Federal Court Cour fédérale

Date: 20230308

Docket: IMM-2237-22

Citation: 2023 FC 321

Ottawa, Ontario, March 8, 2023

PRESENT: Mr. Justice McHaffie

BETWEEN:

M.F.S.

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The parties agree that since the applicant has now landed in Canada as a permanent resident, her application for an order in the nature of a writ of *mandamus* is moot and should be dismissed. However, the applicant argues that given the almost five years it took for her application for permanent residence to be approved—a period that included two prior refusals, two settled judicial reviews, and three procedural fairness letters—the dismissal should be

accompanied by an order of costs of $15,000 in her favour pursuant to Rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules,* SOR/93-22 [*Immigration Rules*]. The Minister opposes the applicant's request for costs.

[2] For the reasons below, I conclude that although processing of the applicant's application has taken a considerable amount of time, the circumstances do not show any misleading or abusive conduct, nor any unreasonable and unjustified delay that would merit an award of costs.

II. Principles Governing Costs in Citizenship, Immigration, and Refugee Protection Matters

[3] The general rule is that no costs are awarded in favour of either an applicant or the Minister in matters before this Court pertaining to citizenship, immigration, or refugee protection. Rule 22 of the *Immigration Rules* provides that costs should only be awarded where there are "special reasons" to do so:

Costs	**Dépens**
22 No costs shall be awarded to or payable by any party in respect of an application for leave, an application for judicial review or an appeal under these Rules unless the Court, for special reasons, so orders.	**22** Sauf ordonnance contraire rendue par un juge pour des raisons spéciales, la demande d'autorisation, la demande de contrôle judiciaire ou l'appel introduit en application des présentes règles ne donnent pas lieu à des dépens.

[4] The *Immigration Rules* contain no definition of "special reasons," and the Federal Court of Appeal has recognized that the variety of circumstances that may give rise to an application for judicial review in the immigration context may render such a definition impossible: *Ndungu v Canada (Citizenship and Immigration),* 2011 FCA 208 at para 6. However, this Court has

consistently described the requirement for “special reasons” as setting a “high threshold” or a “high bar”: see, *e.g.*, *Ibrahim v Canada (Citizenship and Immigration)*, 2007 FC 1342 at para 8; *Singh v Canada (Citizenship and Immigration)*, 2022 FC 1643 at para 45; *Sisay Teka v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 314 at paras 41–42.

[5] The Court of Appeal in *Ndungu* summarized some of the factors relevant to a determination of whether special reasons exist. These include the nature of the case, the behaviour of the applicant, the behaviour of the Minister or the relevant immigration official, and the behaviour of counsel: *Ndungu* at para 7. The term “behaviour” in this context generally means the conduct of the relevant parties or their counsel in the processing of the applicant’s immigration file and/or the handling of the litigation. The Court of Appeal underscored that merely making an erroneous decision cannot justify an award of costs: *Ndungu* at para 7(5)(i). However, misleading or abusive conduct or unreasonable and unjustified delay in rendering a decision may merit a costs award: *Ndungu* at para 7(6)(iii)–(iv).

III. Grounds for the Applicant’s Request for Costs

[6] The applicant is a citizen of Iran. Both her claim for refugee protection and Canada’s concern about her admissibility arose from her work between 2008 and 2017 for businesses in the United Arab Emirates and Oman that are owned by her father and uncles. The applicant was aware that the businesses were effectively fronts for the Iranian government, purchasing equipment being used for weapons and the petrochemical industry. Over time, she came to recognize that they were engaged in money laundering and circumventing international sanctions against Iran.

[7] The applicant states that although she worked at these businesses, she was forced to work there by her father, who beat and threatened her, and that any involvement she may have had in the businesses' activities was involuntary. Her father had earlier held her in confinement in Iran, and she was confined at the businesses and forced to work for food and no wages, living in the offices. She was also harassed while working at the offices and, in January 2017, sexually assaulted in Oman by one of her father's business partners. The pregnancy that resulted from this sexual assault increased the risk from her father and uncles, who she feared would kill her and the baby if they found out about it. She fled to Turkey via Oman.

[8] The applicant was registered as a Convention refugee by the United Nations High Commissioner for Refugees (UNHCR) in Turkey, and applied for permanent residence in Canada as a privately-sponsored Convention refugee in November 2017. After additional information was provided by the sponsor in December 2017, the file was flagged for expedited processing in February 2018. An initial interview was conducted in March 2018 in Turkey, where the applicant was residing and where her child was born. A second interview, directed to concerns about her admissibility based on her work for her father and uncles' companies, was held in July 2018.

[9] A procedural fairness letter was sent shortly after the July 2018 interview, raising concerns that the applicant was inadmissible on grounds of organized criminality under paragraph 37(1)(*b*) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], due to her "activities in support of transnational money laundering, procurement of items for use in Iran's weapons program, and sanctions evasion." The applicant responded to the letter, raising

concerns about the adequacy of the letter, but stating that in any case, any involvement she may have had in illegal activity would have been due to duress and that she did not voluntarily engage in any criminal activity. A visa officer rejected her defence of duress and the applicant's application was refused on September 21, 2018, on the basis of inadmissibility under paragraph 37(1)(*b*).

[10] The applicant filed an application for judicial review of this first decision on September 27, 2018. The parties settled this application in December 2018, agreeing that the application would be sent back for redetermination by a different officer and the applicant would be given an opportunity to submit updated documentation.

[11] A second procedural fairness letter was sent in February 2019, to which the applicant responded shortly thereafter. A second refusal was issued in February 2020, again on the basis of inadmissibility under paragraph 37(1)(*b*). Based on notes in the Global Case Management System (GCMS) pertaining to this decision, it appears the visa officer who issued the rejection concluded that the defence of duress should not be assessed as it is "better reviewed at the Ministerial Relief level." Another application for judicial review was filed in February 2020. It was discontinued in April 2020, again as the result of a settlement in which the Minister agreed that the decision should be set aside and the application redetermined.

[12] In April 2021, a third procedural fairness letter was sent, again based on paragraph 37(1)(*b*) of the *IRPA*. A response was filed in August 2021, again raising the defence of duress, alleging that raising the same inadmissibility concerns constituted an abuse of process,

and requesting a decision within 60 days. In March 2022, the applicant filed this application for judicial review, requesting a writ of *mandamus* directing the Minister to render a determination within a reasonable time.

[13] In October 2022, the applicant's application for permanent residence as a Convention refugee was approved. She landed in Canada on November 23, 2022, as a permanent resident.

[14] The applicant argues there are "special reasons" justifying an award of costs in her case. She points in particular to the "egregious delay" on the part of Immigration, Refugees and Citizenship Canada (IRCC) in processing her claim, which took nearly five years between the approval of her sponsor and the ultimate approval of her claim. She asserts that IRCC's repeated reliance on paragraph 37(1)(*b*) despite several intervening judicial reviews amounted to a "bureaucratic nightmare" that constitutes an abuse of process and reflects an "endless merry-go-round of judicial reviews and subsequent reconsiderations" of the nature criticized by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 142. She argues her narrative clearly establishes the defence of duress, and that it was unreasonable for IRCC not to recognize this.

[15] The applicant submits that the lengthy delay in her case was made all the more unacceptable because of her own particular circumstances as a single mother who is a survivor of sexual assault, abuse, and enslavement, with significant mental health concerns arising both from her experiences and from the delay in processing, and with a child who also has severe health issues. These issues were brought to the attention of IRCC over the course of the years in follow-

up letters filed by her sponsors, asking for updates and urging prompt processing of her file. The applicant also refers to the Minister's initial refusal to consent to her request in this application to file a supplementary application record containing the April 2021 procedural fairness letter to ensure it was part of the record.

IV. Analysis

A. *First Preliminary Issue: The Minister's January 13, 2023, Response*

[16] On December 2, 2022, the applicant's counsel wrote to the Court advising that since she had recently landed in Canada, a number of the issues in this application were no longer at issue. Counsel flagged that the issue of costs remained outstanding, and advised the Court and the Minister that the applicant would be bringing a motion for costs.

