Federal Court  Cour fédérale

Date: 20140605

Docket: IMM-2453-13

Citation: 2014 FC 543

Vancouver, British Columbia, June 5, 2014

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

MOHSEN MERSAD

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGATION

Respondent

JUDGMENT AND REASONS

[1] The applicant, a citizen of Iran, filed an application for permanent resident status for himself and his immediate family under the Federal Investor Class at the Canadian Embassy in Damascus, Syria in March 2008. Receipt of the application was confirmed by the respondent on April 15, 2008.

[2] Now, over six years later, the application remains in a queue at the Canadian Embassy in Ankara, Turkey, and the respondent is unable to predict when processing may begin. The applicant has, therefore, brought this application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] and section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 [the *Federal Courts Act*] for judicial review of the failure by the respondent to render a decision with respect to his application for permanent residence and for a writ of *mandamus*.

[3] Mr. Mersad was told in April 2008 that processing of the application would not begin for approximately 20-26 months due to the existence of a queue of prior applications, although circumstances might change. He was also told in the confirmation letter that he should prepare himself for immigration to Canada. As a result, he rearranged his business affairs and sent his son to Canada to pursue his education.

[4] Following the closure of the visa office at the Canadian Embassy in Syria in January 2012, the investor applications pending in Damascus were transferred to Ankara.

[5] The evidence of the Immigration Program Manager at the Ankara Embassy, Mr. Burke Thornton, is that, as of July 22, 2013:

> Given the inability to know what future targets or processing instructions will be, it is impossible to provide an accurate estimate of the processing time for Mr. Mersad's file. There are too many variables involved in predicting future processing times, which include, but are not limited to targets, world events, resources, changes in priorities, etc.

[6] The Ankara visa office had an admissions target, or quota, for 2012 of 115 investor applications and 99 for 2013. The admissions targets are part of an annual Immigration Levels Plan approved by Cabinet. Factors taken into consideration in planning these targets are said by Mr. Thornton to include "operational capacities and available resources, government of Canada priorities and goals, settlement funding, input from provinces and territories and other stakeholders, the government's responsibility to balance the benefits and costs of the immigration program so as to maintain public confidence in the system, the inventory of applications and ongoing demand, resource constraints including the number of staff and office space, backlog reduction strategies and CIC's service standards."

[7] As of January 2013, Ankara had a total caseload of approximately 1609 federal investor cases and there were 300 pre-June 26, 2010 cases submitted prior to the applicant's. The date of June 26, 2010 is significant because that was when the respondent minister instituted a temporary pause on the intake of new applications pending the making of new regulations governing the investor category.

[8] Section 87.3 of the *IRPA* provides that the Minister may give instructions establishing, among other things, the order for the processing of applications and the number of applications processed any given year. The instructions of June 26, 2010, provided that the processing of investor applications received after the coming into force of the new investor criteria regulations would be concurrent with the old inventory, "in a ratio consistent with operational requirements".

[9] The receipt of new applications was resumed after December 1, 2010, when revised regulations doubling the personal net worth and investment amounts required came into effect. Operational Bulletin 252 (OB-252) issued by the respondent proposed, "as a general rule" that the pre-June 26, 2010 applications be processed at a ratio of 2:1 to those submitted post December 1, 2010. According to OB-252:

> The concurrent case processing ratio of 2:1 is provided as a guideline only; this ratio may change over time in accordance with operational requirements and may not apply equally to all visa offices depending on the volume of investor class applications processed by a given visa office.

[10] From January 2013 to June 2013 the Ankara visa office had finalized 41 pre-June 26, 2010 investor applications and just 2 of the post-December 2010 applications, according to Mr. Thornton. This is, as he notes, a much greater ratio than that suggested in OB-252. Nonetheless, at that rate the earliest that Mr. Mersad's application could begin to be processed would be sometime in 2015.

[11] Mr. Mersad seeks an order in the nature of a writ of *mandamus* to compel the respondent to process his application within ninety (90) days.

