, a Canadian citizen, in Cuba.

[3] The applicant and his wife applied for spousal sponsorship shortly thereafter, and he applied for permanent residence in June 2006. During his interview with the Visa Officer on March 29, 2007 at the Canadian Embassy in Cuba, the applicant was questioned about his service with the Ministry of the Revolution Armed Forces (MINFAR) in Cuba from August 1992 to June 1998. The applicant alleged that he did not volunteer to join the military. He was conscripted to serve. He was a low-level employee who never had any access to any classified information. His responsibilities included listening to radio signals, which he was ordered to record and pass on to his supervisors.

Decision

[4] In January 30, 2008, the Immigration Services (Embassy of Canada in Cuba) decided that the applicant was inadmissible for a permanent resident visa under s. 34(1) *f*) of the Act. The reason for rejecting the applicant's application was his previous involvement with MINFAR.

[5] On August 7, 2008, the applicant filed an application for Ministerial Relief pursuant to s. 34(2) of the Act on the basis that the applicant's presence in Canada would not be detrimental to the national interest. The applicant has yet to receive a response from the Minister.

Issues

[6] The following issues are raised in this application:

a. *Is the delay in making the decision with respect to the application for Ministerial relief unreasonable?*

b. *In the affirmative, is an order in the nature of mandamus the appropriate remedy?*

Statutory Provisions

[7] The following provisions of the Act are applicable in these proceedings:

| Security | Sécurité |
|---|---|
| **34.** (1) A permanent resident or a foreign national is inadmissible on security grounds for | **34.** (1) Emportent interdiction de territoire pour raison de sécurité les faits suivants : |
| (*a*) engaging in an act of espionage or an act of subversion against a democratic government, institution or process as they are understood in Canada; | *a*) être l'auteur d'actes d'espionnage ou se livrer à la subversion contre toute institution démocratique, au sens où cette expression s'entend au Canada; |
| (*b*) engaging in or instigating the subversion by force of any government; | *b*) être l'instigateur ou l'auteur d'actes visant au renversement d'un gouvernement par la force; |
| (*c*) engaging in terrorism; | *c*) se livrer au terrorisme; |
| (*d*) being a danger to the security of Canada; | *d*) constituer un danger pour la sécurité du Canada; |
| (*e*) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or | *e*) être l'auteur de tout acte de violence susceptible de mettre en danger la vie ou la sécurité d'autrui au Canada; |

| | |
|---|---|
| (*f*) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (*a*), (*b*) or (*c*). | *f*) être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle est, a été ou sera l'auteur d'un acte visé aux alinéas *a*), *b*) ou *c*). |
| Exception | Exception |
| (2) The matters referred to in subsection (1) do not constitute inadmissibility in respect of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest. | (2) Ces faits n'emportent pas interdiction de territoire pour le résident permanent ou l'étranger qui convainc le ministre que sa présence au Canada ne serait nullement préjudiciable à l'intérêt national. |

Standard of review

[8] Section 34(2) provides a mechanism whereby a person who has been found to be inadmissible under s. 34 of the Act on security grounds may be granted permanent residence if he can satisfy the Minister that his presence in Canada is not detrimental to the national interest.

[9] This Court in *Naeem v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 123, [2007] F.C.J. No. 173 and *Miller v. Canada (Solicitor General)*, 2006 FC 912, [2006] F.C.J. No. 1164, held that decisions refusing Ministerial relief are reviewed on the standard of patent unreasonableness.

[10] Since the Supreme Court decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the standard of patent unreasonableness was discarded and the previous three standards of review were collapsed into two: correctness and reasonableness. However, where there is existing jurisprudence identifying the standard of review, that analysis need not be repeated.

[11] In the decision *Ramadan v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1155, [2008] F.C.J. No. 1435, at paras. 1 and 16, this Court concluded that the standard of review for a decision regarding Ministerial Relief is reasonableness. In analyzing the exception of Ministerial Relief, Justice Zinn mentioned the following:

> [1] It is the Minister's task to determine whether waiving an inadmissibility restriction for a person who is otherwise inadmissible to Canada would be "detrimental to the national interest". The Minister is uniquely placed to make such an assessment. The Court's role is to satisfy the foreign national and the Canadian public that the decision-making process that was followed was fair, and that the decision, based on all of the evidence, was reasonable.
>
> […]
>
> [16] This is a decision that implements or reflects broad public policy. It is a decision where the Minister is obliged to strike a balance between the interests of an applicant who wishes to obtain residency in order to be reunited with his family, and the public interest in ensuring that the national interest is not prejudiced by a favourable decision. The fact that it is only the Minister, and not a delegate, who is granted this authority also suggests that significant deference is due. Taking all of these factors into account, there is no doubt that the Minister in making the decision at hand is deserving of the highest degree of deference.

[12] Therefore, the standard of review in the case at bar is reasonableness.

Analysis

[13] *Mandamus* is a discretionary equitable remedy. It lies to compel the performance of a public legal duty which a public authority refuses or neglects to perform although duly called upon to do so. In *Kalachnikov v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 777, [2003] F.C.J. No. 1016, from paragraphs 11 to 13, Justice Snider reviewed the requirements for mandamus in the immigration context:

> The Test for Mandamus
>
> [11] Mandamus is a discretionary, equitable remedy *(Khalil v. Canada (Secretary of State)*, [1999] 4 F.C. 661 (C.A.)) subject to the following conditions precedent.
>
> 1. There is a public duty to the applicant to act;
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> 2. The duty must be owed to the applicant;
>
> 3. There is a clear right to performance of that duty, in particular:
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> (a) the applicant has satisfied all conditions precedent giving rise to the duty;
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> (b) there was a prior demand for performance of the duty, a reasonable time to comply with the demand, and a subsequent refusal which can be either expressed or implied, e.g. unreasonable delay; and
>
> 4. There is no other adequate remedy.
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> 5. The "balance of convenience" favours the applicant (*Apotex Inc. v. Canada (A.G.)*, [1994] 1 F.C. 742 (C.A.), aff'd [1994] 3 S.C.R. 1100, *Conille v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 F.C. 33 (T.D.)).
>
> [12] In *Conille*, supra, [1999] 2 F.C. 33 (T.D.), Tremblay-Lamer J. set out three requirements at paragraph 23, that 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.
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> [13] In *Mohamed v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1677 (T.D.) (QL), Dawson J. cautioned at paragraph 15 that prior jurisprudence is "not particularly helpful except for the purpose of outlining the parameters within which the Court has issued an order in the nature of mandamus where it has found an unusual delay which has not been reasonably explained." Dawson J. granted the order for mandamus in Mohamed, supra because of the length of the delay in completing the security review and the lack of explanation for why the estimated six months to one year processing time was exceeded. Dawson J. did not accept that the statement that the delays had to do with security concerns was a satisfactory justification for the fact that, after more than four years, the applicant's application for landing was still outstanding.

[14] The applicant argues that no evidence with respect to the progress on processing the application has been provided and, hence, the delay for the Minister to make a decision is unreasonable.

[15] Following a review of the evidence, the Court is rather of the opinion that the applicant did not provide reasonable time to the authorities to comply with its request. Indeed, 15 months have passed between the time the applicant applied for ministerial relief under s. 34(2) of the Act (August 7, 2008) and the filing of the current application (December 1, 2009).

[16] The Court finds that the applicant is not being ignored and his file is in progress. For instance, the documentary evidence contains a response letter from the Minister of Public Safety and there are a number of telephone conversations related to the status of the file. It is therefore difficult to find an outright refusal to comply with the applicant's demand. Given the nature of the inadmissibility in this file - i.e. on security grounds, reasonable time must be given to the authorities to complete their investigation, review and analyze the facts of the case (Affidavits from Brett Bush and Michelle Barrette).

[17] At hearing before this Court, counsel for the applicant referred to the following case: *John Doe v. Canada (Minister of Citizendhip & Immigration*), 2006 FC 535, 54 Imm. L.R. (3d) 212. In *John Doe*, the applicant came to Canada in 1984 and claimed refugee status which was granted to him in 1986. He then applied for permanent residence. In 1998, officers raised some concerns of a security nature. The applicant then made an application for a Ministerial relief. After eight (8) years, no decision had been taken. This Court found that there had been undue delay without reasonable explanation.

[18] However, in the present case, the *John Doe* decision cannot be of any assistance to the applicant. Indeed, to this day, a total of much less than two (2) years elapsed since the ministerial relief application has been filed in December 2009. The Court finds that the delay, given the facts of this case, is reasonable and justifiable.

[19] For all of these reasons, while the Court sympathizes that the delay may be affecting the wife of the applicant, the Court cannot grant an order of *mandamus* at this time. The application is premature and hence not justified. The applicant has not demonstrated, on a balance of convenience, that the requirements in order to issue a *mandamus* are met. The application for judicial review is therefore dismissed. No question was proposed for certification and there is none in this case.

**JUDGMENT**

**THIS COURT ORDERS AND ADJUDGES that :**

1. This application for judicial review be dismissed.

2. No question of general importance is certified.

"Richard Boivin"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-6156-09 |
| **STYLE OF CAUSE:** | Diubel Sencio Hechavarria v. MPSEP |
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