[17] On December 14, the Minister brought a motion in writing seeking an order that the application be dismissed as moot, without costs to either party. The applicant responded to the Minister's motion on December 23, addressing the issue of mootness and bringing her own written motion seeking an order granting her costs. On January 4, 2023, the Minister filed a brief reply on the issue of mootness, noting the applicant's consent and asking that the motion based on mootness be granted without costs. On January 13, the Minister filed a response to the applicant's motion for costs, setting out the Minister's arguments as to why costs should not be granted in the case.

[18] On January 18, the applicant filed reply representations on the issue of costs, under cover of a letter objecting to the Minister's January 13 filing. In the applicant's submission, the issue of costs had been raised in the original application for leave, in her early December correspondence, and in the Minister's motion for an order dismissing the application "with no costs to either party." The applicant notes that the Minister's January 4 reply addressed costs and argues it was improper for the Minister to file a "second" reply to the applicant's response. She asks that the Court not consider the Minister's January 13 representations.

[19] In my view, the applicant's position is without merit. The applicant chose to put forward her arguments regarding costs by filing a motion seeking an order for costs. Her counsel made that procedural plan clear in the December 2 letter, noting that the motion would be filed once the applicant had provided supporting evidence. The applicant filed her costs motion in accordance with that plan on December 23. It was entirely appropriate for the Minister to respond to the applicant's motion with responding arguments filed within the time period provided in Rule 369(2) of the *Federal Courts Rules*, SOR/98-106. There is no reason for the Court to ignore the Minister's submissions on the applicant's motion for costs.

[20] The fact that the Minister filed a brief reply in accordance with Rule 369(3) on January 4 on the issue of mootness does not make the January 13 representations a "second reply" on the question of costs. Notably, the Minister's brief January 4 reply asked only that the "motion for mootness" be granted without costs. It did not address the costs of the application as a whole nor the applicant's claim for costs associated with her entire application for permanent residence. In my view, the January 4 reply in no way precluded the Minister from properly responding to the

applicant's costs motion. I will therefore consider the Minister's January 13 response on the issue of costs, as well as the applicant's reply of January 18.

B. *Second Preliminary Issue: Certified Tribunal Record*

[21] On December 8, 2022, Justice Gascon made an order pursuant to Rule 14(2) of the *Immigration Rules* that a certified copy of the tribunal's record be provided within 21 days. The Minister's motion for judgment dismissing the application as moot was filed less than a week later. A certified tribunal record (CTR) has not been produced. A motion for judgment does not act as a stay of the Court's production order. However, in the circumstances, the Court can presume that given the applicant's agreement that the matter is moot, it was felt that there was no benefit to incurring the cost of producing the CTR pending the Court's determination of the mootness motion.

[22] The applicant's submissions of December 23 request that a decision on costs be delayed until after production of the CTR, but only "should this Honourable Court wish to review the materials in this matter." In her letter dated January 18, 2023, the applicant states that the "parties" have not received the CTR "and believe that such a record would be of assistance to this honourable Court in its order for costs." I note that the applicant's statement that the "parties […] believe" [emphasis added] suggests that both the applicant *and* the Minister believe it would assist the Court to have the CTR. However, I see no indication in the Minister's submissions that the Minister believes the CTR would be necessary or helpful to the Court. Regardless, whether the applicant's statement is intended to cover both parties or is just a statement of the applicant's belief, it gives no detail as to why having the CTR would assist the Court.

[23] I am satisfied I have sufficient materials to decide the applicant's motion for costs without the CTR. The applicant's motion record in support of its request for costs contains considerable documentation regarding the history of the proceedings and the situation of the applicant and her daughter. The applicant has not identified any documents or information she does not have in her possession that would be expected to be in the CTR and that are necessary or relevant to her request for costs. It can be presumed from the fact that the applicant was granted permanent resident status that an IRCC officer concluded she met the definition of a Convention refugee and was not inadmissible to Canada. To the extent that the GCMS would include notes relating to this decision, the applicant has not explained why these notes would be relevant to the question of costs. In my view, requiring the production of a CTR at this stage, despite the mootness of the underlying proceeding, would simply create unnecessary costs that are not justified by the value of the CTR to the applicant's request for costs.

C. *Costs are not Justified*

[24] Having reviewed the facts and arguments set out by the applicant, I am not satisfied that an award of costs is justified.

[25] It is clear that the processing of the applicant's sponsored application for permanent residence was prolonged by the fact that two decisions by IRCC officers, one in September 2018 and one in February 2020, were set aside. Each decision concluded the applicant was inadmissible owing to her involvement with her father and uncles' businesses. Each rejected the applicant's arguments regarding the defence of duress: the first on its merits; the second, it seems, based on a conclusion that it was better addressed in the context of Ministerial relief.

Each decision was effectively conceded to be unsustainable by the Minister in agreeing that it be set aside and the application remitted for redetermination.

[26] However, an erroneous decision cannot alone justify an award of costs: *Ndungu* at para 7(5)(i), citing *Sapru v Canada (Citizenship and Immigration)*, 2011 FCA 35 at para 65. As the Minister points out, Justice Little recently concluded that even where, over a cumulative period of more than three and a half years, two prior refusal decisions were redetermined after settlements with the Minister *and* a third refusal was set aside by the Court, costs were not justified absent specific facts that met the high threshold contemplated in the *Immigration Rules*: *Singh* at paras 6–11, 44–46.

[27] I agree with the Minister that there is no evidence that the earlier decisions, while erroneous, were taken in bad faith. Indeed, the applicant does not contend that they were. Rather, the applicant relies primarily on (a) the overall time frame for processing her application; (b) the sending of repeated procedural fairness letters, which she describes as "re-traumatizing," and as a "cruel and senseless cycle"; and (c) her personal circumstances.

[28] In terms of the overall time frame, approximately four years and eleven months passed between the applicant's application in November 2017 and her approval in October 2022. About half of this time passed between the second settlement in April 2020 and the approval decision in October 2022. In this 30-month period, there were four months between the third procedural fairness letter and the applicant's response to that letter. The Minister does not raise a specific justification for the remaining 26 months of processing, which appears to have run largely during

the COVID-19 pandemic, but notes that IRCC's current published average processing time for refugee applications in privately sponsored refugee cases is 31 months after the sponsorship application is approved. Based on the evidence in the record, this average processing time appears to represent a material increase from the 19-month average published by IRCC in 2017.

[29] The applicant refers to this Court's decision in *Carrero*, in which Justice Bell found that unnecessary and unexplained delays arising from the transfer of a file and resulting errors warranted an award of costs: *Carrero v Canada (Citizenship and Immigration)*, 2021 FC 891 at paras 16–17. However, as the Minister points out, Justice Bell recognized that the original processing of the application for security reasons, which took 6 years, was not unreasonable in light of earlier cases where delays ranging from 4 to 11 years did not result in *mandamus* orders: *Carrero* at para 15. I also agree with the Minister that the unreported order of Associate Judge Aalto in *Buzko v Canada (Citizenship and Immigration)* (Court File No IMM-3525-14, December 22, 2014) is of little assistance. The award of costs in that case appears to have been warranted because a second rejection of a study permit was issued less than a week after a first application was settled, before the applicant had been given the opportunity to file additional documents in compliance with the terms of settlement.

[30] In the current case, although the two earlier refusals added to the time needed to process the applicant's application, I cannot conclude the overall time taken for the applicant's application is sufficient to constitute an unreasonable and unjustified delay or abusive conduct on the part of IRCC. It is clear there was a material issue that needed to be assessed, namely the inadmissibility concerns raised by the applicant's lengthy involvement with a business engaged

in international money laundering. While the applicant evidently wanted the processing of her application to proceed more quickly, and was understandably frustrated by the delays, particularly given her situation in Turkey, this is not sufficient to justify an award of costs.

[31] The applicant asserts that she did not have any knowledge about her father's work at any point during her forced labour, and that she consistently maintained this throughout the process. She argues the defence of duress "clearly applied" in her case such that she should never have been caught in the "bureaucratic nightmare" arising from the negative decisions. However, as the Minister points out, and contrary to the applicant's submission on this motion, the GCMS notes indicate that she stated in her interviews that she was very much aware that the businesses were fronts for the Iranian government, engaged in money laundering and avoiding sanctions. The issue of admissibility and the applicant's defence of duress were live issues throughout the process. While the applicant is of the view that her submissions on the issue of duress ought to have been accepted earlier in the process, I cannot conclude that the earlier negative decisions were improper or that the resulting processing time were abusive or unreasonable.

[32] Nor do I consider the issuance of the second and third procedural fairness letters to justify an award of costs. There is no indication that the settlement of either application for leave and judicial review was intended or agreed to resolve the issue of inadmissibility. Rather, the matter was to be sent back for redetermination, with the applicant having the opportunity to submit further documentation. Given this, the issuance of additional procedural fairness letters permitting the applicant to make further submissions on the issue of inadmissibility cannot be considered "cruel and senseless," or otherwise abusive. As the Minister points out, procedural

fairness letters are a requirement of the duty of fairness imposed by the common law, designed to give applicants an opportunity to address concerns raised in the processing of their file. It is therefore unclear how sending such letters to identify concerns that remain at issue can constitute special reasons or demonstrate improper conduct on the part of IRCC.

[33] The Minister agreed to settle the applicant's two prior applications for leave and judicial review on the basis that the matter would be redetermined. Notably, the evidence in the record, in the form of the GCMS notes, indicate that the terms of the first settlement included an agreement that there would be "no cost requested." The terms of the second settlement are not in the record beyond the reconsideration and the opportunity to submit further documentation. The evidence does not show that the continued examination of the substantive issue of the applicant's inadmissibility involved any abuse on the part of IRCC or its visa officers.

[34] The applicant and her mother have provided evidence regarding the impact on the applicant of the length of time it took to process and approve her application for refugee protection. As a single mother living with post-traumatic stress disorder and other mental health challenges, with a child who herself has significant medical needs, there is no question that the applicant experienced great difficulties over the course of the period when her application was pending. These difficulties cannot and should not be minimized. Such consequences may be relevant in assessing costs where there has been abusive conduct or unreasonable or unjustified delays: see, *e.g.*, *Carrero* at para 17. However, I conclude that the delays in the current case, much of which arise simply because there were earlier erroneous decisions in the handling of the applicant's application, do not constitute abusive conduct or unreasonable or unjustified delay.

[35] Finally, the applicant points to the Minister's "unreasonable behaviour" in initially refusing to consent to the applicant's filing of a supplemental record to include the April 2021 procedural fairness letter, consenting only after the applicant had prepared a motion record. The applicant's motion record provides little in the way of supporting details or evidence to allow the Court to assess this allegation. However, based on a review of the Court file, it appears the applicant has left out relevant details regarding the nature of her motion and its result. As the Minister notes, the applicant's motion sought to file a supplemental record that included not only the April 2021 procedural fairness letter, but also her entire application for a temporary resident permit [TRP], filed after this application for leave and judicial review was commenced. Associate Judge Horne granted leave to file a supplemental record with the April 2021 procedural fairness letter, which the Minister did not oppose, but denied the applicant's request to file the TRP application: *MFS v Canada (Citizenship and Immigration),* (Court File No IMM-2237-22, August 3, 2022). Further, Associate Judge Horne's order was expressly made without costs. The foregoing does not suggest any unreasonable behaviour on the part of the Minister, and provides no justification for an award of costs.

V. Conclusion

[36] As I am not satisfied that the applicant has shown there are special reasons in this case that would justify an award of costs pursuant to Rule 22 of the *Immigration Rules*, the application will be dismissed as moot, without costs.

[37] Neither party proposed a question for certification. I do not see any question arising that meets the test for certification.

JUDGMENT IN IMM-2237-22

THIS COURT'S JUDGMENT is that

1. The application is dismissed as moot.

2. There is no order as to costs.

"Nicholas McHaffie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2237-22
STYLE OF CAUSE:	MFS v MINISTER OF CITIZENSHIP AND IMMIGRATION

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

JUDGMENT AND REASONS:	MCHAFFIE J.
DATED:	MARCH 8, 2023

WRITTEN REPRESENTATIONS BY:

Warda Shazadi Meighen Rachel Bryce	FOR THE APPLICANT
Hillary Adams	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Landings LLP Barristers & Solicitors Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT