Federal Court Cour fédérale

**Date: 20110131**

**Docket: IMM-2104-10**

**Citation: 2011 FC 108**

**Ottawa, Ontario, January 31, 2011**

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

**BETWEEN:**

**SONAM DHONDUP, TENZIN YONTEN
AND TENZIN YESHI**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

**Respondent**

**<u>REASONS FOR JUDGMENT AND JUDGMENT</u>**

[1] This is an application by Sonam Dhondup (the Principal Applicant, PA), Tenzin Yonten and Tenzin Yeshi (together, the Applicants) made pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA), for judicial review of the Respondent Minister's failure to render a decision with respect to Mr. Dhondup's application to sponsor his *de facto* dependent children, the applicants Tenzin Yonten and Tenzin Yeshi, on humanitarian and compassionate (H&C) grounds for permanent residence in Canada.

[2] The Applicants request an order for a writ of *mandamus* requiring the Respondent to make a decision regarding the PA, Sonam Dhondup's, application to sponsor his *de facto* dependants Tenzin Yonten and Tenzin Yeshi, on H&C grounds pursuant to subsection 25(1) of the IRPA, with the information available before them, and to respond to the PA's request to issue Temporary Resident Permits (TRP's) to Tenzin Yonten and Tenzin Yeshi, pursuant to subsection 24(1) of the IRPA.

[3] Based on the reasons below, this application is allowed.

## I. Background

### A. *Factual Background*

[4] The PA, Sonam Dhondup, is an ethnic Tibetan who lived in India. He successfully obtained refugee protection in Canada in July 2002. The PA was granted permanent resident status in May 2003 and subsequently attempted to sponsor his spouse, Tsering Paldon, their daughter Tenzin Tselha, as well as his two children from an alleged previous common-law relationship, the minor co-Applicants Tenzin Yonten and Tenzin Yeshi. His previous common-law wife, Pema Bhuti, died in 1995.

[5] The PA's spouse and children attended an interview at the Canadian High Commission (CHC) in India on July 16, 2003. While the Officer was satisfied that there was a *bona fide*

relationship between the PA and his spouse and their child, she had concerns about the parent-child relationship between the PA and the other two children. After the interview, the Applicants received a letter requiring them to undergo DNA testing to confirm their relationship if they wanted to proceed with the application.

[6] Much to the alleged surprise of the PA, the results of the DNA test showed that he was not the biological father of the minor co-Applicants. In his affidavit, the PA described this revelation as “incredibly painful” since he had raised Yonten and Yeshi as his own and had no idea that their deceased mother had any other relationships during their common-law relationship.

[7] As a result of the DNA test, the minor co-Applicants were excluded from the PA’s sponsorship application in January 2004. The Applicants received a letter to this effect, advising them that they could nevertheless apply to be considered separately for permanent residence “directly to any Canadian Embassy or Consulate outside of Canada”. The PA’s spouse and child were granted permanent resident status in March 2004. The minor co-Applicants were left behind in India in the care of the PA’s brother when the PA’s spouse and child left to join the PA in Canada.

[8] In an effort to bring the minor co-Applicants to Canada, the PA resubmitted his application to sponsor Yonten and Yeshi as his *de facto* dependent children on H&C grounds. This application was submitted to the CHC in New Delhi on April 30, 2004. The application included submissions with respect to H&C considerations, specifically the best interests of the children.

[9] On May 31, 2004, by way of letter the CHC informed the PA that the application for Yonten and Yeshi could not be processed because the previous application for sponsorship had been closed after visas were issued to the PA's spouse and child. On July 29, 2004 the PA filed an application for leave in the Federal Court to commence a judicial review challenging the refusal to process the application. Leave was granted on August 4, 2004.

[10] The PA and counsel for the Minister of Citizenship and Immigration (CIC) eventually agreed to settle the matter. The terms of the settlement are found in a letter from Ms. Marinos dated September 16, 2004 and provided that the PA's application for H&C consideration would be processed by the CHC in Delhi, backdated to the original application date of May 2004. The PA filed a notice of discontinuance on February 10, 2005, and resubmitted a completed application to the Case Processing Centre (CPC) in Mississauga on May 25, 2005. Ms. Marinos advised the PA by way of letter dated February 9, 2005 that in his application the PA should indicate that an H&C request was being made and submit all the information related to the H&C request with the children's application.

