Federal Court  Cour fédérale

Date: 20100625

Docket: IMM-6241-09

Citation: 2010 FC 697

Ottawa, Ontario, June 25, 2010

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

MOHSEN ESMAEILI-TARKI

Applicant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) for an order for *mandamus* compelling the Respondent to make a decision regarding the Applicant's application for ministerial relief pursuant to subsection 34(2) of the Act.

[2] The parties agree that the style of cause be changed so that the Minister of Public Safety and Emergency Preparedness be named as the Respondent (the Minister). The style of cause is amended accordingly.

[3] The relevant facts are not in dispute and are as follows. The Applicant, Mohsen Esmaeili-Tarki, is a citizen of Iran who was declared a Convention Refugee in Canada on January 5, 1998. He applied for permanent resident status on February 28, 1999. The Applicant was found to be inadmissible by reason of his former membership in an organization for which there are reasonable grounds to believe had engaged in acts of terrorism – the Mujaheddin-E-Khalq (MEK).

[4] He subsequently filed an application for ministerial relief pursuant to subsection 34(2) of the Act which provides that "[t]he matters referred to in subsection (1) do not constitute inadmissibility in respect of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest." The Minister may not delegate authority with respect to subsection 34(2). The ministerial exemption power is non-delegable.

[5] The Applicant attended an interview in conjunction with that request and, on July 24, 2001, he was notified that a recommendation for favourable consideration of his application would be made. On March 17, 2004, he was notified that his request was refused, and therefore, his application for permanent residence was denied. That decision was set aside by this Court on April 15, 2005 as the reasons provided were found to be insufficient. The decision was referred back to the Minister for redetermination (*Esmaeili-Tarki v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 509, [2005] F.C.J. No. 633).

[6] On December 22, 2007, the Applicant received a copy of a briefing note and other documents that were to be reviewed by the Minister in making the decision on the requested exemption. Submissions were made in response and since that time there has been no further information with regard to the decision.

[7] On July 30, 2009, the Applicant contacted the Minister asking that his application be processed and a decision rendered. The response received from the Counter-Terrorism Section, which is dated August 5, 2009, stated that the Manager had been informed that the application was in the redrafting process and that no timeline could be provided as to the completion of the draft recommendation.

[8] The Applicant seeks an order in *mandamus* pursuant to paragraph 18.1(1)(a) of the *Federal Courts Act*, R.S.C. 1985, c. F-7. The Court must be satisfied of the following conditions before a *mandamus* is issued:

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 a 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.

(*Apotex Inc. v. Canada (Attorney General)*, [1994] 1 F.C. 742 (F.C.A.))

[9] With respect to the requirements above, the Respondent does not contest the first two. The remaining applicable requirements are at issue.

Clear right to performance

[10] The Applicant has provided all of the necessary submissions and satisfied the conditions precedent. I am satisfied that there has been an unreasonable delay in this case. In order for there to be a finding that the delay is unreasonable, it must be shown that the delay in question has been longer than the nature of the process requires, *prima facie*; the applicant and his counsel are not responsible for the delay; and the authority responsible for the delay has not provided satisfactory justification (*Conille v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 F.C. 33 (F.C.T.D)).

[11] In determining whether or not a delay is excessive, the facts in every case must be considered. Determinations made in other cases may provide guidance in this regard (*Mohamed v.*

Canada (Minister of Citizenship and Immigration) (2000), 195 F.T.R. 137 (F.C.T.D.); *Hanano v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 998, 257 F.T.R. 66 at para. 15).

[12] In *Hanano* at paragraph 15, the following review is provided:

> However, determinations made by my colleagues in other cases provide guidance in this regard. In Bhatnager, a delay of 4 1/2 years was found to be unreasonable. In Mohamed, supra, a delay of 4 years in waiting for a security clearance for landing of a Convention refugee was found to be longer than prima facie required. In Platonov v. Canada (Minister of Citizenship and Immigration) (2000), 192 F.T.R. 260 (T.D.) a delay of slightly over two years, after provisional approval, spent in waiting for security checks on former business associates was considered excessive. In Kalachnikov v. Canada (Minister of Citizenship and Immigration) (2003), 236 F.T.R. 142 (T.D.), a delay of approximately 3 years in processing a visa application was considered unreasonable and unjustified when the estimated processing time was 14 months. In Conille, supra, the delay of 3 years waiting for a CSIS investigation to be completed before citizenship was granted was found to be unreasonable. In Dragan, *supra*, delays within a range of 2 to 3 years were found to be unreasonable and *mandamus* issued.

[13] The Respondent relies on the affidavit of Michelle Barrette, Senior Program Officer with the Canada Border Services Agency (CBSA) Ministerial Relief Unit, dated April 30, 2010, where she states that a new recommendation in this case has been prepared and reviewed and, if the revisions and required reviews proceed within normal timeframes, the recommendation should be disclosed to the Applicant for comment within six to eight weeks. Relying on the decision in *Rouleau v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 602, 252 F.T.R. 309, the Respondent submits that these recent steps render the order of *mandamus* inappropriate. However, in that case,

the Minister actually issued the report that would have been subject to the order; that is not the case here.

[14] The Respondent argues also that the delay is not unreasonable if one considers the numerous and varied responsibilities of the Minister who cannot delegate his decision making power. He further submits that the entire process has been hampered by an institutional reorganisation and that it has not taken longer than required considering the many levels of assessment and review involved.

[15] I do not accept these arguments as justifying the delay. In light of the facts that more than five years have elapsed since the matter was sent back to the Minister for redetermination and the Minister had the benefit of the previously prepared briefing note. Also, a briefing note was sent to the Applicant for comments in 2007 and there have been no further follow ups with him. There is no way to know that there won't be further delays even if the new recommendation is communicated to the Applicant in the timeline proposed in Michelle Barrette's affidavit. There is no evidence that there are any pending investigations regarding the Applicant. The Applicant has cooperated in all aspects of the process.

No other adequate remedy

[16] There is no other remedy available to the Applicant. The recourse suggested by the Respondent to apply for a waiver on humanitarian and compassionate grounds does not address the duty in question here which is that of the Minister to provide a decision.

Balance of convenience

[17] In my view, while the balance of convenience favours the Applicant because his lack of status presents significant obstacles for him, the Respondent also raises valid concerns that should be addressed.

[18] The Respondent alleges that the waiving of inadmissibility on security grounds requires careful consideration and the weighing of multiple factors by the Minister. He urges that requiring a decision to be made in a set amount of time could lead to the Applicant's participatory rights being compromised. I am aware that it is important that the Applicant be allowed to participate fully in the evaluation of his assessment and that national security concerns are not to be taken lightly. Nevertheless, I believe that my decision can address these concerns by allowing the Respondent until October 31, 2010 in order to allow the Minister to render his decision.

[19] The Applicant has asked for costs on this judicial review. I am satisfied that the Applicant has demonstrated special reasons as required by Rule 22 of the *Federal Court Immigration and Refugee Protection Rules*, SOR/93-22 to obtain costs.

[20] In his further memorandum of argument, the Respondent asks the court to address a motion seeking to protect certain information from disclosure on the basis that its release would injure national security or the safety of any persons. That motion was adjourned *sine die* by Lutfy CJ.

Since this motion has already been adjudicated upon by the Federal Court, I do not have the jurisdiction to amend or vary that Order.

[21] Neither party has submitted a question for certification nor does one arise.

JUDGMENT

THIS COURT ORDERS that the Respondent render a decision on the Applicant's application no later than October 31, 2010. Costs are awarded to the Applicant in a lump sum of $2,500. No question is certified.

"Michel Beaudry"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6241-09
STYLE OF CAUSE:	**MOHSEN ESMAEILI-TARKI AND MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	June 23, 2010
REASONS FOR JUDGMENT:	BEAUDRY J.
DATED:	June 25, 2010

APPEARANCES:

Kristin Marshall	FOR THE APPLICANT
Martin Anderson	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Downtown Legal Services Toronto, Ontario	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT