Federal Court  Cour fédérale

Date: 20240201

Docket: IMM-5032-22

Citation: 2024 FC 163

Toronto, Ontario, February 1, 2024

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

MAHMOUD ES-SAYYID JABALLAH AND HUSNAH AL-MASHTOULI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS AND JUDGMENT

I. INTRODUCTION

[1] Mr. Mahmoud Es-Sayyid Jaballah (the "Principal Applicant") and his wife Husnah Al-Mashtouli (collectively "the Applicants") bring this application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act").

In their application, the Applicants seek an Order of *mandamus* to compel the Minister of Citizenship and Immigration (the "Respondent") to finalize the Principal Applicant's application for permanent residence made under the "Spouse and Common-Law Partner in Canada Class" described in Part 7, Division 2 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the "Regulations").

II. BACKGROUND

[2] The Principal Applicant, his wife and their four children arrived in Canada holding false Saudi Arabian passports on May 11, 1996. They claimed refugee protection against Egypt.

[3] Between 1998 and 2008, the Principal Applicant was the subject of three certificates issued under subsection 77(1) of the Act, that is on grounds of security. The three certificates were quashed in 1999, 2001 and 2016. The details and history of the security certificate proceedings are set out in the decision of Justice Hansen, *Jaballah (Re)*, [2017] 1 F.C.R. 229.

[4] On December 13, 2011, the Principal Applicant's wife obtained Canadian citizenship.

[5] On October 7, 2016, Immigration, Refugees and Citizenship Canada ("IRCC") received the Applicants' application for permanent residence under the spousal sponsorship class.

[6] In 2017 and for some months in 2018, IRCC asked the Principal Applicant to provide police clearances, his passport, travel documents and birth certificate.

[7] On August 3, 2018, the Principal Applicant's file was submitted for security screening.

[8] On August 15, 2018, the Principal Applicant's wife was advised that she met the requirements for eligibility as a sponsor.

[9] On October 4, 2018, the Applicants inquired about progress on their application. They were told, on October 19, 2018, that the application was undergoing security background checks.

[10] On October 30, 2018, the Principal Applicant commenced an application for leave and judicial review in cause number IMM-5332-18, seeking the remedy of an Order of *mandamus*. The application was dismissed on August 7, 2019, on the grounds that the spousal sponsorship application was incomplete.

[11] In August 2019, IRCC asked the Principal Applicant to submit police certificates from Egypt, Pakistan, Saudi Arabia, Yemen and Azerbaijan.

[12] In January 2020, the Canada Border Services Agency (the "CBSA") asked the Principal Applicant to attend a security interview with the Canadian Security Intelligence Service. This interview was ultimately scheduled for October 2020.

[13] The Principal Applicant attended the interview but refused to answer any question related to any issues that occurred before June 2016, when Justice Hansen found the most recent security certificate to be unreasonable.

[14] The Principal Applicant provided IRCC with an expired Egyptian passport from which three pages had been torn out.

[15] On July 12, 2021, the Principal Applicant requested a passport waiver and advised IRCC that without a valid passport, he could not obtain the requested police certificates.

[16] On July 13, 2021, IRCC denied the Principal Applicant's request.

[17] In October 2021, IRCC advised the Principal Applicant that it needed to verify the expired passport in order to confirm his identity. IRCC asked the Principal Applicant to provide his birth certificate and an affidavit to explain the circumstances surrounding his expired passport.

[18] In November 2021, the Principal Applicant submitted the requested materials.

[19] On November 26, 2021, IRCC advised the Principal Applicant that he met the eligibility requirements to apply for permanent residence as a member of the "Spouse or Common- Law Partner in Canada" class.

[20] In the letter of November 26, 2021 IRCC also advised the Principal Applicant that he needed a passport from his country of origin, that is, Egypt and police certificates. IRCC advised him that the requirement to provide police certificates would not be waived without sufficient

evidence to show that all possible efforts had been made to obtain these certificates. IRCC also requested a detailed list of his travels before arriving in Canada and various other documents.

[21] On December 13, 2021, the Principal Applicant provided some of the other documents that were requested. He explained that he could not obtain police certificates without a valid passport.

[22] On January 20, 2022 and on April 20, 2022, the Principal Applicant inquired about the status of his application.

[23] On May 30, 2022, the Applicants commenced the within application for judicial review.

[24] On June 1, 2022, the Principal Applicant advised IRCC that he would not provide more information and that the material already provided was sufficient.