[11] It is clear from the written submissions of the parties that it is at this point their understanding of the facts giving rise to this matter diverged. The PA received a letter from the CPC in Mississauga on June 16, 2005 informing him that his application had been forwarded to the CHC in Delhi, and referring to the application he submitted "on behalf of the child you intend to adopt…" The letter further informed the PA that, as a resident of Ontario, he would be subject to the *Intercountry Adoption Act* and that he would receive more instructions and application kits for his children in the following weeks. The PA claims to have been surprised by this letter, as it

seemed to suggest that his application was being processed on the basis that he intended to officially adopt his children. His intent had always been, and the terms of the settlement agreement provided for, the PA to sponsor his *de facto* children on H&C grounds.

[12] In an effort to clarify the situation, the PA wrote to the CPC in Mississauga to emphasize that the PA's application to sponsor his *de facto* children would be processed in New Delhi on H&C grounds, and an exemption from the adoption requirements had therefore been requested. Nevertheless, on July 5, 2005 the PA received a letter from the provincial Ministry of Children and Youth Services, advising the PA that CIC required a "letter of no objection" from the Ministry, and requesting further information. The case assistant who wrote the letter understood that "adoption [was] part of the plan". The PA responded with a detailed affidavit and again mentioned that he wished to sponsor his *de facto* dependent children, but would adopt them later in Canada.

[13] In October 2005, the PA again claims to have been surprised to receive a letter from the Coordinator for Private and International Adoption for the Ministry of Children and Youth Services, informing the PA that the adoption of the sponsored children would be subject to certain legislation and so would require the PA to fulfill a number of requirements, including obtaining a home-study report and retaining the services of a licensed adoption agency.

[14] According to the affidavit of the PA, throughout 2005 and 2006 the PA still expected that his application would be processed based on H&C considerations and he continued to submit evidence of the relationship between the Applicants. The PA also began to explore whether adopting the children in India would be a viable option.

[15] The PA visited his children in India in March of 2006 and attempted, unsuccessfully, to request an interview at the CHC in New Delhi to speed up the process. Based on this visit, the PA developed more concerns regarding the well-being of his children, and swore an affidavit to this effect which was forwarded to the CHC in New Delhi on June 5, 2006. It was accompanied by submissions regarding the prohibitive cost of adopting children from India. He therefore again requested that his sponsorship be processed on H&C grounds. Correspondence with the CPC in Mississauga and the provincial authorities was also included.

[16] From the point of view of the Respondent, the PA completed his sponsorship application in 2005 as “children to be adopted in Canada”. The applications for permanent residence in Canada as “children to be adopted in Canada – FC6 category” were received at the CHC in New Delhi on June 24, 2006. Applications filed under this category need to meet several requirements under subsection 117(g) of the *Immigration and Refugee Protection Regulations* (SOR/2002-227).

[17] Manjit Keshub, an Immigration Officer at the CHC in New Delhi, interviewed the minor co-Applicants along with their paternal uncle on November 16, 2006.

[18] The PA received no communication from the CHC in New Delhi, and so sent a letter of inquiry on December 18, 2006, again explaining his situation and reiterating that he could not afford to adopt his children. On January 12, 2007, the PA was sent a letter requesting that he provide, within 180 days, the documents required pursuant to regulation 117 - a guardianship order from a court of competent jurisdiction giving him permission to remove the children from India, a copy of

a home study completed in Canada, a Notice of Agreement or No Objection letter from provincial authorities and a No Objection Certificate from the Central Adoption Resource Agency (CARA) in India.

[19] The PA believed that the CHC had mistakenly chosen to process his application on the understanding that the PA intended to adopt the minor co-Applicants, and so the PA sent another letter on February 6, 2007 repeating that the PA could not afford to adopt his children and requesting that they be granted immigrant visas as *de facto* family members on H&C grounds.

[20] The only response the PA received was a fax from the CHC on February 27, 2007 responding to the PA's December 2006 inquiry and requesting the same documents. The Respondent claims to have sent two similar further requests on March 1, 2007 and July 18, 2007 for the same outstanding documents.

[21] The PA attempted to obtain the outstanding required documents. He arranged to have a home-study conducted by a social worker from the Ontario Association of Social Workers who agreed to provide her services at a very reduced cost given the PA's extenuating circumstances. The PA wrote to the CHC requesting additional details regarding the specific requirements of the study three times, in May, June and July 2007. The June letter also inquired as to whether these requirements implied that the PA's application was proceeding on an adoption basis as opposed to an H&C basis. The PA received no response. The PA decided to go ahead anyway, and the home study was completed on June 27, 2008. The completed study was sent to the CHC on June 27, 2008 along with updated submissions concerning the best interests of the child.

[22] According to the affidavit of Manjit Keshub, the CHC only realized that the PA wanted his application to be assessed on H&C grounds because the he could not afford the $10,000 - $20,000 adoption fee per child following the June 27, 2008 submissions. This is reflected in his Computer Assisted Immigration Processing System (CAIPS) notes as an entry dated July 24, 2008 which reads in part, "sponsor's counsel, Parkdale Community Legal Services advises that sponsor now wants these two applications to be assessed on H&C grounds…" (emphasis added). The only earlier reference to H&C consideration in the CAIPS was when the file was initiated in June 16, 2005 and states, "counsel has provided a complete submission for special consideration including H&C which will be forwarded to the v/o". However, in Mr. Keshub's affidavit, he makes reference to receiving the June 5, 2006 submissions giving the background of the PA's applications and a request that the application be processed on H&C grounds, but does not note that this is inconsistent with his stated belief that the PA changed his mind about how he wanted the application to be sponsored in 2008.

[23] The PA continued to attempt to fulfill the requirements demanded by the CHC, corresponding with them in August 2008 regarding the outstanding documents, explaining the difficulty he was having acquiring them and again reiterating that the PA wanted to sponsor the children on H&C grounds, and as children he wished to adopt.

[24] The PA travelled to India in May 2009 to obtain a guardianship order. His hearing was rescheduled three times before finally taking place June 1, 2009. During the same visit the PA repeatedly visited the CARA to obtain a "No Objection Certificate". CARA declined to provide

such a certificate as neither the PA nor the minor co-Applicants were citizens of India and CARA did not belief itself to have jurisdiction over the matter. The PA eventually got the Deputy Director of CARA to issue a letter saying as much.

[25] In July 2009, the PA received the written decision of the Indian court. The court decided that it could not issue the PA a guardianship order because he was found to be in fact and in law the father of the minor co-Applicants since they were born during his marriage to their mother. The judge acknowledged that the PA's need for guardianship arose in the context of a negative DNA test, but noted that the test results had not been placed on the record, despite the fact that the PA had submitted an affidavit regarding the DNA test.

[26] The PA wrote to the CHC in September 2009 including an affidavit sworn by the PA detailing his attempt to obtain a guardianship order and his current concerns regarding the well-being of his children, a copy of the letter from CARA and a copy of the court order refusing to grant the PA a guardianship order. The PA requested that the minor co-Applicants be granted TRPs pursuant to subsection 24(1) of IRPA allowing them to await the CHC's final decision in Canada.

[27] In October 2009 the Respondent advised the PA by e-mail that the additional information provided in September 2009 would be reviewed and that a final decision would be rendered in 10-12 weeks. After receiving no further communication, in December 2009 the PA sent a follow-up letter requesting an update, and reminding the visa officer that the PA had made a formal request for the issuance of TRPs for the minor co-Applicants. Two additional follow-ups were sent in January 2010, each with a second and third formal request for TRPs.

[28] By way of letter dated January 11, 2010 the CHC informed the PA that in order to review his application on H&C grounds they required a guardianship order appointing the PA as the legal guardian. The PA was advised to apply to the court for a guardianship order, this time filing the DNA evidence. The PA responded on January 28, 2010 once again explaining the reason that he was unable to obtain the required order and urging the visa officer to make a decision based on the information available. In this letter, the PA made the third formal request for the TRPs.

[29] The PA received no response to his letters, and so sent another follow-up letter to the visa officer in March 2010 including a fourth formal request for TRPs and advising the visa officer that the PA would be filing a *mandamus* request in the Federal Court if their was no response within seven days. The CHC responded via e-mail April 1, 2010 again asking for the guardianship document that had been requested on January 11, 2010.

[30] The PA filed an Application for Leave and for Judicial Review in this Court, following which Mr. Keshub provided his affidavit on behalf of the Minister Respondent. In response to concerns the Immigration Officer raised in his affidavit regarding the non-existence of a death certificate for the minor co-Applicants' mother, the PA prepared a further affidavit and sent this to the CHC on New Delhi on July 23, 2010. Included was another request that the children be granted TRPs.

[31] The PA sent further submissions to the CHC in New Delhi in September 2010 emphasizing the risk faced by the children. The PA alleges that as of February 2011, Yonten will require an

Indian Registration Certificate in order to have legal status in India. Since his only known parent, the PA, is now a Canadian citizen it will be impossible for Yonten to get this document. At that point he will be living in India illegally and will be unable to continue his education. Another request for TRPs was made on October 4, 2010.

[32] On October 21, 2010 the Federal Court granted leave on this application.

