Federal Court  Cour fédérale

Date: 20140402

Docket: IMM-977-13

Citation: 2014 FC 322

Ottawa, Ontario, April 2, 2014

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

ABBAS FARIBORZ MAZAREI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application by 63 applicants (the applicants) pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] for judicial review of the respondent's failure to render a decision with respect to their applications for permanent residence in the Quebec Investor class. The applicants request an order in the nature of a *mandamus* requiring the respondent to render a final decision on their applications within a specific time-frame not exceeding one year.

BACKGROUND

[2] The 63 applicants who are party to this judicial review are all investors who were selected by the province of Quebec for immigration purposes. In order to be selected, they were required to make an investment of $400,000 with a designated financial intermediary of the Investor Program, which they did between August 2010 and February 2012. Pursuant to making this investment, the applicants were issued a *Certificat de Sélection du Québec* by the *Ministère de l'Immigration et des Communautés Culturelles* confirming that they met all the conditions to be duly selected as an Immigration Investor by the province of Quebec.

[3] As a result, the applicants submitted Permanent Residence applications to the Visa and Immigration Section of the Canadian Embassy of Damascus in Syria between April 2010 and December 2011.

[4] On January 31, 2012, the Canadian Embassy in Damascus closed due to civil strife. The applicants' files were redistributed to the visa office in Ankara, Turkey. Approximately 22,000 permanent resident files were transferred from Damascus to Ankara, including 7,687 files that needed adjudication. The transfers began in February 2012 but problems with customs in Syria and Turkey delayed the process. The physical transfer of all files was completed in May 2012.

[5] On April 29, 2012, the Visa and Immigration Section in Tehran, Iran, closed and 50,000 temporary resident files were also transferred to Ankara, including 8,100 that needed adjudication.

[6] During the spring and summer of 2012 resources in Ankara were shifted to hasten the processing of temporary resident applications during the peak summer season. The objective was to reduce the resources for processing economic applications in order to address priority applications in other categories, such as business, refugee, family class and temporary residents.

[7] The Ankara office also hired 17 new staff members in order to deal with the increased workload. Visa officers with decision-making ability were involved in the hiring and training process.

[8] Since the filing of their permanent residence applications, the applicants have not received a decision from the respondent.

DECISION UNDER REVIEW

[9] This application was brought after a request was filed by the applicants pursuant to Rule 9 of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22. The applicants made a request under Rule 9 and received a response from the Respondent dated February 13, 2013 stating that no decision had been made on their application under the Quebec Investor Program.

ISSUE

[10] I find that the determinative issue in this application is whether there is a satisfactory justification for the delay in processing the applicants' application for permanent residence.

APPLICANTS' SUBMISSIONS

[11] The applicant contends that the excessive nature of a delay can only be understood in light of the particular circumstances of a situation. He argues that Justice Snider, in *Vaziri v Canada (Minister of Citizenship and Immigration),* 2006 FC 1159 [*Vaziri*], made clear that there is no fixed length of time according to which a delay must be considered unreasonable. Justice Tremblay-Lamer set out the criteria for the determination of whether a delay is unreasonable in *Conille v Canada (Minister of Citizenship and Immigration)*, [1999] 2 FC 33, [1998] FCJ No 1553 at para 23 [*Conille*]:

> (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.

[12] The applicant argues that the delay in question is particularly unreasonable in light of the fact that once processing of the application begins, eligibility, security and medical assessments will have to be carried out, further prolonging the process. As a result, it is the "numerous months still to come" that the applicant alleges is unreasonable and warrants the issuance of a *mandamus*.

[13] In addition, the applicant argues that because applicants are required to comply with fixed time delays, the same obligation should be incumbent upon the respondent.

[14] The applicant also argues that the closure of the Canadian Embassy in Damascus cannot serve to explain or justify the delay the applicants are facing. This argument appears to have two

bases: firstly, the only measure the respondent took to address the increased caseload in Ankara was the hiring of 17 additional staff, a clearly inadequate measure; and secondly, the closure of the Damascus and Tehran offices have created an increased workload at the Canadian Embassy in Ankara, and as Justice Kelen stated in *Dragan v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 211, [2003] 4 FC 189 at para 58 [*Dragan*], an enormous workload cannot be used as an excuse for the delay in processing a valid claim, which claim would have been accepted but for the delay and change in legislation.

[15] The applicant also alleges that the applicants in question have suffered great prejudice from the delay in the processing of their applications in that they have had to freeze $400,000 each since they complied with the investment requirement.

[16] Forty-four of the 63 applications for leave are from Iranian citizens. The *Special Economic Measures (Iran) Regulations*, SOR/2010-165, make it extremely difficult for Iranian citizens to transfer money to financial institutions in Canada. Further, Iranian rials have lost two-thirds of their value since the applicants submitted their applications. All this means that the applicants' assets have significantly decreased in value while they have been waiting for the processing of their applications.

[17] The applicant alleges that, in consideration of the criteria for granting a *mandamus*, there is no alternative way to remedy the situation.

[18] The applicant further alleges that the argument that granting a *mandamus* would be allowing him to "jump the queue" is baseless since this would deprive a *mandamus* of its very essence.

[19] In closing, the applicant alleges that the balance of convenience supports his application.

[20] Finally, the applicant requests costs, citing *Platonov v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 1438, 192 FTR 260; and *Ben-Musa v Canada (Minister of Citizenship and Immigration)*, 2005 FC 764, [2005] FCJ No 942 .

ANALYSIS

[21] The applicants and respondent agree that the test for the issuance of a *mandamus* was established in *Apotex Inc v Canada (Attorney General)*, [1994] 1 FC 742 [*Apotex*]. The *Apotex* test was restated by the Federal Court of Appeal in *Canada (Attorney General) v Arsenault*, 2009 FCA 300 as the following:

> 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 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;
>
> 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:
>
> 8. On a "balance of convenience" an order in the nature of mandamus favours the applicant: […]
>
> [Emphasis in original]

[22] The most contentious issue for our purposes is the second element – that there has been a 'reasonable time' to comply with the duty.

[23] What, then, constitutes a 'reasonable time'? As the applicant himself points out, the jurisprudence of this Court has established that, in the evaluation of the length of a delay, no

particular fixed delay can be applied uniformly. Rather, an evaluation must be made in the particular circumstances (*Vaziri*, cited above, at para 48; *Dragan*, cited above, at para 55).

[24] Also as pointed out by the applicant, Justice Tremblay-Lamer in *Conille* (cited above) established some helpful criteria for evaluating a delay. In this case, regardless of the analysis carried out under the first two *Conille* criteria (that the delay in question be longer than the nature of the process required, and that the applicant and his counsel not be responsible for the delay), the applicants would clearly fail at the third step, that the authority in question provide satisfactory justification for the delay.

[25] The respondent has provided ample explanation for the delay: that the Canadian Embassy in Damascus closed due to the civil strife in Syria, and that the Visa and Immigration Section of the Canadian Embassy in Tehran subsequently closed, such that all the permanent resident applications at these respective embassies were transferred to the Canadian Embassy in Ankara, which was extremely overburdened as a result. These circumstances constitute an extraordinary situation.

[26] The respondent further explained that 17 new staff were hired to deal with the increased workload, more than doubling the number of staff at the Canadian Embassy in Ankara; previously there were 16 staff members. However, the hiring of new staff entailed training, further straining the resources at the Embassy in Ankara. This would appear to indicate that the respondent acted in good faith in an attempt to deal with the situation.

[27] This context is very important, as was made clear by Justice Snider in *Vaziri* (cited above), who stated the following at paras 53-55:

> [53] There are two ways to look at whether the delay has been longer than the nature of the process required. The first way is to consider a PR application in a vacuum, without considering whether it relates to a parent or grandparent or to someone from another class. In that case, the deliberate delay at the sponsorship stage and at the beginning of the PR application stage clearly extends the amount of time required to process the Applicants' applications beyond the time strictly necessary to assess the applications.
>
> [54] On the other hand, if one takes a wider and more detailed view, then the length of time taken is within the time that the nature of the process requires, because there are simply too many applications for Canada to allow them all, resulting in annual levels being set. Even among the number of applications that can be allowed within a given year, the Minister must discriminate between the classes in order to meet the goals of IRPA and the explicit policies of the Government. In this context, applications relating to parents and grandparents require a longer time to process than most other PR applications. The nature of the process is longer.
>
> [55] I prefer the latter view. The "nature of the process" must be informed by a full understanding of where the Applicants' applications fit within the immigration scheme. It is inherent in the system, as currently constituted, that some PR applications are processed differently than others. FC4 applications are processed slower, in accordance with policies. Therefore the length of time taken to process the Applicants' files must be viewed in light of this longer process. Upon the evidence before me, then, it does not seem that the delay to date – between 3 and 4 years – is excessive. It would appear that this is in accordance with the expected times to process FC4 applications that were filed in 2003. Indeed, the Respondent indicates that the Applicants' files are expected to be completed sooner than would be expected, since the rate of PR applications being received in the last year or two is lessening.

[28] As a result, as Justice Snider underscores, the applicants' applications must be understood within the immigration scheme. As the respondent explained, a choice was made mid-2012 to reduce resources for economic applications in order to process priority applications in the business,

refugee, and family class, as well as temporary resident applications, which was certainly an understandable choice in the context of a vicious civil war. As Justice Snider points out, it is inherent in the system that some permanent resident applications are processed differently than others.

[29] The applicants relied upon *Dragan* (cited above) and *Meikle v Canada (Minister of Citizenship and Immigration)*, [1997] FCJ No 1274, 137 FTR 304 for the proposition that a *mandamus* cannot be refused solely because a 20-month delay is deemed "premature". The circumstances in those two instances are quite different than the case at bar. *Meikle* concerned a deportation order on the basis of criminality, and the issue was whether there had been a breach of a principle of natural justice or procedural fairness for failing to process the applicant's notice of appeal for almost two years, thus precluding an appeal. *Dragan* concerned a legislative change that occurred while a group of applicants were waiting for their permanent resident applications to be processed, and which affected the rights of those applicants such that they were treated differently because of the delay and the change in the system that occurred in the meantime.

[30] In this case, it has been less than four years since the first applications were filed for permanent residence from the group of 63 applicants. There is no reason to believe that their applications will not eventually be processed and accepted. On the contrary, as the respondent pointed out, in 2013 the Ankara office reached its target of finalizing 300 applications in the Quebec Investor class.

[31] Finally, it must be noted that maintaining the integrity of the system requires consideration of the inequitable impact of allowing a *mandamus* application on other applications for permanent residence.

[32] The evidence indicates that the applicant's application was preceded by 519 to 523 applications for permanent residence as of June 4, 2013. If his application were allowed, in essence the applicant would be allowed to "jump the queue," thereby violating the fundamental rule of fairness by which the processing of applications occurs in order of the date of their filing.

[33] Justice Phelan, in *Agama v Canada (Minister of Citizenship and Immigration)*, 2013 FC 135 at paras 20-21, remarked that it would be inequitable to grant a similar application considering the impact of his decision on other applicants who were also waiting for processing:

> [20] In applying the fairness principle, it is relevant in this case to look at the impact of the Applicant's position vis-à-vis others. All those persons who filed after September 19, 2011 but before the Applicant would have just as legitimate complaint as the Applicant. Since they were prior in filing time, their applications would have priority over the Applicant.
>
> [21] Even if there was some basis for the Applicant's position, it would not be equitable to grant relief without addressing the situation of these other applicants.

[34] As a result, I find that the applicant has not demonstrated that the delay is unreasonable, and the granting of a *mandamus* is not merited in the circumstances.

[35] The applicant submitted the following question for certification:

> "If an applicant successfully establishes that he is entitled to the issuance of a writ of *mandamus* considering all the circumstances put

> forward in his case, should the potential impact of the issuance of the relief on other individuals who are not part of the application prevent the Court from granting the *mandamus* to the applicant?"

[36] In order to certify a question for appeal, a question must be (i) dispositive of the appeal and (ii) transcend the interests of the immediate parties to the litigation, as well as contemplate issues of broad significance or general importance (*Zhang v Canada (Minister of Citizenship and Immigration)*, 2013 FCA 168). The proposed question is not dispositive of the issue, as there are other factors influencing the outcome, including the actions taken by the respondent in response to the delay and the causes for the delay. As a result, the question proposed by the applicant does not merit certification.

[37] These Reasons for Judgment and Judgment will apply to all the files indicated in Annex A, attached.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

"Peter Annis"

Judge

ANNEXE A

1.	IMM-971-13	AKBAR ADI GOZAL
2.	IMM-974-13	JALIL PAKRAVESH
3.	IMM-979-13	KHADIJEH SARSEPAR
4.	IMM-985-13	MOHAMMAD HOSSEIN TOOSI
5.	IMM-1216-13	ABDULHALEEM HAMEED MUKHLIF ALMALHMI
6.	IMM-1217-13	ALAALDIN AHMED YONIS ALMUZIAN
7.	IMM-1218-13	SALIH HWAIDI NASER NASER
8.	IMM-1220-13	HUSSEIN FADHIL BALMAN AL SAIGH
9.	IMM-1222-13	NIZAR ROUMANI
10.	IMM-1223-13	ABDUL GHANI SARHAN
11.	IMM-1224-13	FARIS MOHAMMED DHEYAB DHEYAD
12.	IMM-1225-13	FOUAD QASIM MOHAMMED AL AMERI
13.	IMM-1226-13	KAMAL ABDULATEEF YAS YAS
14.	IMM-1227-13	RAAD ISSA YOUSIF AL-ISSA
15.	IMM-1228-13	MOHAMMED GH. M. ABBAS
16.	IMM-8264-13	SAQAFI FARIBORZ
17.	IMM-2087-13	AYMAN ALZUHAILI
18.	IMM-8265-13	JAVAD HARANG

19. IMM-8266-13 MAJID HABIBIZADEH

20. IMM-8268-13 ZEINOLABEDIN SHARIFI SIATNI

21. IMM-8269-13 GHOLAMREZAEY AHMAD

22. IMM-8270-13 RAMIN NASSIMI

23. IMM-8271-13 SEYED NEHZAD POUSTI

24. IMM-8272-13 DREZA DAVOUDI RAD

25. IMM-8273-13 KAMBIZ ASHOURI

26. IMM-8274-13 KHALIL FANI YAZDI

27. IMM-8275-13 HEDESHI, HOSSEIN

28. IMM-8276-13 LAJOUE KALAKI SAEYED HOSSEIN

29. IMM-8277-13 HOSSEIN RAAFATISHBANI

30. IMM-8279-13 FARIDEH FOROOTAN

31. IMM-8280-13 JALAL YARMOHAMMAD

32. IMM-8281-13 KAZEMEINI ABDOLRAHIM

33. IMM-8283-13 MOHAMMAD SHID FAR

34. IMM-8284-13 BAHRAM DANESHVAR

35. IMM-8285-13 NOJABA BABAK

36. IMM-8286-13 PARVIN RIAZRAFAT

37. IMM-8287-13 JIRIANI, MEHDI

38. IMM-8288-13 MOHSEN HONARIAN

39. IMM-8289-13 OYARHOSSEINI ALIASGHAR

40. IMM-8290-13 MOGHADDAM SALEK

41. IMM-8291-13 PIRAYESH JUBIM

42. IMM-8292-13 SHADNOOSH, MOHAMMAD MEHDI

43. IMM-8293-13 SEYEDABOLFAZL AHMADPANAH

44. IMM-8294-13 KHOMARLOO PENDAR

45. IMM-8295-13 SABRI, ASHKBUS

46. IMM-8296-13 JAMALI, DR. HOSSEIN

47. IMM-8297-13 SAEID M. POORTEHRANI

48. IMM-8298-13 TAJDARI, RAMTIN

49. IMM-8299-13 ABBAS SHAHBAZIAN

50. IMM-8300-13 SHAHROKH KHANDABI

51. IMM-8302-13 FARZAD IZADI

52. IMM-8306-13 DEHJI ABDOLHOSSEIN

53. IMM-1064-14 AHMAD MOHAMMADKHANI

54. IMM-1065-14 ABOLF JALALI

55. IMM-1066-14 MAHMOUD MOHAMMADKHANI

56. IMM-1069-14 MOHSEN REZAEI

57. IMM-1070-14 ALI SHAH HAMZEH

58. IMM-1071-14 KARIM RAJI

59. IMM-1072-14 NASER AAVANI

60. IMM-1117-14 BEHZAD AHADI

61. IMM-1118-14 ALIREZA RABBANI ESFAHANI

62. IMM-1119-14 MAJED SAHYOUN

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-977-13
STYLE OF CAUSE:	ABBAS FARIBORZ MAZAREI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	MONTREAL, QUEBEC
DATE OF HEARING:	FEBRUARY 27, 2014
REASONS FOR JUDGMENT AND JUDGMENT:	ANNIS J.
DATED:	APRIL 2, 2014

APPEARANCES:

Stéphanie Riccio Ingrid E. Mazzola	FOR THE APPLICANT
Daniel Latulippe Charles Junior Jean	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Rochefort & Associates Lawyers Montréal, Quebec	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT