Federal Court  Cour fédérale

Date: 20140430

Docket: IMM-4628-13

Citation: 2014 FC 399

Ottawa, Ontario, April 30, 2014

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

NAGY WAGDY MOHAMED METWALY MOBASHER

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the *Act*) of the respondent's failure to process and render a decision with respect to the applicant's application for permanent residence in the investor category. The applicant seeks an order of *mandamus* requiring the respondent to process and render a final decision on his application.

I. FACTS

[2] The applicant is a citizen of Saudi Arabia. His application for permanent residence in Canada under the investor category was received at the Canadian High Commission in London, United Kingdom (CHC) on March 22, 2010. The applicant's wife and four children are included in the application. The applicant has not yet received a decision from the respondent.

[3] In April 2010, the applicant received a letter from CHC informing him that his application had been received. The letter indicated that the processing period at the time was estimated to be 12 to 18 months but that this was based on the current inventory of applications and that processing times may vary as a result of changes to the inventory. The letter further indicated that CHC will send a list of required documents to be returned within four months.

[4] On September 1, 2010, CHC sent a letter to the applicant requesting that the remaining supporting documents be submitted.

[5] On November 25, 2010, CHC received from the applicant the remaining documents required to assess his application.

[6] In February, 2012, the applicant's immigration consultant wrote to CHC requesting an update on the status of the file.

[7] On March 8, 2012, CHC informed the applicant that its workload had increased which impacted the usual processing times greatly, that applications were being processed in chronological order from the date of receipt, and that "it may be some time yet" to process his application.

[8] On July 10, 2012, October 9, 2012, and February 26, 2013, CHC replied to enquiries from the applicant's consultant informing him that the application was currently in a queue awaiting review, that processing delays continued, and that average processing time frames are based on an average only, and were not a guarantee.

[9] On July 9, 2013, the application was paper screened and assigned to an immigration officer for review.

A. *Changes to the federal Immigrant Investor Program*

[10] Several important changes were made to the federal Immigrant Investor Program (IIP) after the applicant submitted his application, as detailed in *He v Canada (Minister of Citizenship and Immigration)*, 2014 FC 92 at paras 4-9 [*He*] and the six companion cases that follow.

[11] Ministerial Instructions published on June 26, 2010 stated that investor permanent resident applications received after the coming into force of upcoming changes to the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the *Regulations*) would be processed concurrently with the old inventory. The Instructions also set an administrative pause on the acceptance of applications until the changes to the *Regulations* were made.

[12] On December 1, 2010, subsection 88(1) of the *Regulations* was amended to raise the "investment" required for an investor candidate from $400 000 to $800 000.

[13] The Operational Bulletin 252, published December 2, 2010, established a ratio for the processing of applications, providing that as a general rule, for every two "old" $400 000 applications received before December 1, 2010, the respondent must process one "new" $800 000 application received on or after December 1, 2010.

[14] The Ministerial Instructions published July 1, 2011 introduced a cap of a maximum of 700 new federal immigrant investor applications to be considered for processing each year.

[15] Finally, in the Ministerial Instructions published on July 1, 2012, a second administrative pause on accepting new immigrant investor applications was put into place, a pause that remains in effect to this date.

II. ISSUE

[16] The issue before this Court is whether the delay in processing this application is longer than the nature of the process requires and whether there is a justification for the delay.

III. ARGUMENTS OF THE PARTIES

[17] Both parties agree on the legal test for granting on order of *mandamus* as that set out in *Apotex Inc v Canada (Attorney General)*, [1994] 1 FC 742 (FCA), aff'd [1994] 3 SCR 1100

[*Apotex*]. This test is well-known and does not need to be repeated, as the present case turns on the nature of the delay in question.

[18] The test for determining whether a delay is unreasonable in the immigration context is established in my decision in *Conille v Canada (Minister of Citizenship and Immigration)*, [1999] 2 FC 33 at para 23 [*Conille*] as being:

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.

[19] On the one hand, the applicant submits that paragraph 3(1)(f) of the *Act* referring to prompt processing of applications and consistent standards applies to the present case. It has been recognized that the respondent has a public duty to process and decide immigration applications (*Liang v Canada (Minister of Citizenship and Immigration)*, 2012 FC 758 at para 25 [*Liang*]). The delay in the treatment of the applicant's application, currently standing at 49 months, is unreasonable as it far exceeds what the nature of the process requires (*Conille*). The applicant underscores that no action has been taken on his file other than the opening of an envelope, acceptance of the $400,000 investment as security to be held without interest, and the assignment of his file more than three years later.

[20] The applicant distinguishes the present case from the facts in *He*. While in *He*, there were no processing time estimates provided, here the applicant was notified in 2010 that the estimated processing period was 12 to 18 months. The applicant acknowledges that these representations

were not unqualified; however, he submits that the representations made by the respondent on the delay it expects to take to process the application constitute a valid indication of the normal delay required for the processing of applications of that nature (*Liang* at paras 28-31, 33, 37, 41). Boiler-plate statements such as "or longer", "several months after", and "we cannot tell" should not be taken as insurance against an order of *mandamus*.

[21] Further, the applicant argues that the respondent's justifications for the delay cannot succeed, since they are of its own making (*Liang* at paras 39, 40, 45; *Esmaeili-Tarki v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 697 at paras 14, 15). Allowing such an excuse would be contrary to the rationale that one cannot plead one's own turpitude. The present case can be distinguished from the "extraordinary situation" in *Mazarei v Canada (Minister of Citizenship and Immigration)*, 2014 FC 322 at paras 25, 26 where the processing of applications was delayed by the political situations in Iran and Syria, and where there was evidence that the respondent had taken measures to deal with the situation, including hiring 17 new staff members.

[22] On the other hand, the respondent submits that the applicant has not shown that all of the requirements for the issuance of a *mandamus* have been met in the present case. The respondent has never refused to act on the application and has continuously done all that it reasonably could to fulfill its obligation to process the application. The applicant's application is in active process and has been advanced diligently, as seen from the fact that several steps in the process have occurred and his position in the queue of applications has advanced. The processing of the applicant's file is thus far consistent with the processing of investor applications at CHC and the

current average processing time for such applications is 56 months. Further, any longer than expected delay can be explained by the fact that CHC has had to deal with increased inventory, backlog, and processing delays due to prevailing circumstances beyond its control.

[23] The respondent further argues that no legitimate expectations of a certain processing timeline or a specific time for a decision were created nor proffered by the respondent. The estimate of a processing time of 12 to 18 months communicated to the applicant was not clear, unambiguous, and unqualified, was based on information at that time, and thus cannot serve to establish processing time in any individual case. The introduction of concurrent processing of new applications by the Minister clearly increases the length of time the applicant's case will be outstanding, however these guidelines are entirely authorized by law. Being subject to such a wait does not give a person an action for *mandamus* (*He* at paras 28, 29; *Vaziri v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1169 at paras 36, 37). Granting this application for *mandamus* would in essence be to allow the applicant to jump the queue of all similarly situated applicants whose applications were filed before his, which would be fundamentally unfair *(Agama v Canada (Minister of Citizenship and Immigration)*, 2013 FC 135 at paras 20-22 [*Agama*]).

IV. ANALYSIS

[24] The central question before this Court is that of determining whether the processing time of the applicant's application is reasonable. With respect to the first factor in *Conille*, an evaluation of whether the delay in processing the application is longer than the nature of the process requires must be informed by a full understanding of the larger immigration scheme

(*Vaziri* at paras 53-55). At para 55 of *Vaziri*, Justice Snider specifies, "It is inherent in the system, as currently constituted, that some PR applications are processed differently than others".

[25] In the present case, according to the September 20, 2013 affidavit of the Immigration Officer, CHC finalized approximately 162 federal business applications between January and August of 2013, 220 in 2012 and approximately 285 in 2011. CHC's current average processing time for federal investor applications is 56 months, according to the Immigration Officer's February 24, 2014 affidavit. The applicant's delay, which currently stands at 49 months, is thus in accordance with this average.

[26] Here, the longer delay must be situated in the changes made to the IIP, including the enactment of a 2:1 processing ratio of old to new applications and a processing cap of 700 new applications per year. Coupled with these changes, CHC has had to deal with an increased inventory of applications to be processed arising from several factors beyond its control: the spike in applications in the lead up to the regulatory changes of December 2010, the taking over of responsibility for the processing of investor applications from the Islamabad visa office, and the labour dispute resulting in the withdrawal of service by Foreign Service Officers. Together, these circumstances serve as a reasonable explanation for the current backlog in processing applications, and thus satisfy the third part of the *Conille* test of a satisfactory justification for the delay.

[27] I agree with my colleague Justice Richard Boivin at para 28 of his decision in *He* dealing with similar facts, where he stated, "The Court can understand that the applicant might be discontent with the current IIP scheme because of its place in the queue, but it was legally set out and implemented in full contemplation of the law, more particularly of the powers adopted by Parliament pursuant to the new section 87.3 of the *Act*."

[28] In the present case, I am satisfied that despite a slow start, the processing of the application is currently proceeding at a normal pace, taking into account the changes to the IIP. As pointed out by the respondent, the applicant's file is presently active. It has advanced from being at the midpoint of approximately 200 applications that had been paper-screened and were awaiting review in September, 2013, to currently having 21 applications before it in the queue of paper-screened applications pending review.

[29] In such a case, the intervention of the Court is not warranted, and would only result in the inequitable outcome of allowing this application to jump the queue ahead of other applications that are also awaiting processing but are ahead of the applicant in the queue (*Agama* at paras 20, 21).

[30] I am also not convinced that the respondent's estimate of 12 to 18 months constituted the sort of "clear, unambiguous and unqualified" statement that would engage the doctrine of legitimate expectations (*Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 95; *Canada (Attorney General) v Mavi*, 2011 SCC 30 at para 68 [*Mavi*]). In *Mavi*, Justice Binnie explained the meaning of this standard through a reference to the law of

contracts, stating at para 69, "Generally speaking, government representations will be considered sufficiently precise for purposes of the doctrine of legitimate expectations if, had they been made in the context of a private law contract, they would be sufficiently certain to be capable of enforcement."

[31] In the present case, the original estimate of 12 to 18 months was qualified with the statement that it was based on the current inventory of applications and that processing times may vary as a result of changes to the inventory. Correspondence from the respondent in 2012 and 2013 notified the applicant that CHC had taken over the processing of applications from the Islamabad offices, resulting in a larger than normal volume of applications, and that it "may be some time yet" before the application is processed. The applicant was also informed that average processing time frames for applications are "based on an average only, and not a guarantee". Furthermore, it is important to note that unlike in *Liang*, there is no processing estimate set out in the guidelines and regulations affecting the current application. The respondent stating that the 2010 average processing time was 12 to 18 months does not give rise to a legitimate expectation of a certain processing time for the applicant, particularly given the changes to the IIP enacted since then.

[32] For these reasons, the Court's intervention is not warranted and the application for judicial review is dismissed.

[33] Unlike in *He*, the applicant in the present case does not wish to have a question certified.

JUDGMENT

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

No question is certified.

"Danièle Tremblay-Lamer"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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