Federal Court  Cour fédérale

Date: 20240410

Docket: IMM-4485-23

Citation: 2024 FC 564

Toronto, Ontario, April 10, 2024

PRESENT: The Honourable Mr. Justice A. Grant

BETWEEN:

THUVARAKA SARAVANABAVANATHAN
SANJEEVAN MURUGIAH

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

JUDGMENT AND REASONS

I. OVERVIEW

[1] The Applicants, Thuvaraka Saravanabavanathan and Sanjeevan Murugiah, seek an order of *mandamus* compelling the Respondents to finish processing Mr. Murugiah's application for permanent residence under the spousal sponsorship class. The Respondents maintain that the

Applicants have not met the test for *mandamus*, primarily because the delays associated with their application are not unreasonable.

[2] For the reasons that follow, I will allow this application. The Applicants have met the test for *mandamus* and an order to this effect will be issued.

II. BACKGROUND

[3] Mr. Murugiah is a 39-year-old citizen of Sri Lanka. The other Applicant, Ms. Saravanabavanathan, is a 39-year-old naturalized citizen of Canada, who obtained her citizenship in 2010. The Applicants married in Sri Lanka in September 2018.

[4] In January 2019, Mrs. Saravanabavanathan submitted an application to sponsor her husband for permanent residence in Canada. In March 2019, she was advised that she met the eligibility requirements to sponsor Mr. Murugiah and his application was transferred to the Visa Office in Colombo, Sri Lanka. In July and November 2019, Mr. Murugiah was requested to do a medical examination and to provide biometric information. The Applicants responded promptly to these requests.

[5] In November 2019, Mr. Murugiah was also asked to provide information and documentation regarding a claim for asylum that he had made earlier in the United Kingdom. According to the Applicants, this asylum application was prepared by counsel and falsely connected Mr. Murugiah with the Liberation Tigers of Tamil Eelam [LTTE]. UK asylum

officials disbelieved Mr. Murugiah's story and rejected his asylum application in March 2017. Mr. Murugiah commenced an appeal of the refusal but later withdrew it.

[6] In December 2019 and then in November 2020, Mr. Murugiah was asked to provide an updated IMM 5669—Schedule A—Background Declaration form, which he promptly did. Since then, the Applicants have followed up on the status of their application on a number of occasions, but a decision has yet to be made.

III. ISSUES

[7] The sole issue to be determined in this matter is whether the delay in processing the Applicants' application warrants the issuance of an order of *mandamus*. Determining this issue requires the consideration of a number of factors which will be assessed below.

IV. Preliminary Issue: Style of Cause

[8] In filing their application for leave and judicial review, the Applicants indicated that both the Minister of Citizenship and Immigration ("**IRCC**" or "The Minister") and the Minister of Public Safety and Emergency Preparedness ("**MPSEP**") are the applicable Respondents in this application. Note that only IRCC presented arguments in this matter, so I will refer to it in the singular as "IRCC," "the Minister," or "the Respondent."

[9] IRCC argues, however, that pursuant to subsection 4(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [**IRPA**], IRCC is solely responsible for administering the Applicant's sponsorship application, as the exceptions that confer responsibility on MPSEP to

administer certain parts of the IRPA do not apply in this case. They rely on *Jaballah v Canada (Citizenship and Immigration)*, 2019 FC 1051 at paras 30–34 [***Jaballah***] to support this argument.

[10] The Applicants did not make written submissions on this point, but in oral argument, they opposed amending the style of cause. Admissibility assessments, they argue, are a necessary component in the processing of applications for permanent residence, and fall under the auspices of the MPSEP. To the extent that Mr. Murugiah's admissibility is at issue in his application for permanent residence, MPSEP may be a central contributor to unreasonable delays in the process and, as such, is properly named as a Respondent in this matter. They point to decisions such as *Almuhtadi v Canada (Citizenship and Immigration)*, 2021 FC 712 [***Almuhtadi***] and *Zhang v Canada (Citizenship and Immigration)*, 2023 FC 1505 in support of this position [***Zhang***].

[11] While I agree with the Respondent that IRCC bears ultimate and formal responsibility for administering the applicable provisions of the IRPA in this matter, the fact remains that, *functionally*, the government has bifurcated responsibilities for processing applications for permanent residence. As a key player in assessing the admissibility of permanent resident applications, MPSEP plays an integral role in the decision-making process. In this regard, I see something of a distinction between an application for judicial review of a final decision, for which IRCC is clearly responsible, and a *mandamus* application, where the focus tends to be on the process and, more specifically, on delays in processing, which may relate to either IRCC or MPSEP responsibilities.

[12] The Applicants' concern is that, if IRCC is the sole respondent, but is not responsible for the delays in processing their application, any order of this court would have, at best, only an indirect application to the agency at the root of the delay. This is not an idle concern, as can be seen in the *Zhang* decision, where the court dismissed a *mandamus* application, albeit on somewhat different facts, in part because the delay at issue was the responsibility of MPSEP, but had not been named as a respondent in the application.

[13] I also note that in *Ghalibaf v Canada (Citizenship and Immigration)*, 2023 FC 1408 [***Ghalibaf***], which was also a *mandamus* matter, the Applicant named both Ministers as respondents because agencies under the authority of the MPSEP are responsible for security screenings. The Respondents in that matter do not appear to have objected to the inclusion of both Ministers, and both remained listed as parties in the style of cause.

[14] Given the above, the style of cause in this matter will not be amended.

V. ANALYSIS

[15] *Mandamus* is a discretionary, equitable remedy. The parties agree on the legal test for *mandamus*, as set out in *Apotex Inc. v. Canada (Attorney General)*, 1993 CanLII 3004 (FCA), [1994] 1 F.C. 742 (C.A.), at pages 766–769, aff'd [1994] 3 S.C.R. 1100 [***Apotex***]. To obtain an order of *mandamus*, the Applicant bears the onus of satisfying the following conditions:

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 — it this criterion that involves an assessment of the issue of unreasonable delay.
>
> 4. Where the duty sought to be enforced is discretionary (which is not the case here) certain additional principles apply.
>
> 5. No other adequate remedy is available to the applicant.
>
> 6. The order sought will be of some practical value or effect.
>
> 7. There is 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.

[16] This test has been applied in the immigration context on many occasions: see for example *Conille v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 9097 (FC), [1999] 2 F.C. 33 (T.D.) [***Conille***]; *Almuhtadi*; *Bidgoly v Canada (Citizenship and Immigration)*, 2022 FC 283 [***Bidgoly***].

[17] In considering the *Apotex* factors, it appears to be common ground between the parties that there is a public duty to act that is owed to the Applicants, that no other adequate remedy is available, and that the order sought will be of practical value or effect.

[18] However, the Respondent disputes that the Applicants have met steps 3, 7 and 8 of the test for *mandamus*. In other words, the Minister argues that (1) there is no unreasonable delay, (2) there are equitable bars to the relief sought and (3) the balance of convenience should weigh in favour of dismissing the application for *mandamus*.

A. *Clear Right to Performance: Refusal to Act*

[19] When determining whether there is a clear right to the performance of a public legal duty to act, three relevant factors have been outlined by the Courts: i) the applicant has satisfied all the requirements for a decision to be made; ii) the applicant has made a prior request that a decision be made; and iii) the decision-maker has either expressly refused to make a decision or it has taken unreasonably long to do so (*Apotex* at pp 766–767). In the present case, the only live issue is whether the Minister has taken unreasonably long to make a decision.

[20] Further to this final criterion, the courts have set out three further factors for determining when a delay will be considered unreasonable (*Conille* at para 23). These are:

1. the delay in question is prima facie longer than the nature of the process required;

2. the applicants are not responsible for the delay; and

3. the authority responsible for the delay has not provided satisfactory justification

(1) *Applicant's Position*

[21] The Applicants acknowledge that there is no fixed length of time that will be considered unreasonable and that each case turns on its own facts. They further note that assessing unreasonable delay requires an understanding of where a particular application fits within the immigration scheme. With this in mind, the Applicants note that the average processing time for overseas spousal sponsorship applications is 16 months. By the time of the hearing into this

matter, the Applicants' application had been outstanding for over five years. The Applicants further state that they have promptly responded to requests from the Minister and are not the cause of any significant delay.

[22] Lastly, the Applicants argue that the Minister has not provided a satisfactory reason or justification for the delay. Despite several attempts to move their application forward, the Applicants argue that the process has stalled and that neither pandemic concerns, nor security-related concerns can justify such delays.

(2) *Respondent's Position*

[23] The Minister first notes that there is no clear refusal to act, as there is no evidence that the Minister is not performing his duties nor refusing to process the application in accordance with existing priorities and targets. The Minister argues that, contrary to the Applicants' assertions, the Minister has remained active in processing their application as it progresses towards finalisation.

[24] The Minister further asserts that there is no implied refusal to act through unreasonable delay and that general IRCC processing estimates cannot ground a claim for unreasonable delay.

[25] The Minister also notes that IRCC has taken multiple steps to process the Applicants' application, such as biometrics and security screening, and that the application involves added complexity because of Mr. Murugiah's prior refugee claim in the UK, in which he claimed to be

a member of the LTTE, which is a listed terrorist entity in numerous countries, including Canada.

[26] The Minister further notes that background checks were and are being completed. These background checks are essential and may justify lengthy proceedings.

[27] Lastly, the Minister notes that both the COVID-19 pandemic and the large number of applications they have received justify the delay and render it reasonable.

(3) *Analysis*

[28] It is clear that the first two factors for determining a right to performance have been met: the Applicants have fulfilled all of the conditions for a decision to be made and they have requested (multiple times, in fact) that a decision be made. The only question, then, is whether the delay is reasonable, per the factors set out in *Conille*.

[29] It is true that delays in the processing of an application must be assessed in terms of the particular facts of the case: *Tapie v Canada (Citizenship and Immigration)*, 2007 FC 1048 at para 7; *Sowane v Canada (Citizenship and Immigration)*, 2024 FC 224 at para 24; *Almuhtadi* at para 37. It is also true that IRCC's publicly posted processing time data should not be considered a guaranteed service standard, but a simple indication as to average processing times at any given point in time. Although IRCC may *try* to process *most* applications within target timeframes, expecting the IRCC to adhere to this timeframe for *all* applications would ignore the complexity of our immigration regime: *Jaballah* at para 94.

[30] All of this being said, this court has also found that IRCC processing guidelines should be accorded weight in assessing delay: *Liang v Canada (Minister of Citizenship & Immigration)*, 2012 FC 758 at para 41. This is in part because of the first of the *Conille* factors: it is important to have some baseline understanding of average processing times in order to assess whether a specific delay in question is prima facie longer than the nature of the process requires.

[31] With this in mind, I note that the average processing time for sponsored overseas applications for permanent residence, as provided in the record, is 16 months. It has now been over 60 months since the Applicants in this case submitted their application—more than three times the average processing time—and there remains no sign that a decision on this application is imminent.

[32] I turn now to a consideration of the justifications provided by the Respondents for this delay, namely concerns related to security screening and impacts of the pandemic.

[33] Screening regarding security and inadmissibility is a necessary and important requirement under the Canadian immigration framework: IRPA, paragraphs 3(1)(h) and (i). This point has been reaffirmed by the Supreme Court and the Federal Court of Appeal: *Medovarski v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51 at para 10; *Canada (Citizenship and Immigration) v Solmaz*, 2020 FCA 126 at para 53.

[34] However, ‘blanket statements’ justifying delays because of pending (and long outstanding) security assessments are inadequate, as this Court has determined in multiple

instances: *Ghaddar v Canada (Citizenship and Immigration)*, 2023 FC 946 at para 33; *Bidgoly* at paras 37—38; *Almuhtadi* at para 40; *Kanthasamyiyar v Canada (Citizenship and Immigration)*, 2015 FC 1248 at paras 49–50; *Abdolkhaleghi v Canada (Minister of Citizenship and Immigration)*, 2005 FC 729 at para 26.

[35] Furthermore, aside from general and potentially speculative statements made by the Minister over the course of this judicial review application, the Applicants have not been apprised of any specific security concerns that may explain the delay in their case. The Minister implies that there may be inadmissibility concerns due to Mr. Murugiah's previously claimed association with the LTTE, but this concern, to the extent that it is a live one, has never been put to the Applicants. I find in these circumstances that the Minister has not pointed to any specific or particularly complex security concerns that would adequately justify the significant delays in this case.

[36] It is clear that the COVID-19 pandemic has had significant impacts on processing times: *Djikounou v Canada (Citizenship and Immigration)*, 2022 FC 584 at para 14; *Bidgoly* at paras 27, 41. However, the Court in *Almuhtadi* stated at paragraph 47 that "COVID-19 [. . .] does not negate the Respondents' decision-making capacity for the entirety of time subsequent to March 2020. The pandemic was undoubtedly disruptive, but governmental processes have slowly resumed and decisions are being made."

[37] In this case, the Applicants' application was submitted over a year before the pandemic began, and it has now been many months, if not years, since most government agencies resumed

to a fully operational state. As the Respondent acknowledges, the global pandemic cannot explain the entirety of the delay.

[38] Taking into account the above, together with the preponderance of recent, applicable jurisprudence, I find that the Applicants have established a *prima facie* situation of unreasonable delay, one that they are not responsible for, and that the Respondents have been unable to adequately justify.

B. *Equitable Bars to Relief*

(1) Applicant's Position

[39] The Applicants note that, to their knowledge, there is nothing in the record which would indicate wrongdoing on their part and, as such, there is no bar to equitable relief in this case.

(2) Respondent's Position

[40] The Respondent does not point to any wrongdoing on the Applicants' part, but argues that granting *mandamus* in this case would cause an inequity because it would result in the displacing of other files, would allow the Applicants to "jump the queue," and would effectively grant the Applicants' priority over the many other applications that have also been impacted by COVID-19 delays.

(3) Analysis

[41] On the facts of this case, I do not believe there to be any equitable bars to relief, or that an order of *mandamus* would cause inequity to other immigration applicants. First, there is no information before me as to how many applicants have been waiting longer than the roughly 63 months that the Applicants have been waiting for their application to be processed. If there are such applications, it may well be that they have a valid cause of action as well. That is not for this court to determine here, but suffice to say that speculation as to whether others have been waiting longer in the queue than the Applicants provides no basis on which to bar relief in this case. Moreover, given the average processing times provided by IRCC, there may be many applicants who applied *after* the Applicants, but have received a decision.

[42] Based on the GCMS notes, the Applicants' application appears to have been stalled for an extended period of time. There is essentially no sign of any activity in the processing of their applications since March 2022 — over two years ago. An order of *mandamus* in this case would not allow the Applicants to "jump the queue," but to rejoin it from the sidelines, where their application appears to have been diverted.

C. *Balance of Convenience*

(1) Applicant's Position

[43] The Applicants reiterate that they have been waiting for a decision on their application for five years, and that this delay has been immensely difficult for them. In comparison, the

Applicants do not see how the Respondents could claim any inconvenience from having to finalize their application on a timely basis.

(2) Respondent's Position

[44] The Minister asserts that the Applicants have not lost any substantive rights, nor have they demonstrated that the delay has caused significant prejudice. Although the Applicants may be experiencing hardship, the Respondent argues that this does not mean they are entitled to an order of *mandamus*, citing *Vaziri v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1159 at paras 50, 52; *Jia v Canada (Citizenship and Immigration)*, 2014 FC 596, at para 91.

(3) Analysis

[45] As stated in *Khalil v Canada (Secretary of State)*, [1999] 4 FC 661 (C.A.), "[u]nder the 'balance of convenience' test outlined in *Apotex*, courts retain the discretion to refuse to issue an order where the public interest outweighs the interests of those who would otherwise be entitled to the order."

[46] I find the balance of convenience in this matter favours the Applicants. As a preliminary note, the references to hardship cited by the Minister in the above authorities are in the context of unreasonable delay, and were not made at the "balance of convenience" stage of the analysis. By contrast, the court has referenced hardship and prejudice in finding that the balance of convenience favours the granting of relief: *Ghalibaf* at para 20.

[47] I further note that the Respondents have not identified any public interest considerations that would cause the balance of convenience to tilt in their favour. On the other hand, the Applicants have provided evidence that the delay has caused them harm, as it has prevented them from starting a family, and prevented them from building a life together.

[48] As such, I find that the balance of convenience in this case lies with the Applicants and that they have met all of the conditions necessary to warrant the intervention of this court.

VI. CONCLUSIONS AND REMEDY

[49] For the reasons above, I would grant the application and issue an order for *mandamus*.

[50] The Applicants requested that the Respondents be ordered to complete the processing of their application within three months. Counsel for the Respondent did not have specific instructions concerning this request for relief.

[51] In the absence of any evidence or submissions suggesting that the Applicant's proposed deadline is unreasonable or would be unfair to the Respondents, I am satisfied that it is appropriate.

[52] However, if circumstances warranting an extension of the deadline arise, the Respondents may bring a motion to that effect. If the extension is not opposed, the request may be submitted informally. Otherwise, a motion record and supporting evidence will be required, and I shall remain seized of this matter to consider any such motion or informal request.

JUDGMENT in IMM-4485-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.
2. A decision shall be rendered on the Applicants' application for permanent residence within 90 days of the date of this judgment.
3. This time period is without prejudice to the right of the Respondents to seek an extension of the deadline set out herein.
4. I will remain seized of this matter.
5. No question is certified for appeal.

"Angus G. Grant"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Barbara Jackman	FOR THE APPLICANTS
Kevin Spykerman	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Jackman & Associates Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENTS