Federal Court  Cour fédérale

Date: 20230919

Docket: IMM-12549-22

Citation: 2023 FC 1253

Ottawa, Ontario, September 19, 2023

PRESENT: Mr. Justice McHaffie

BETWEEN:

REZA JAHANTIGH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] In October 2019, Reza Jahantigh applied for a study permit so he could pursue a PhD in computer engineering at Montreal's École de technologie supérieure. In December 2022, 38 months after his initial application, and 24 months after he was told his application was being processed for "background checks," he filed this application seeking an order of *mandamus* to

require Immigration, Refugees and Citizenship Canada [IRCC] to process and render a decision on his application.

[2] On September 12, 2023, the day before this application was scheduled to be heard, an IRCC officer issued a "fairness letter," indicating they had reasonable grounds to believe Mr. Jahantigh may be inadmissible under paragraph 34(1)(*d*) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] for being a danger to the security of Canada [the "11th Hour Procedural Fairness Letter"]. The Minister filed the 11th Hour Procedural Fairness Letter with the Court the morning of the hearing, with Mr. Jahantigh's consent. The security concerns raised in the letter pertain to the work Mr. Jahantigh "could have engaged in" while at a private software company, in combination with his previous work as a research assistant and possible future research areas while completing his doctorate, "that may be considered as sensitive areas of research." The letter gives Mr. Jahantigh 30 days to submit additional information relating to this issue.

[3] For the reasons below, I conclude that the 11th Hour Procedural Fairness Letter renders some, but not all, of Mr. Jahantigh's *mandamus* application moot. Mr. Jahantigh's application seeks an order compelling the Minister to (i) "continue processing" his study permit application, and (ii) to render a decision forthwith. The former request has been rendered moot; the latter has not. In the circumstances, I conclude I should not exercise my discretion to decide the former issue despite its mootness. I also conclude that I should not grant the latter on the updated terms Mr. Jahantigh sought at the hearing, namely requiring the Minister to render a decision within 15 days of his response to the 11th Hour Procedural Fairness Letter. Rather, given the security

issues raised and the Court's concern about the potential for further delay, I conclude that the appropriate order is to require the Minister to report to the Court on a monthly basis as to the status of the application, so that any outstanding issues or further delays may be addressed promptly.

[4] I conclude this overview by repeating two of the Court's observations made during the hearing. First, the timing of the appearance of the 11th Hour Procedural Fairness Letter is inefficient and unfair to Mr. Jahantigh. IRCC and the Canada Border Services Agency [CBSA] have known about this *mandamus* application since December 2022, and about the hearing date since it was set down three months ago. The issuance of the letter the day before the hearing puts both counsel for the parties and the Court in the position of having to address issues at the last minute. It also means that the time set aside by the Court to hear this application could not be assigned to other litigants. The timing of the letter cannot have been coincidental: presumably, IRCC and/or the CBSA wished to ensure that a step had been taken in processing Mr. Jahantigh's application before the hearing. Of itself, that desire is laudable. However, the Court has no evidence to explain why such a step could not have been taken well prior to the hearing to avoid the situation that has arisen. To put it another way, while late may be better than never, early is also considerably better than late.

[5] Second, the underlying security review of Mr. Jahantigh's application is being conducted by the National Security Screening Division [NSSD] of the CBSA. In its submissions on this application, the Minister took the position that since the screening was being conducted by one of IRCC's "security partners," it was effectively unable to obtain or put before the Court any

evidence about the cause for the delay in conducting that screening. As discussed further below, and as this Court has held on many occasions, the Minister cannot expect the Court to simply accept the reasonableness of any delay in the processing of an immigration application based on a review being conducted by a security partner within the Government of Canada, without evidence regarding the need for the delay.

II. Mootness

A. *Mr. Jahantigh's Application for Judicial Review*

[6] Mr. Jahantigh's application for judicial review seeks an order in the nature of *mandamus* in respect of his study permit application. It asserts that IRCC officials are under a public duty to render a decision on his application and have failed or refused to process and decide his application. It contends that the delay of over three years in rendering a decision on a student visa is unreasonable in the circumstances.

[7] The relief sought in the notice of application is "An order in the nature of mandamus compelling the Respondents to continue processing the Applicant['s] Study Permit application and to render a decision forthwith." In his further memorandum of fact and law, filed after leave was granted on June 21, 2023, Mr. Jahantigh similarly asks that an order in the nature of *mandamus* be issued requiring IRCC to process his study permit application within thirty days.

[8] Thus, both inherently and expressly, Mr. Jahantigh's application seeks an order requiring IRCC to (i) continue to process; and (ii) decide on his study permit application. Processing and

decision are evidently related, as a decision on the application is typically the culmination of processing it. However, I view an order requiring IRCC to continue processing Mr. Jahantigh's application as being different in nature from an order requiring IRCC to reach a final determination on the application within a fixed period of time.

B. *The Application is Partially Moot*

[9] In addressing mootness, the Court applies the two-step analysis established by the Supreme Court of Canada in *Borowski*: (1) determine whether the "tangible and concrete dispute has disappeared and the issues have become academic" such that the case has become moot; and (2) if so, decide whether the court should exercise its discretion to hear the case nonetheless: *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 at p 353.

(1) The request for an order requiring IRCC to "continue processing" is moot

[10] As is clear from the 11th Hour Procedural Fairness Letter, IRCC has recently taken a step in processing Mr. Jahantigh's student visa application. In particular, they have put Mr. Jahantigh on notice of security concerns that could result in a decision refusing his study permit application on grounds of inadmissibility. In my view, this renders Mr. Jahantigh's request to this Court for an order to "continue processing" his application moot, in that an order directing IRCC to continue processing the application would have no practical effect and would be academic.

[11] In this regard, Mr. Jahantigh argues the Court should effectively ignore the 11th Hour Procedural Fairness Letter. He argues the letter's timing and contents indicate that it was issued

in bad faith, and that it should not be recognized as a *bona fide* procedural fairness letter or as a step in processing his application. In particular, he contends that the references in the letter to possible future security concerns are too vague to allow a meaningful response, while the references to his earlier military service ignore the fact that this was simply part of the mandatory service required of all Iranian men. He points to the requirement set out in *Suresh* that "[t]here must be a real and serious possibility of adverse effect to Canada," arguing the letter points to no basis for such a possibility: *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 88.

[12] I do not agree that the Court should simply ignore the 11th Hour Procedural Fairness Letter. Mr. Jahantigh may have valid responses to the letter, and may ultimately satisfy IRCC and the CBSA that he presents no danger to the security of Canada on the relevant standard. However, the Court is not satisfied that the letter, on its face, is of a nature that indicates it was issued in bad faith. In submitting that the letter does not raise any substantive national security issue, Mr. Jahantigh is essentially inviting the Court to assess and determine the merits of the inadmissibility concerns raised. However, the *IRPA* gives the responsibility for assessing security issues to the Minister and his delegates and not to this Court, subject to the availability of judicial review. I conclude it would not be appropriate for the Court to undertake any form of pre-determination of the national security issue raised in the letter.

[13] I note, for clarity, that not every step that has appearance of "processing" will necessarily render all or part of a *mandamus* application moot. The circumstances of the particular case, and the nature of the step or steps taken, must be assessed.

(2) The Court will not exercise its discretion to decide the moot issue

[14] The Court retains a discretion to depart from the usual practice of declining to hear and decide moot cases or issues. In *Borowski*, Justice Sopinka described three non-exhaustive factors for the Court to consider in exercising this discretion: (1) the existence of an adversarial context; (2) the concern for judicial economy; and (3) sensitivity to the court's proper law-making role as the adjudicative branch in the Canadian political framework: *Borowski* at pp 358–363.

[15] I accept that a continued adversarial context remains here. However, the concern for judicial economy and sensitivity to the Court's role vis-à-vis the administrative process leads me to conclude the Court should not exercise its discretion to decide whether Mr. Jahantigh has shown that he meets the requirements to obtain an order in the nature of *mandamus*, as set out in *Apotex Inc v Canada (Attorney General)*, [1994] 1 FC 742 (CA) at pp 766–769.

[16] In this regard, the primary dispute between the parties pertained to whether the delay in processing Mr. Jahantigh's application was "unreasonable": *Apotex* at p 767; *Conille v Canada (Minister of Citizenship and Immigration)*, [1999] 2 FC 33 (TD) at para 23. The Minister points to the COVID-19 pandemic and the investigation by its security partners as justification for the delay. Mr. Jahantigh points to the nearly four years his study permit application has been outstanding to date, IRCC's own published estimates of processing times, and the absence of any explanation for the length of the "background check."

[17] In my view, there would be little value in the Court pronouncing on these issues in the circumstances of this case. An assessment of the appropriateness of *mandamus* is necessarily factually driven and dependent on the circumstances: *Platonov v Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 16104 (FC) at para 10. A conclusion that the delay in this case was or was not reasonable or justified in the context of the pandemic and the security review would be of little assistance to either Mr. Jahantigh or the Minister. Nor would it provide material jurisprudential guidance. Given these factors and the Court's limited role on judicial review, I conclude that I should not exercise my discretion to determine the issue despite its mootness.

[18] I nonetheless observe that the Court would have faced some difficulty in assessing the reasonableness of the delay in this case, given the evidence filed by the Minister. As noted, the Minister relied heavily on the security screening conducted by the CBSA to justify IRCC's delay in processing Mr. Jahantigh's application. As the Minister stated in written submissions, "to the extent there has been a delay, there is a reasonable justification: the Applicant's study permit application is presently undergoing security screening."

[19] This Court has been clear that simply referring to a security review cannot justify any delay, regardless of its length or necessity. Even where the Minister is given express statutory discretion to suspend a process for "as long as necessary" to receive the result of an admissibility investigation, this Court has recognized that such a suspension is limited to what is within reasonable bounds: *Zhang v Canada (Citizenship and Immigration)*, 2019 FC 938 at paras 33–38; *Niu v Canada (Citizenship and Immigration)*, 2018 FC 520 at paras 13–15; *Gentile v Canada*

(Citizenship and Immigration), 2020 FC 452 at paras 19–20; each dealing with section 13.1 of the *Citizenship Act*, RSC 1985, c C-29. The Court is necessarily deferential on issues pertaining to the length of a security investigation process, but that does not give the Minister *carte blanche* in respect of any investigation. To adopt the language of Justice Manson in *Zhang*, "it is not for this Court to dictate the length of such an investigation, within reasonable bounds" [emphasis added]: *Zhang* at para 38.

[20] For the Court to assess whether the length of a security review is reasonable, it must have some information about the review and the reasons for its length. This is particularly so where, as here, the concerns ultimately raised appear to be based on information already contained in Mr. Jahantigh's original application in October 2019: his former employment at a private software company; his prior mandatory military service; and his area of study in computer science.

[21] IRCC, however, has filed no evidence about the nature of the security screening or why it took almost three years after Mr. Jahantigh was advised that his application was being processed for "background checks" to issue the 11th Hour Procedural Fairness Letter. IRCC appears to take the position that it is simply unable to provide any such information to the Court, beyond general submissions that security partners were also affected by the COVID-19 pandemic. IRCC suggests that since the screening is conducted by its security partner, *i.e.*, the NSSD of the CBSA, all it is able to do is inquire with the CBSA as to the status of the investigation. When the CBSA simply responds that the investigation is ongoing, IRCC appears to be of the view that it has done all it can and that it can neither obtain nor provide to the Court any further information.

[22] This Court has rejected this approach on a number of occasions. Over twenty years ago, Justice Lemieux criticized a delay in a security screening by the Canadian Security Intelligence Service [CSIS] and the "lack of any explanation to the Court in this regard": *Latrache v Canada (Minister of Citizenship and Immigration)*, 2001 CanLII 22063 (FC) at paras 18–20. I agree with the observations of Justice Tremblay-Lamer in *Abdolkhaleghi v Canada (Minister of Citizenship and Immigration)*, 2005 FC 729:

> The issue, it seems to me, requires returning to the basic principle established by Strayer J., as he then was, in *Bhatnager* [*v MEI*, [1985] 2 FC 315 (TD)]: if there is a long delay without adequate explanation, then *mandamus* can follow. **To simply state, in response to the applicants' requests for information as to why their applications are taking so long to process, that a security investigation by CSIS is ongoing is not an adequate explanation**. What will constitute an adequate explanation will of course depend on the relative complexity of the security considerations in each case. **A blanket statement to the effect that a security check investigation is pending, which is all that was given here, prevents an analysis of the adequacy of the explanation altogether**. And security concerns instead appear to be lacking as a result.
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> [Bold added; underlining in original; *Abdolkhaleghi* at para 26.]

[23] In *Singh v Canada (Minister of Citizenship and Immigration)*, 2005 FC 544, Justice Harrington similarly underscored that it was not sufficient for IRCC to simply advise the Court that another agency was conducting an investigation:

> It matters not whether the delays lie within the Minister's office, or with CSIS. The Minister had a duty to act with reasonable diligence, taking into account that resources may be limited. That duty is not satisfied simply by a delegation to CSIS, which falls within the purview of another Minister. The delegate in turn might exercise reasonable diligence. No one is suggesting that Mr. Singh was entitled to an instant decision. Queues are a fact of life, but at this point in time, the delays are simply unacceptable.
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> [Emphasis added; *Singh* at para 16.]

[24] To similar effect are this Court's decisions in *Kanthasamyiyar v Canada (Citizenship and Immigration)*, 2015 FC 1248 at paras 49–50; *Almuhtadi v Canada (Citizenship and Immigration)*, 2021 FC 712 at paras 40–42; *Gentile* at paras 27–33; *Bidgoly v Canada (Citizenship and Immigration)*, 2022 FC 283 at paras 38–39, 46; and *Ghaddar v Canada (Citizenship and Immigration)*, 2023 FC 946 at para 33.

[25] The Court appreciates both the need to ensure that security assessments are thorough, and the concern that evidence filed on a *mandamus* application should not itself undermine the security assessment. However, this does not mean that it is impossible for the Government of Canada to file information regarding the process and the reason for its length that would allow the Court to assess its reasonableness, rather than simply a "blanket statement" that the delay is due to a security investigation.

(3) The request for an order requiring IRCC to decide the application is not moot

[26] While IRCC has issued the 11th Hour Procedural Fairness Letter, no decision has yet been made on Mr. Jahantigh's study permit application. This means his application for an order in the nature of *mandamus* requiring IRCC to decide his application remains a tangible and concrete dispute and is not moot. I will therefore address that aspect of his application below.

III. Mr. Jahantigh's Request for a Decision in a Fixed Time

[27] Although Mr. Jahantigh's application for a *mandamus* order requiring IRCC to decide his application is not moot, the factual situation has changed with the issuance of the 11th Hour

Procedural Fairness Letter and the national security issues it raises. That change may affect elements of the *mandamus* analysis including, for example, whether all conditions precedent to the duty to act have been satisfied; the issue of unreasonable delay; and the balance of convenience. In addition, it creates a situation that will necessarily change again in the near future, through Mr. Jahantigh's response to the 11th Hour Procedural Fairness Letter, assuming he chooses to file one.

[28] Mr. Jahantigh submitted that given the nature of the 11th Hour Procedural Fairness Letter and the delays to date, the Court should order IRCC to decide his application within 15 days of his response to the letter. The Court has previously issued *mandamus* orders directing that a decision be made within a certain time, even where a security assessment remains outstanding: see, *e.g.*, *Bidgoly* at paras 1, 11, 45–47; *Ghaddar* at paras 14–17, 41, 50. In the present case, the Minister was unable to provide any submissions on a reasonable or feasible time frame for the security screening, given the timing of the 11th Hour Procedural Fairness Letter and the limited information even the Minister's own counsel had been given about the security screening.

[29] I conclude the Court is not in a position to evaluate at this stage whether an order in the nature of *mandamus* requiring IRCC to issue a decision should issue, or on what terms. Despite the fact that the lack of information before the Court about the process lies at the feet of IRCC and its security partners, the Court is unwilling, based on the record before it, to risk imposing an unrealistic time frame on a decision-making process that has national security implications. However, for the same reasons, and given the delay in processing this application to date, the Court is also unwilling to simply dismiss the matter, leaving Mr. Jahantigh with the sole option

of pursuing another *mandamus* application if there is further delay after he responds to the 11th Hour Procedural Fairness Letter.

[30] In these circumstances, I will remain seized of the matter and will issue an order requiring the Minister to report to the Court on the status of Mr. Jahantigh's application within 30 days of this Order, and every 30 days thereafter until processing is completed or until further order of the Court. The parties are encouraged to consult prior to filing such report to identify any concerns regarding the status of the processing and draw them to the Court's attention, so that they may be dealt with on an expedited basis.

[31] To the extent the Minister seeks to explain or justify further delay in the processing of Mr. Jahantigh's application on the basis of the ongoing security investigation and the need to await the decision of its security partners, I reiterate the observations in paragraphs [19] to [25] above.

IV. Costs

[32] Mr. Jahantigh did not seek costs in his notice of application for leave and judicial review. However, at the hearing of the application he submitted that a costs order would be appropriate, citing the appearance of the 11th Hour Procedural Fairness Letter and the lack of any proposed time frame for decision from the Minister.

[33] I will reserve my decision with respect to this request to the final disposition of this matter.

JUDGMENT IN IMM-12549-22

THIS COURT'S JUDGMENT is that

1. The Respondent shall report to the Court on the status of Mr. Jahantigh's application for a study permit within 30 days from the date of this Order, and every 30 days thereafter until a decision is made on that application or until further order of the Court.
2. The undersigned remains seized of the matter.
3. Costs of this application are reserved until final disposition.

"Nicholas McHaffie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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