III. ISSUE

[25] This application raises one issue: should an Order of *mandamus* be granted?

[26] That issue falls to be determined according to the test set out in *Apotex Inc. v. Canada (Attorney General)* (1993), 162 N.R. 177 (C.A.), aff'd [1994] 3 S.C.R. 1100. At pages 192 to 194, the Court set out the following test:

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, in particular:

    a. the applicant has satisfied all conditions precedent giving rise to the duty:

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

4. Where the duty sought to be enforced is discretionary, the following rules apply:

    a. in exercising discretion, the decision-maker must not act in a manner which can be characterized as "unfair", "oppressive" or demonstrate "flagrant impropriety" or "bad faith";

    b. *mandamus* is unavailable if the decision-maker's discretion is characterized as being "unqualified", "absolute", "permissive" or "unfettered";

    c. in the exercise of a "fettered" discretion, the decision-maker must act upon "relevant", as opposed to 'irrelevant", considerations;

    d. *mandamus* is unavailable to compel the exercise of a "fettered discretion" in a particular way; and

    e. *mandamus* is only available when the decision-maker's discretion is "spent"; i.e., the applicant has a vested right to the performance of the duty.

5. No other adequate remedy is available to the applicant;

6. The order sought will be of some practical value or effect;

7. The court in the exercise of its discretion finds 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.

IV. SUBMISSIONS

A. *The Applicants' Submissions*

[27] The Applicants argue that the Respondent has a legal duty to finalize the application, that a reasonable period of time has passed since they submitted their application, that they responded to all requests to provide documents and information, and that the security investigations have been resolved in favour of the Principal Applicant.

B. *B. The Respondent's Submissions*

[28] The Respondent raises a preliminary issue. He argues that the Applicants' failure to provide a personal affidavit from the Principal Applicant, in support of their application for judicial review, is fatal to this proceeding.

[29] The Respondent submits that this application should be dismissed since the Applicants did not satisfy all the conditions precedent for their sponsorship application, specifically that the Principal Applicant failed to provide the documents requested by IRCC.

[30] The Respondent further argues that any delay in processing the permanent residence application is due to the Principal Applicant's actions, that is his refusal to provide the documents requested and to sit for an interview.

V. DISCUSSION AND DISPOSITION

[31] There is no "decision" under review in this proceeding, therefore there is no need to consider any standard of review. The Respondent does not seriously contest the elements of the *Apotex, supra* test, with the exception of the time required to process the application for permanent residence.

[32] I will first address the Respondent's preliminary issue.

[33] In my opinion, the absence of a personal affidavit is not fatal. The relevant facts about the history of the Applicants' spousal sponsorship are set out in the Certified Tribunal Record and no negative consequences flow from the lack of a personal affidavit.

[34] Since the first application for an Order of *mandamus* was dismissed on August 7, 2019 by Justice Elliott, the Applicants have provided "missing" documents, that is a copy of his expired Egyptian passport that was valid from 1991 to 1998 and a copy of his birth certificate.

[35] In *Conille v. Canada (Minister of Citizenship and Immigration) (T.D.)*, [1999] 2 F.C. 33, Justice Tremblay-Lamer outlined the requirements for an unreasonable delay in the context of processing a citizenship application:

> (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.

[36] According to the Applicants, the “expected” time for processing an application for permanent residence is 15 months. In this case, the application was filed in October 2016. The history of the Principal Applicant’s interaction with Canadian authorities about his status in Canada is long and complicated, including three security certificate proceedings which are now concluded. Those proceedings began in 1999.

[37] An application for permanent residence should not, in the ordinary course of events, take nearly 7 years. The Applicants began seeking permanent residence for the Principal Applicant after dismissal of the security proceedings in 2016. His background had been thoroughly reviewed during the security proceedings.

[38] I acknowledge that the personal circumstances of the Principal Applicant are unusual. However, in my opinion, the time taken to process his permanent residence application is longer than the nature of the process requires.

[39] Although the Respondent argues that the Applicants have failed to fully answer the questions asked or to provide all the documents requested, I am satisfied that in the particular circumstances of these Applicants, they have done the best they could do. In my opinion, neither the Applicants nor their counsel are responsible for the delays in processing their outstanding application.

[40] In their written submissions, the Applicants pled that the Principal Applicant is not eligible to obtain police certificates because he does not have a valid passport.

[41] I do not agree with the Respondent's argument that the Applicants are effectually reversing their burden to provide information.

[42] The Respondent and the Government of Canada surely know whatever is to be "known" about the Principal Applicant since the beginning of the security certificate proceedings in 1999. The Minister of Public Safety and Emergency Preparedness was a party to the security certificate proceedings. Details about the life of the Principal Applicant are recorded in *Jaballah (Re)*, *supra*.

[43] The Respondent contends that he cannot access information that was gathered as part of another process, that is the security certificate process. I do not understand why not, if the information is available and can facilitate the completion of the process of obtaining status in Canada.

[44] Finally, I move to the remaining element set out in *Conille*, *supra*, that is whether the authority responsible for the delay has failed to give a satisfactory explanation for it.

[45] I agree with the submissions of the Applicants. They recognize that the Respondent holds a discretion in the matter of granting an application for permanent residence, but their complaint in this cause is not about the "granting" but the "processing" of their application.

[46] The Respondent appears to argue that because the Applicants have not provided the information and documents requested by his servants and agents, as part of the administrative processing of the application for permanent residence, the processing delays are “justified”.

[47] I do not agree.

[48] I generally agree with the submissions of the Applicants that they have satisfied the test, in order to obtain an Order of *mandamus*. The most significant factor in their favour is the length of time that the spousal application for permanent residence has been outstanding.

[49] Considering the materials filed and the submissions of the parties, I am satisfied that an Order of *mandamus* is appropriate in this case.

[50] The Applicants have provided information and documents in the years following the dismissal by Justice Elliott in 2019 of their application for *mandamus*. Although the Respondent argued that this Court should adopt the reasons of Justice Elliott and dismiss the present application, in my opinion, the facts have changed sufficiently since that decision was released.

[51] In granting the relief sought in this application for judicial review, the Court is not “directing” the Respondent to “grant” permanent residence. The grant of permanent residence lies within the purview of the Respondent, not of the Court. The effect of allowing this application is that the Respondent will be ordered to process the Applicants’ application for permanent residence within a specified timeframe.

[52] In the special circumstances of the Applicants, I consider one hundred and twenty days to be a reasonable period for the Respondent to process the application for permanent residence.

[53] At the hearing of this application, the parties were not prepared to submit proposed questions for certification. A Direction was subsequently issued, giving them the opportunity to consult between themselves and to propose questions.

[54] I have reviewed the proposed questions.

[55] Subsection 74(d) of the Act sets out the test for certifying a question, that is a question that raises a serious question of general importance that is dispositive of the case, as discussed in *Zazai v. Canada (Minister of Citizenship and Immigration)* (2004), 318 N.R. 365 (F.C.A.).

[56] An application for an Order of *mandamus* will usually be fact-specific and not give rise to a serious question of general importance that is dispositive of the application.

[57] In my opinion, the questions submitted by the parties do not meet the applicable legal test for certification. No question will be certified.

[58] The Applicants seek costs if successful upon this application. Pursuant to Rule 22 of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22, 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.

[59] The Applicants seek the amount of $5,000.00. The Respondent opposes any award of costs.

[60] The Court has full discretionary power over the amount and allocation of costs and the determination of by to whom they are to be paid under Rule 400 of the *Federal Courts Rules*, SOR/98-106.

[61] In *Ndungu v. Canada (Citizenship and Immigration)* (2011), 423 N.R. 228 (F.C.A.), the Federal Court of Appeal identified some factors that may qualify as “special reasons” to award costs in an immigration proceeding, including where an immigration official circumvents an order of the Court, engages in conduct that is misleading or abusive, or issues a decision only after an unreasonable and unjustified delay.

[62] Among other things, the Applicants submit that the Respondent contributed to the delay in processing their application for permanent residence by requesting information that he knew that they could not obtain.

[63] The Respondent opposes the award of any costs and questions the basis of the request for $5000.00.

[64] I am satisfied, considering the submissions of the parties and the relevant jurisprudence, that an award of costs is merited in this case.

[65] I agree with the Applicants' submissions that the Respondent's continuing requests for documents, that they knew the Applicants could not provide, constitute "special reasons" for the award of costs.

[66] Considering the submissions of the parties, the guiding Rules and applicable jurisprudence, in the exercise of my discretion I award costs to the Applicants in the amount of $3,500.00, together with GST.

JUDGMENT IN IMM-5032-22

THIS COURT'S JUDGMENT is that the application for judicial review is granted and an order of *mandamus* will issue, the Respondent will process the Applicants' application for permanent residence within one hundred and twenty (120) days of this judgment. Costs are awarded to the Applicants in the amount of $3,500.00, together with GST.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5032-22
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