Date: 20170728

Dockets: IMM-3171-17
IMM-3172-17
IMM-3173-17

Citation: 2017 FC 739

Ottawa, Ontario, July 28, 2017

PRESENT: The Honourable Mr. Justice Fothergill

Docket: IMM-3171-17

BETWEEN:

SUPUN THILINA KELLAPATHA
NADEEKA DILRUKSHI NONIS PATHTHINI KUTTIGE
SETHMUNDI THILANYA KELLAPATHA
SUVASTHAKI VITHIKA DINATH KELLAPATHA

Applicants

and

THE MINISTER OF IMMIGRATION,
REFUGEES AND CITIZENSHIP

Respondent

Docket: IMM-3172-17

AND BETWEEN:

AJIT PUSHPA KUMARA DEBAGAMA KANKANAMALAGE

Applicant

and

**THE MINISTER OF IMMIGRATION,
REFUGEES AND CITIZENSHIP**

Respondent

Docket: IMM-3173-17

AND BETWEEN:

**VANESSA MAE BONDALIAN RODEL
SANUTHI KEANA NIHINSA KELLAPATHA**

Applicants

and

**THE MINISTER OF IMMIGRATION,
REFUGEES AND CITIZENSHIP**

Respondent

ORDER AND REASONS

I. Overview

[1] The Applicants are citizens of either Sri Lanka or the Philippines. They are currently in Hong Kong, where they have resided since at least 2010. Their refugee claims were recently rejected by the Hong Kong authorities. An appeal is pending before the Hong Kong courts.

[2] The Applicants have applied for permanent residence in Canada as members of the Convention Refugees Abroad Class. They have commenced applications for leave and judicial

review of the alleged delay by the Minister of Immigration, Refugees and Citizenship [Minister] in processing their applications. The Applicants seek interim injunctive relief in the nature of *mandamus* to compel the Minister to immediately issue Temporary Resident Permits [TRPs] to enable them to travel to Canada and remain in this country pending the final disposition of their claims for refugee status.

[3] For the reasons that follow, I conclude that a writ of *mandamus* may be obtained only on an application for judicial review under s 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7. It cannot be obtained on an interlocutory motion. This Court is therefore without jurisdiction to grant the interim injunctive relief sought by the Applicants.

[4] The Applicants' request to consolidate the applications for leave and judicial review is granted. Their request to expedite the proceedings and to make oral submissions regarding the applications for leave is refused.

II. Background

[5] The adult Applicants have resided in Hong Kong since at least 2010, some of them since 2006. The minor Applicants were born in Hong Kong, and are considered by the Hong Kong authorities to be stateless persons. All of the Applicants sought refugee protection in Hong Kong, but this was denied. An appeal of the denial was recently heard by the Hong Kong judiciary, and a decision is pending.

[6] On January 26, 2017, the Applicants applied for permanent residence in Canada as members of the Convention Refugees Abroad Class. They are being privately sponsored by a not-for-profit group in Montreal called "For the Refugees". The group was established by their legal counsel to facilitate their applications for permanent residence.

[7] According to the Canadian Consulate in Hong Kong, the normal processing time for applications for permanent residence as members of the Convention Refugees Abroad Class is approximately 52 months, or more than four years. On or about March 1, 2017, the Applicants asked the Minister to expedite the processing of their applications. On May 8, 2017, an officer with the Ministerial Enquiries Division acknowledged receipt of the Applicants' request, and stated the following:

> […] these applications are actively being processed by Canadian visa officials in Hong Kong. In addition, visa officials have recently (April 20) sent requests to the family members for updated information and documentation, and have initiated background screening checks on an expedited basis.
>
> […] it appears that the processing of these applications has been initiated on an expedited basis, with no unforeseen delays.

[8] On July 5 and 7, 2017, counsel for the Applicants sent enquiries to the Canadian Consulate in Hong Kong respecting the progress of their clients' applications for permanent residence. They received the following reply:

> As previously advised, we confirm the files of your clients are in progress. The files are in queue for review.

> However, please be aware that the files will be accessed based on chronology of receipt by our office. As you can appreciate, all Privately Sponsored Refugee applicants express concerns with respect to their personal situation in this region and it is important for all applicants to know that their cases be processed in order of receipt to ensure the files are equitably and transparently managed.

[9] On July 11 and 12, 2017, the Applicants submitted their applications for TRPs. On July 18, 2017, the Applicants filed applications for leave and judicial review of the Minister's alleged delay in processing their applications for permanent residence, and interim relief in the nature of *mandamus* compelling the immediate issuance of TRPs to enable them to travel to Canada. The Applicants filed their motion records for interim relief on July 25, 2017, and requested a hearing on either July 26 or 27, 2017.

[10] By letter dated July 25, 2017, counsel for the Minister objected to the Applicants' motions on the ground that the Court is without jurisdiction to grant an order in the nature of *mandamus* as a form of interim relief. Counsel for the Minister also objected to the lack of notice provided by the Applicants, and urged the Court not to hear the matter on an urgent basis, or even at all.

[11] The Court agreed to hear the parties on July 27, 2017, but directed that the hearing be restricted to the following issues:

(a) whether the applications for leave and judicial review should be consolidated;

(b) whether the Court has jurisdiction to grant the interim relief sought by the Applicants;

(c) whether the applications for leave and judicial review should be expedited; and

(d) whether the parties should be permitted to make oral submissions regarding the applications for leave.

[12] Despite the limited scope of the hearing, both parties opted to make initial submissions regarding the tripartite test for interim injunctive relief prescribed by *Toth v Canada (Employment and Immigration)* (1988), 86 NR 302, 6 Imm LR (2d) 123 (FCA). In order to obtain extraordinary injunctive relief, an applicant must demonstrate that (a) there is a serious issue to be tried, (b) the applicant will suffer irreparable harm if the relief is not granted, and (c) the balance of convenience favours the applicant. An applicant must satisfy each branch of the tests.

[13] The test for establishing a serious issue to be tried is generally low. The issue must be neither frivolous nor vexatious. However, where granting the interim relief is tantamount to granting the relief sought in the underlying application for leave and for judicial review, the test is more onerous. The Court must closely examine the merits of the underlying application, and conclude that the applicant has put forward "quite a strong case" (*Baron v Canada (Public Safety and Emergency Preparedness)*, 2009 FCA 81 at para 67; *Wang v Canada (Citizenship and Immigration)*, 2001 FCT 148 (TD)).

A. *Should the applications for leave and judicial review be consolidated?*

[14] The parties agree that the applications for leave and judicial review share common legal and factual issues. The Applicants are connected by kinship or friendship, and there is a common Respondent. No party will suffer prejudice or injustice as a result of the proposed consolidation, and this will provide the most efficient resolution of the matters in issue (*Sanofi-Aventis Canada Inc v Novopharm Ltd*, 2009 FC 1285 at para 16).

[15] The applications for leave and judicial review are therefore consolidated as Court File No. IMM-3171-17, and shall be heard together.

B. *Does the Court have jurisdiction to grant the interim relief sought by the Applicants?*

[16] The Applicants state in their applications for leave and judicial review that they are seeking:

> […] an Order of **Mandamus** ordering, by way of interim relief, the Respondent to immediately provide Temporary Resident Permits allowing the Applicants into Canada, until such time as the Respondent reaches a final determination on their file. [Emphasis original]

[17] In *Clifton v Hartley Bay Village Council*, 2005 FC 1594 at paras 3-5 [*Clifton*], Justice Danièle Tremblay-Lamer confirmed that the writ of *mandamus* may be obtained only on an application for judicial review under s 18.1 of the *Federal Courts Act*. It cannot be obtained on an interlocutory motion:

> [3] *Mandamus* is an extraordinary remedy for which the Federal Court has exclusive original jurisdiction pursuant to subsection 18(1) [of the *Federal Courts Act*]. Subsection 18(3) of the Act provides the writ of *mandamus*, amongst others "may be obtained only on an application for judicial review made under section 18.1". It cannot be obtained on an interlocutory motion. A writ of *mandamus* by definition cannot be characterized as an interim relief. (*Brissett v. Canada (Minister of Citizenship and Immigration)*, (2002), 2002 FCT 971, 228 F.T.R. 314 at para. 12).
>
> [4] As I stated in *Delisle v. Canada (Attorney General)* (2004), 2004 FC 788, 258 F.T.R. 268 at paragraph 13:
>
> > [...] this is a motion for an interlocutory order of *mandamus*. Here again, the case law is determinative in this regard. The issuance of a writ of *mandamus* is not possible in such circumstances, for it would constitute in fact an interim declaration of right (*Paquette v. Canada(Attorney General)* (2001), 2001 FCT 921, 211 F.T.R. 179 (F.C.T.D.); *Brissett v. Canada (Minister of Citizenship and Immigration)* (2002), 2002 FCT 971, 228 F.T.R. 314 (F.C.T.D.)).
>
> [5] Thus, the Court has no jurisdiction to grant this remedy on a motion.

[18] The Applicants rely on *Canadian Council for Refugees v Canada*, 2006 FC 1046 [*Canadian Council for Refugees*]. In that case, the applicants sought interim injunctive relief in the form, *inter alia*, of an order directing the respondent to allow them to enter Canada from the United States pending determination on judicial review as to whether or not the Safe Third Country Agreement barred them from making a refugee claim. Justice Roger Hughes held at paragraphs 8 and 9 that the general powers of supervision given by Parliament to the Federal Court under the *Immigration and Refugee Protection Act*, SC 2001, c 27, and *Regulations*,

SOR/2002-227, taken together with section 44 of the *Federal Courts Act*, gave the Court jurisdiction to grant the type of relief requested.

[19] Justice Hughes ultimately declined to grant the extraordinary equitable relief sought by the applicants in *Canadian Council for Refugees* on the ground that they had failed to demonstrate they would suffer irreparable harm. His comments regarding the jurisdiction of this Court to grant *mandamus* as a form of interim injunctive relief must therefore be taken as *obiter*.

[20] In my view, the analysis of Justice Tremblay-Lamer in *Clifton* is to be preferred. A writ of *mandamus* cannot be granted as a form of interim injunctive relief, in part because it would amount to an interim declaration of right. The purpose of an interlocutory motion is to preserve or restore the *status quo*, not to give the applicant his remedy (*Brissett v Canada (Citizenship and Immigration)* (2002), 2002 FCT 971 at para 11).

[21] The Applicants argue that the *mandamus* they seek in the underlying applications for judicial review differs from that sought in the present motions for interim relief. The Minister responds that the Applicants did not seek leave to commence an application for judicial review of the Minister's alleged delay in issuing the TRPs. The Minister says that the Applicants cannot achieve by indirect means what they are unable to achieve directly. In any event, for the reasons expressed by Justice Tremblay-Lamer, the Court's lack of jurisdiction to grant *mandamus* as interim injunctive relief is independent of whether the same relief is sought in the underlying application for judicial review.

[22] Furthermore, *mandamus* is not available unless (a) there is a public legal duty to act, (b) the duty is owed to the applicant, and (c) there is a clear right to performance of that duty. Nor is it available to compel the exercise of discretion in a particular way (*Mersad v Canada (Citizenship and Immigration)*, 2014 FC 543 at para 12 , citing *Apotex v Canada (Attorney General)*, [1993] 1 FC 742 at para 45 (FCA), aff'd, [1994] 3 SCR 1100). The most the Court might do in these circumstances is order that the Canadian Consulate in Hong Kong process the Applicants' requests for TRPs within a reasonable time. Given that the requests were made only on July 11 and 12, 2017, it can hardly be said that there has been unreasonable delay in the Minister's consideration of the applications for TRPs.

[23] I therefore conclude that the Court is without jurisdiction to grant the interim injunctive relief sought by the Applicants.

C. *Should the applications for leave and judicial review be expedited?*

[24] In *Smith v Canada (Citizenship and Immigration)*, 2002 FCT 662, Justice Elizabeth Heneghan observed at paragraph 13 that an order removing a proceeding from the usual time-frames involves an exercise of discretion and must be related to a substantial ground arising from the proceeding at issue. The threshold for justification is high (*Manesh v Canada (Citizenship and Immigration)*, 2014 FC 765 at para 46).

[25] The Minister argues that the precedential implications of the Applicants' applications for leave and judicial review are significant. The Applicants have only a tenuous connection with

Canada. They have very recently applied for permanent residence as members of the Convention Refugees Abroad Class. They ask to circumvent the usual processes of the Government of Canada due to the potential harm they may face as a result of having their claims for refugee status rejected by the authorities in Hong Kong. The Minister notes that many others in precarious circumstances around the world are similarly-situated. If a sudden deterioration in conditions in other countries were sufficient to compel an immediate authorization to travel to Canada in order to pursue a refugee claim in this country, this would be a major alteration and expansion of Canada's approach to refugee protection.

[26] The Minister notes that the Applicants have resided in Hong Kong for seven years or more, and until recently have been content to seek refugee protection in that country. Their refugee claims were rejected by the Hong Kong authorities on May 11, 2017. Since then, they have chosen to advance their claims for refugee protection in Canada through political channels. They have sought the intervention of this Court at the last minute, despite knowing for a considerable period of time that they were potentially at risk in Hong Kong.

[27] The Applicants argue that the assurances they received from a representative of the Minister's office in May 2017 created a reasonable expectation that their applications would be decided in an expeditious manner – within one to four months of when they were first submitted in January 2017. They say that their cases are unique, and the potential precedential impact of their cases is therefore small. They dispute that there has been undue delay in asserting their rights against the Government of Canada.

[28] The Applicants also maintain that they are at imminent risk of harm. They say that they have been specifically targeted by the authorities in Hong Kong, and have been ordered to report to a detention centre for possible removal early next week. They say that human rights abuses in Hong Kong detention centres are well-documented, and unsuccessful refugee claimants are sometimes returned to their countries of origin even while their appeals and other legal processes are ongoing.

[29] The Minister has filed an affidavit from a visa officer with the Canadian Consulate in Hong Kong who states that the notices requiring the Applicants to report to the Castle Peak Bay Immigration Centre indicate that the purpose is only for "signature". The only other possibility disclosed by the notices is that the reporting may be for "interview". The visa officer also deposes that the Hong Kong courts are a well-functioning judiciary with avenues for appeal and judicial review, and there is no reason to believe that the Applicants will be treated unfairly.

[30] The Minister's response to the applications for judicial review is currently due 30 days from the date of filing. The Applicants' arguments are novel, and the public policy implications are potentially significant. The Minister should be afforded a reasonable opportunity to respond. Considering the timing of the Applicants' applications for permanent residence in Canada, their requests for TRPs and the related legal proceedings in this Court, and the speculative nature of the harm they allegedly face in Hong Kong, I am not persuaded that this Court should exercise its discretion to expedite the proceedings.

[31] In the event that leave to commence the applications for judicial review is granted, or if further developments warrant, the request to expedite the proceedings may be revisited.

D. *Should the parties be permitted to make oral submissions regarding the applications for leave?*

[32] The Applicants' request to make oral submissions regarding their leave applications was intended to facilitate the determination of their applications for judicial review on an expedited basis. In light of the conclusion that there are insufficient reasons to expedite these proceedings, it is no longer necessary to consider this aspect of the relief sought by the Applicants.

ORDER

THIS COURT ORDERS that:

1. The motions to consolidate the Applications for Leave and Judicial Review, Court File Nos. IMM-3171-17, IMM-3172-17 and IMM-3173-17, are allowed. The Applications will continue as a single proceeding, Court File No. IMM-3171-17.

2. The motions for interim injunctive relief in the nature of *mandamus*, to expedite the proceedings, and to permit oral submissions regarding the Applications for Leave are dismissed.

"Simon Fothergill"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3171-17
STYLE OF CAUSE:	SUPUN THILINA KELLAPATHA, NADEEKA DILRUKSHI NONIS PATHTHINI KUTTIGE, SETHMUNDI THILANYA KELLAPATHA AND SUVASTHAKI VITHIKA DINATH KELLAPATHA v THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP
AND DOCKET:	IMM-3172-17
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AND DOCKET:	IMM-3173-17
STYLE OF CAUSE:	VANESSA MAE BONDALIAN RODEL AND SANUTHI KEANA NIHINSA KELLAPATHA v THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP
PLACE OF HEARING:	HELD VIA TELECONFERENCE FROM OTTAWA, ONTARIO AND MONTRÉAL, QUEBEC
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