[12] The issue is whether this application meets all of the criteria for the issuance of *mandamus* set out in *Apotex v Canada (Attorney General) (CA)*, [1993] 1 FC 742 at para 45, [1994] FCJ No 1098, aff'd in [1994] 3 SCR 1100:

> **45** Several principal requirements must be satisfied before mandamus will issue. The following general framework finds support in the extant jurisprudence of this Court...

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:

> (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 should (or should not) issue.

[citations excluded]

[13] The applicant submits that his situation satisfies all of these criteria. Subsection 11(1) and paragraph 3(1)(f) of the *IRPA* impart upon the respondent the public duty to promptly process the applicant's application for permanent residence. The applicant submits that he is owed a public duty because the application was submitted in good faith, accompanied by the required supporting documents, and all the required processing fees were paid. He had a clear right to the performance of the duty as he had satisfied all of the conditions precedent and had diligently pursued the processing of his application and is not responsible for the delay. At all times he had rapidly responded to communications received from the respondent.

[14] When it became clear that the respondent had not taken any steps to begin processing the application within the estimated time frame it had set, the applicant made a demand for performance of the public duty within a reasonable timeframe. The lack of a response from the respondent should be interpreted as an implied refusal to begin processing the application within that timeframe, the applicant argues.

[15] This Court has held that neglect to perform a duty or unreasonable delay in performing the duty may be deemed an implied refusal to perform the duty: *Dragan v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 211, [2003] 4 FC 189; *Kalachnikov v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 777, [2003] FCJ No 1016.

[16] The factors in deciding whether there has been an unreasonable delay were set out by this Court in *Conille v Canada (Minister of Citizenship and Immigration)*, [1999] 2 FC 33, [1998] FCJ No 1553 at para 23:

> **23** From the reasons of the Court, it appears that three requirements 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.

[17] The applicant submits that his application meets these three requirements. While each case turns on its facts with respect to the reasonable period of time for performing the public duty, the Court has found that the respondent's initial time estimate can be used to gauge what reasonable amount of time should be required: *Abdolkhaleghi v Canada (Minister of Citizenship and Immigration)*, 2005 FC 729, [2005] FCJ No 967 at paras 16-17. Here, more than six years have elapsed since the applicant was advised that processing would begin in approximately 20-26 months. This, he says, created an expectation that processing would not only be done but be completed within a reasonable time-frame that has now been far exceeded.

[18] The applicant acknowledges the unpredictable nature of the need to transfer applications from Damascus to Ankara, but notes that this occurred in January 2012, approximately one-and-a-half years after the 20-26 month timeframe elapsed. No explanation has been provided for the delay in beginning to process the application other than that the application is "in a queue pending review". He contends that there is no adequate alternative to *mandamus* to compel the respondent to carry out the duty owed and no equitable bar to the relief sought. In the result, he argues, the balance of convenience favours the issuance of the writ.

[19] The respondent's position is that while there has been delay in processing the application, there is no evidence that the Minister has refused to perform a duty, or that the Minister is not acting on Mr. Mersad's application in accordance with existing priority and targets, and in light of the large backlog of files awaiting processing. Due to the number of applications, the respondent submits, Mr. Mersad must wait to have his application processed in queue. Moreover, the respondent argues, Mr. Mersad has not demonstrated significant prejudice due to the delay in processing his application. Delay in and of itself does not meet the "significantly prejudiced" test. Mr. Mersad was advised at the outset that processing times were an estimate and any decisions that he made to make significant changes to his business and the education of his children were his own responsibility.

[20] The Minister's entitlement to set priorities for certain admission targets was recognized by Madam Justice Snider in *Vaziri v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1159 [*Vaziri*] at paras 36-37:

> **36** The Applicants also argue, in conjunction with their main thrust, that the Minister lacked any specific authority to prioritize or discriminate between different groups of family class applicants. I note that such discrimination is recognized in the provisions of *IRPA* and the *Regulations*; see for example special privileges conferred only on spouses and partners, set out in Division 2 of the *Regulations*. It would seem that the kind of discrimination that the Applicants find upsetting is inherent in *IRPA*, but even if it were not, I am convinced that the power to draw this distinction would fall within the Minister's power to manage the immigration flow on the basis of social and economic policy considerations. It could be said that this kind of discrimination was the same kind of distinction made by the MFO in *Carpenter Fishing*, above, based upon vessel length and historical performance of the licence owner. There is nothing in *IRPA* or the *Regulations* that appears to detract from such a power; again, this is reflective of the "framework" nature of the *Act*.

> *Summary*
>
> **37** In summary, I am satisfied that, in the absence of regulations made under s. 14(2) of *IRPA*, the Minister acted lawfully in establishing the 60:40 ratio, in establishing targets for visa approvals by class and in setting procedures for prioritizing sponsored applications within the family class.

[21] At paragraph 54 of *Vaziri*, Justice Snider noted that it was necessary to set annual levels for the number of applications that can be allowed within a given year. In those circumstances, she observed, "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."

[22] In several recent cases relating to the respondent's failure to render a decision with respect to applications for permanent residence in the investor category, the court has declined to grant *mandamus*: *Agama v Canada (Minister of Citizenship and Immigration)*, 2013 FC 135; *He v Canada (Minister of Citizenship and Immigration)*, 2014 FC 92 [*He*]; *Fang v Canada (Minister of Citizenship and Immigration)*, 2014 FC 94; *Mazarei v Canada (Minister of Citizenship and Immigration)*, 2014 FC 322 [*Mazarei*]; *Mobasher v Canada (Minister of Citizenship and Immigration)*, 2014 FC 399.

[23] In *Mazarei*, above, Justice Peter Annis found that the respondent had acted in good faith to deal with the extraordinary situation at the Ankara Embassy due to the transfer of files after the closure of the Damascus and Teheran visa offices. Justice Annis stated the following at paragraphs 31 and 32:

> [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.

[24] The respondent submits that similarly, in this case, if the applicant's request for an order of *mandamus* is granted, it would allow him to "jump the queue", which is inequitable.

[25] I appreciate that *mandamus* is an individual remedy which should not be denied solely on the ground that others may be similarly affected. Nonetheless, the Court can't ignore the obvious implications of favouring one applicant over others who are ahead of him in the queue.

[26] It is not difficult to feel sympathy for Mr. Mersad and his family in the circumstances in which they have found themselves. They did everything that was required of them to comply with the requirements of Canada's immigration program only to be stymied by events over which they had no control.

[27] Applying the *Conille* factors, the delay is more than the actual process requires and is not attributable to the applicants. However, I am unable to find that the authority responsible for the delay, the Minister, has failed to provide an adequate justification. The fact is that a great many people with significant financial resources, such as the applicant, wish to immigrate to Canada and the country can only absorb so many of them on an annual basis. Parliament has entrusted the determination of what that number should be and of the measures to put the necessary

administrative machinery in place to achieve that objective to the executive branch of government. This Court should not intervene to force the consideration of one applicant's case over the many that are ahead of him in the queue.

[28] The applicant has requested that I certify the question proposed by Justice Boivin in *He*, above:

> Are individuals who will be subject to a lengthy waiting period, prior to the assessment of their immigration applications under the investor class, due to the effective annual targets and ministerial instructions made under s. 87.3 of the IRPA, entitled to an order of *mandamus* to compel immediate processing?

[29] I agree with the respondent that this question would not be dispositive of an appeal as the determinative issue in this case is not the effect of the ministerial instructions but rather the volume of applications being assessed ahead of the applicant's. Moreover, in the circumstances of this case, the question does not transcend the interests of the parties.

[30] In closing, I note that in an order issued on October 23, 2013, I granted the respondent's motion under s 87 of the *IRPA* to protect certain information that was redacted and not disclosed in the Certified Tribunal Record. As I stated in that order, the content of the redacted information was not relevant to this application.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed. No question is certified.

"Richard G. Mosley"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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