[33] On October 31, 2010 Mr. Keshub responded to the PA, again informing him that the applications were not being processed because the CHC required an order of guardianship. Mr. Keshub indicated that he believed the Indian court erred the first time because the Court only relied upon affidavit evidence for proof the PA's marriage, which in fact was a common-law relationship. Mr. Keshub informed the PA that he could apply for Minister's permits for the children, but that they might not be approved since it was clear that he was not the biological father of the minor co-Applicants.

## II. Issue

[34] The issue to be decided is whether the Applicants are entitled to an order of *mandamus* with respect to the PA's pending application for immigrant visas and TRPs for his two *de facto* dependent children on H&C grounds based on the evidence provided and pursuant to the settlement agreement of 2004.

## III. Argument and Analysis

[35] *Mandamus* is a discretionary equitable remedy. For this Court to issue an order in the nature of *mandamus*, the following criteria, as set out by Justice Joseph Robertson writing for the Federal Court of Appeal in *Apotex Inc. v Canada (Attorney General)*, [1994] 1 FC 742, [1993] FCJ No 1098 (QL) (CA); affirmed [1994] 3 SCR 1100 at para 45, must be satisfied:

> 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: [omitted]
> 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…
> 8. On a "balance of convenience" an order in the nature of mandamus should (or should not) issue.

[36] The Respondent's submission focused on the third criterion. Specifically, the Respondent submits that the PA has not satisfied all conditions precedent and that the lengthened processing time required by the presence of "special circumstances" is not *prima facie* unreasonable (*Lee v Canada (Secretary of State)* (1987), 16 FTR 314, 4 Imm. L.R. (2d) 97 (TD)).

A. *Conditions Precedent*

[37] The PA submits that there is a clear right to the performance of the duty and that the PA has submitted and re-submitted all documentation requested to the best of his ability and has thus satisfied all conditions precedent giving rise to the duty.

[38] The Respondent submits that the PA has failed to provide the Respondent Minister with a death certificate for his former common-law partner, Pema Bhuti, and that without this, the Respondent has no conclusive evidence that the minor co-Applicants' mother is dead. Given the negative results of the DNA test, and in light of the factual backdrop of this case, the Respondent argues that it is not unreasonable to require that the PA be designated the legal guardian of the minor co-Applicants.

[39] The concern regarding the provision of a death certificate for the PA's wife was never brought to the PA's attention until the Respondent's materials were filed for this application. In response, the PA swore another affidavit explaining why he did not have a death certificate and detailing his brother's unsuccessful attempts to obtain one from the equivalent of the coroner's office in New Delhi in the summer of 2010.

[40] I understand that the Respondent has concerns regarding the parentage of the minor co-Applicants. In accordance with the legislation and regulations the potential for abuse and child trafficking remains a major concern of the Respondent. However, the PA has now spent five years trying to address these concerns. There is nothing in the record to indicate that the PA's efforts have

ever amounted to anything less than a noble attempt to comply with the Respondent's demands and expedite the arrival of the minor co-Applicants in Canada. From what I can see in the record, there have never been any inconsistencies that raised the suspicion of the representatives of the Respondent. At this stage, the passage of more time seems unlikely to cure the deficiencies on which the Respondent remains focused.

[41] The Respondent maintains that the PA should re-attempt to obtain a guardianship order from the Indian court - despite the PA's repeated explanations of how the time and cost of doing so are prohibitive. The PA argued in his most recent submissions that the matter would be considered *res judicata* by the Indian court. I am not comfortable expounding on what would or would not be the likely outcome of a second application to an Indian court, but note that at this moment, the PA is considered by the Indian court to be the putative father of the minor co-Applicants.

[42] The Respondent seems to be dissatisfied with this finding that the PA is the "biological father" since it has in its hands conclusive evidence that the PA can not possibly be the biological father. Furthermore, the record reveals that the Respondent thinks this decision was arrived at in error since it is based on the belief that the birth of the minor co-Applicants occurred during a marriage between the PA and Pema Bhuti, the existence of which is not proven with the usual kinds of documents.

[43] In fact, the order of the court only refers to the PA as the father and not the biological father and the PA has previously sworn to the specifics of the relationship he had with the mother of the minor co-Applicants and her subsequent death. In the initial application in 2003 the PA provided

the Respondent with the birth certificates and school documents of the minor co-Applicants in which he is described as their father.

[44] I can see no reason to say that the PA has failed to meet the conditions precedent, especially when the PA asked the Respondent to make a decision based on the material available, and the Respondent assented, estimating that a decision would be arrived at in 10-12 weeks from October of 2009.

B. *Unreasonable Delay*

[45] Three requirements must be met in order for a delay to be considered unreasonable: (1) the delay in question must have been longer than the nature of the process required, *prima facie*; (2) the applicant and his counsel must not be responsible for the delay; and (3) the authority responsible for the delay must not have provided a satisfactory justification (*Conille v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 FC 33, 159 F.T.R. 215 at para 23. In this case, I am satisfied that the PA has satisfied all three criteria.

[46] The Respondent submits that what is important in the case of permanent resident visas is not whether the Respondent has explained a lengthened processing period, but whether the record as a whole gives a preliminary indication of special circumstances. I can agree that there are special circumstances in this case, but as I think I have made clear already, the delay has been longer than these circumstances required and has not been satisfactorily justified in these proceedings by the Respondent.

[47] Each demand for *mandamus* turns on its own particular set of facts. As Justice Michael Kelen wrote in *Dragan v Canada (Minister of Citizenship and Immigration)*, [2003] 4 FC 189 (TD), affirmed 2003 FCA 233:

> […]What period of time would be considered too long to process an immigration file? In *Bhatnager*, supra, the delay was four and a half years; in *Dee*, supra, and in *Bouhaik*, supra, about four years; in *Conille*, supra, and in *Platonov*, supra, about three years. All those delays were considered unreasonable on the facts. The holdings did not, in the words of Strayer J. in *Bhatnager*, supra. at page 317, "fix any uniform length of time as being the limit of what is reasonable." Justice MacKay in *Platonov*, supra, also expressly cautioned against such an approach at paragraph 10:
>
>> Each case turns upon its own facts, and I am not persuaded that the jurisprudence in relation to this matter is particularly helpful, except to outline some parameters within which the Court has issued an order in the nature of mandamus where it has found there has been unusual delay which is not reasonably explained.

[48] As the PA argues, the six-year plus delay has been much longer than the one to two year processing time estimated by the Respondent for an H&C application. Mr. Keshub sent the PA a letter in October 2009 stating that a decision would be made in 10-12 weeks. However, an April 2010 e-mail from Mr. Keshub made it clear that a decision had still not been made.

[49] The Respondent submits that the lengthened processing time has been necessitated by the failure of the PA to provide sufficient evidence to establish that he has the legal authority to bring the minor co-Applicants to Canada. However, more than six years since the initial application, more than two years since the Respondent re-realized that the application was to be processed on H&C grounds, a misunderstanding the Respondent makes no attempt to explain, an ample amount

of time and correspondence has ensued in which the Respondent ought to have at least raised the issue on which the he now relies to explain the delay. Despite the suggestion in the Respondent's written submission, I will not be able to deny this application on the basis that the question of whether or not Pema Bhuti is actually dead has yet to be definitively answered.

[50] The PA has submitted and re-submitted evidence. No reason has been given for disbelieving any of the supported documentation. The Indian court considers him the putative father of the minor co-Applicants. I share the PA's view that based on the evidence, a court in Canada would likely also find that the PA is the *de facto* parent of the minor co-Applicants, responsible for their care and support, DNA evidence aside.

[51] The delay has become unreasonable.

[52] The Respondent does not seem to contest, and I find, that all of the other requirements of the *mandamus* test are met.

[53] The PA currently finds himself in a Kafkaesque state of limbo. It is unreasonable for the Respondent to expect the PA to wait any longer for a decision. The PA is asking for a decision to be made based on H&C considerations that would exempt him from specific obligations imposed by IRPA and presently imposed by the Respondent. It is paradoxical that the Respondent refuses to issue a decision because it lacks specific documentation that the decision itself might very well exempt the PA from having to provide.

## IV. Conclusion

[54] In consideration of the above conclusions, this application for judicial review is allowed. The Respondent is ordered to make a decision within 30 days.

[55] No question to be certified was proposed and none arises.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** this application for judicial review is allowed. The Respondent is ordered to make a decision within 30 days.

" D. G. Near "

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | **IMM-2104-10** |
| **STYLE OF CAUSE:** | **DHONDUP ET AL. v. MCI** |
| **PLACE OF HEARING:** | **TORONTO** |
| **DATE OF HEARING:** | **JANUARY 19, 2011** |
| **REASONS FOR JUDGMENT AND JUDGMENT BY:** | **NEAR J.** |
| **DATED:** | **JANUARY 31, 2011** |

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| | |
|---|---|
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| Michael Butterfield | FOR THE RESPONDENT |

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