Date: 20050526

Docket: IMM-5637-04

Citation: 2005 FC 753

Toronto, Ontario, May 26th, 2005

Present: The Honourable Mr. Justice Mosley

BETWEEN:

DMITRY SHAPOVALOV

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

BACKGROUND

[1] Dmitry Shapovalov is a 32-year-old lawyer from Russia. He and his wife, Assia Chapovalova, also a lawyer, have a Canadian child (born on a previous visit). They are expecting a second child on June 15.

[2] In 1998, Mr. Shapovalov and his wife made a visit to Canada. In December 1998, they applied to the Buffalo Consulate for permanent resident visas but were unable to get visas to the United States to attend the scheduled interview there in June 2000.

[3] As they were returning from Canada to Russia when their Canadian visitor's visas expired, they asked that their file be transferred to the Moscow visa post. This was done in August 2000. They were informed at the time their file was transferred in August 2000 that they should have a wait of about 18 months before a final decision was made.

[4] Their counsel requested in March 2001, as they had previously reached the point of being called for an interview in Buffalo, that their interview in Moscow be expedited. This apparently did not happen. In April 2002, counsel again wrote to the Consulate asking that the applicants' visas be processed.

[5] Then the *Immigration and Refugee Protection Act* came into effect, requiring the re-submission of forms and the submission of an Arranged Employment Opinion from HRDC. All of this was done by May 15, 2003 and sent along with another request to deal with the application on an expedited basis.

[6] The couple was not called for an interview until July 23, 2003. They were approved in principle at the interview, were issued medical instructions, and background checks were initiated. It was not until October 2003, however, that the Consulate got around to requesting

that the applicants provide Russian police clearance certificates. The applicant also sent in a letter in January 2004 indicating that his offer of employment in Canada was still open, the approval of which job offer was confirmed by Human Resources Development Canada in February 2004. In February, March and May 2004, counsel repeatedly wrote to the Consulate requesting a final decision on the file.

[7] On June 23, 2004, the applicant filed an application for *mandamus*. Since the application for *mandamus* was filed, several additional events have occurred.

[8] On July 20, 2004, the same day the visa post received notice of the *mandamus* application, the couple was contacted by the Embassy, telling them that their case had been completed, but that it would take a couple of days to issue visas. Their medicals were also about to expire. They opted to take new medicals rather than go to Canada on extremely short notice, but were assured that it was simply a formality. A Promise of Visa letter, allowing them to settle their affairs in Russia, was to be issued on receipt of the new medicals. Those medicals were completed in September.

[9] Instead, on January 17, 2005, they were instructed to attend another interview on February 21, 2005, this time conducted by a Security Liaison Officer (SLO), based on information regarding possible inadmissibility. There is no real information either in the record or in the affidavits related to the nature of that inadmissibility, but it appears to be related to the

applicant's father-in-law, rather than to the couple specifically. The results of the SLO interview can take about six months, meaning that the results may not be available until August 2005.

[10] Mrs. Chapovalova became pregnant some time in September 2004 and wants her child to be born in Canada. That is highly unlikely, as the hearing of this application took place on May 24, the child is due on June 15, and she will not be able to travel after May 15. If the child is born in Russia, it will not be able to travel to Canada before being added to the application and undergoing a medical assessment of its own. The wife's medicals expire in September 2005, but she would also have to submit a post-partum medical report in any case.

[11] There was evidence on the cross-examination of his affidavit from visa officer Michael Scott McCaffrey that the delays in this case are attributable to the fact that, after the collapse of the Russian banking sector in 1998, there was a huge increase in applications at the Moscow visa post. He also explained in the cross-examination that medicals are rarely extended at the Moscow consulate because of the prevalence of tuberculosis in the area served by the visa post.

ARGUMENT AND ANALYSIS

[12] The test for *mandamus*, as first elaborated by Justice Robertson in *Apotex Inc. v. Canada (Attorney General)*, [1994] 1 F.C. 742 (C.A.), aff'd [1994] 3 SCR 1100, has been adapted for use in the immigration law context. In *Conille v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 F.C. 33, this test was described as follows:

(1) there is a public legal duty to the applicant to act;

(2) the duty must be owed to the applicant;

(3) there is a clear right to the performance of that duty, in particular:

(a) the applicant has satisfied all conditions precedent giving rise to the duty;

(b) there was a prior demand for performance of the duty, a reasonable time to comply with the demand, and a subsequent refusal which can be either expressed or implied, e.g. unreasonable delay; and

(4) there is no other adequate remedy.

All parts of the test must be satisfied.

[13] The only debate in this case relates to whether the delay in this case was reasonable. In *Conille* at para. 23, Justice Tremblay-Lamer held that if a delay is to be considered unreasonable, it must meet three requirements:

(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.

[14] The applicant submits that by delaying unreasonably, the visa officer has effectively refused to perform the duty as required by law: *Bhatnager v. Canada (Minister of Employment and Immigration)*, [1985] 2 F.C. 315 at para. 4; *Platonov v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1438 at para. 10.

[15] The applicant submits that the four years since the file was transferred to Moscow (and culminating in the application for *mandamus*) are an unreasonable delay, especially since nearly a year passed after the interview at which the applicants were approved in principle. Those delays were not caused by the applicant, but by administrative negligence, and there is no adequate explanation for them. The Court should not approve a lack of diligence and allow the case to drag along without tangible progress: *Bouhaik v. Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No. 155.

[16] The respondent submits that the delay has been reasonable. The applicant basically restarted the process by requesting a transfer of the file from Buffalo to Moscow. Then, on July 20, rather than accept a visa that would expire on July 24, the applicant opted to redo his medicals. There is a satisfactory explanation for the delay, including the applicant's own action and the fact that there is a large backlog at the Moscow visa post because of a banking collapse in Russia. The delay has not been longer than the nature of the process required.

[17] I agree with the applicant that the delay in this case has not been reasonable.

[18] *Prima facie*, the delay has been longer than the nature of the process required. The Consulate's estimate at the time the application was transferred to Moscow was that it would take 18 months. Once that time had been exceeded, there was no explanation given as to why the processing was taking longer: *Mohamed v. Canada (Minister of Citizenship and Immigration),* [2000] 195 F.T.R. 137 (T.D.) at para. 16.

[19] There is no evidence that extra staff were put on to deal with the large backlog, nor any evidence that the Consulate revised its estimate of how long the process would take and communicated the new estimate to the applicants. There is, however, evidence that while "BFs" or bring forward notes for files are printed on a nightly basis, the visa officer only actually checks on BFs for his files on a monthly basis. Thus, it might take up to a month after the BF date before an officer would begin taking steps on the file by, for instance, checking for documents or communicating with the SLO officer to see what progress has been made. Had the visa officer in all cases acted on information submitted by the applicants on a timely basis, a great number of delays could have been avoided.

[20] The applicant and his counsel are not responsible for the delay. They submitted all documentation in a timely manner and cannot be faulted for either being unable to attend the visa interview in Buffalo, or refusing the offer of "short" visas that came only after the application for *mandamus*.

[21] The CAIPS notes confirm that the letter to the applicants was dictated the same day the Moscow office received notice of the *mandamus* application. I think it clear that the file would have been ignored otherwise until after the medicals had expired had they not received that notice. The offer of short term visas at that point was unreasonable and there is no reason that the applicants should have accepted them. I also accept the wife's affidavit evidence that they acted on the advice of a counsellor at the embassy to update their medicals.

[22] Finally, the authority responsible for the delay has not provided any satisfactory justification. Neither in response to repeated inquiries regarding progress on the file, nor in the CAIPS notes, nor in any correspondence, did the Embassy indicate that the application raises concerns that would justify the delay or give any precise explanation: *Bhatnager*, *supra*; *Hanano v. Canada (Minister of Citizenship and Immigration)* (2004), 257 F.T.R. 66 at para. 14.

[23] Officer McCaffrey’s only explanation for the delays has been the existence of a backlog. Any argument that the delay is merely systemic and ought not be attributed to the Minister cannot be accepted. A backlog of cases is not an excuse: *Dragan v. Canada (Minister of Citizenship and Immigration)*, [2003] 4 F.C. 189 at para. 58 (T.D.); *Conille*, *supra*; *Platonov*, *supra*.

[24] Because of developments since the application for *mandamus* was filed, including the required SLO interview and Mrs. Chapovalova’s pregnancy, there will inevitably be further

delays before a final decision can be made. However, counsel for the parties agreed that this delay should be minimized. I also suggested at the hearing that the respondent ought to seriously consider exercising his discretion to extend the validity of the medical certificates for the couple.

[25] The applicant requested costs on this application. The usual rule in immigration matters is that no costs are awarded: *Federal Court Immigration and Refugee Protection Regulations*, Rule 22. This Court has previously considered undue delay in processing a claim to be a special reason that would justify costs: *Platonov*, *supra*; *Dragan*, *supra*. I have exercised my discretion to award costs to the applicant in the amount of $2,500.00.

ORDER

THIS COURT ORDERS that the application is granted and:

1. The respondent shall process the applicant's application for permanent residence in Canada in accordance with the law and the *Immigration and Refugee Protection Act* and in accord with the following terms:

    i) the respondent shall issue new medical instructions to the applicant and his wife within ten days of being notified of this order;

ii) upon notification to the respondent by the applicant of the birth of the applicant's child, expected to be delivered on June 15, 2005, the respondent shall issue new medical forms within 10 days of such notification, subject to clause iii) hereafter;

iii) the applicant shall pay the appropriate processing fee for his child's application for permanent residence in Canada, namely $150.00, and provide the appropriate photographs of his child to the Canadian Embassy in Moscow following the birth of his child;

iv) the applicant, the applicant's wife and their child, shall attend a designated medical practitioner (DMP) as soon as is reasonably possible after the birth of the child;

v) the respondent shall process the applicant and his family's application for permanent residence in Canada and provide them with a decision with respect to the issuance of permanent resident visa by September 6, 2005 or within 90 days of their attendance at a DMP, whichever is later, subject to clause vi) hereafter;

vi) in the event the Respondent requires further testing to complete the applicant's medical evaluation or that the Applicant is asked to comment upon any preliminary findings made by the Respondent regarding his or his dependent's medical inadmissibility, finalizing of the applicant's application for permanent residence shall

be extended to a date no later than 21 days following receipt of the final medical opinion by the Canadian Embassy in Moscow from Immigration Health Services;

2. The applicant is awarded costs in the amount of $2500.00.

"Richard G. Mosley"

J.F.C.

FEDERAL COURT
Names of Counsel and Solicitors of Record

DOCKET:	IMM-5637-04
STYLE OF CAUSE:	DMITRY SHAPOVALOV Applicant and THE MINISTER OF CITIZENSHIP AND IMMIGRATION Respondent
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	TUESDAY, MAY 24, 2005
REASONS FOR ORDER BY:	MOSLEY J.
DATED:	MAY 26, 2005

APPEARANCES BY:

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Mr. John Loncar	FOR THE RESPONDENT

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