Federal Court  Cour fédérale

Date: 20200102

Docket: IMM-544-19

Citation: 2020 FC 3

Ottawa, Ontario, January 2, 2020

PRESENT: The Honourable Mr. Justice Bell

BETWEEN:

SAID AL KHATIB

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview and Decision under Review

[1] Mr. Al Khatib is a citizen of Lebanon and is married to a Canadian citizen. From 1993 to 2013, he was a member of the Lebanese Internal Security Forces [ISF], from which he retired as a Chief Warrant Officer. In November 2011, he applied for permanent residency in Canada via a spousal sponsorship. That application was refused for the first time in June 2017, in part, on the

basis of misrepresentation under paragraph 40(1)(*a*) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The alleged misrepresentation was straightforward: Mr. Al Khatib reported in his application that he was not facing any criminal charges in Lebanon, when, in fact, he was facing two (2) criminal charges for which he was subsequently found guilty. The Program Manager rejected Mr. Al Khatib's contention that he misunderstood the question to be asking about criminal convictions rather than charges. The Program Manager noted that Mr. Al Khatib's spouse was a doctoral candidate in Canada, Mr. Al Khatib was a police officer and he had a formal legal education. The Program Manager also relied upon paragraph 35(1)(*a*) of the *IRPA*, finding Mr. Al Khatib to have been complicit in human or international rights violations while with the ISF, and paragraph 36(1)(*a*) of the *IRPA*, finding he participated in war crimes and crimes against humanity while serving with the ISF, in refusing the application. The Program Manager considered humanitarian and compassionate grounds but concluded they were insufficient to overcome the other obstacles to permanent residency. Mr. Al Khatib sought judicial review of the June 2017 decision. On agreement between Mr. Al Khatib and the Minister, Mr. Al Khatib discontinued the judicial review application. His application for permanent residency was remitted to another Program Manager for redetermination.

[2] The second Program Manager to consider Mr. Al Khatib's application for permanent residency concluded there was insufficient evidence upon which to refuse the application on the basis of Mr. Al Khatib's alleged participation in war crimes and crimes against humanity (pursuant to para 36(1)(*a*) of the *IRPA*). The Program Manager did, however, maintain the refusal on the basis of misrepresentation (pursuant to para 40(1)(*a*) of the *IRPA*) and complicity in human and international rights violations (pursuant to para 35(1)(*a*) of the *IRPA*). The

Program Manager refused to consider humanitarian and compassionate grounds because they were made following the coming into force of the *Faster Removal of Foreign Criminals Act*, SC 2013, c 16 on June 19, 2013, which prohibited considering humanitarian and compassionate grounds where an applicant is found inadmissible under section 35. It is that second decision, dated November 27, 2018, which is the subject of the within application for judicial review made pursuant to subsection 72(1) of the *IRPA.*

II. Positions of the Parties

[3] The Respondent consents to the application for judicial review and requests the matter be remitted to a different Program Manager for redetermination. Mr. Al Khatib agrees with the Respondent that the application for judicial review should be allowed. He, however, disagrees with the Respondent's proposed disposition. He contends this Court should grant the judicial review and, in addition, direct the Program Manager to allow the spousal sponsorship and order costs against the Respondent.

III. Relevant Provisions

[4] The relevant provisions are subsection 18.1(3) of the *Federal Courts Act*, RSC 1985, c F-7 and rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules* (SOR/93-22) as set out in the attached Schedule.

IV. Analysis

[5] First a word about nomenclature. I will, as directed by the Federal Court of Appeal in *Canada (Citizenship and Immigration) v Tennant*, 2019 FCA 206 at para 73, 436 DLR (4th) 155 [*Tennant*] refrain from using the words "directed verdict" or "directed outcome". I will refer to the substitution remedy sought by the applicant as *certiorari* with *mandamus* in aid.

[6] Mr. Al Khatib contends it is appropriate for this Court to order the Program Manager to grant his application for permanent resident status through *certiorari* with *mandamus* in aid for two (2) reasons: first, there is only one lawful or reasonable response open to the decision-maker; and second, the inordinate delay in processing his application has resulted in an abuse of process. The respondent relies on *Lebon v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 FCA 55 at para 14, 444 NR 93 and *D'Errico v Canada (Attorney General)*, 2014 FCA 95 at paras 15-16, 459 NR 167.

[7] Firstly, I am unable to agree with Mr. Al Khatib's contention there is only one lawful or reasonable response to his application for permanent residency. While the previous two (2) decision-makers have taken different approaches to the availability of relief based upon humanitarian and compassionate grounds and have reached different results on the issue of the application of paragraph 36(1)(*a*) (complicity in war crimes), both found Mr. Al Khatib to have misrepresented facts about criminal charges in his application. In my view, the alleged misrepresentation remains a live issue. Another decision maker, while required to consider the matter afresh, might well choose not to grant the application. Therefore, more than one lawful or reasonable outcome exists. See *Tennant* at paras 71-72 and the cases cited therein and *Canada*

(Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65 at para 142 and the cases cited therein.

[8] Secondly, while accepting, without deciding, Mr. Al Khatib's contention that inordinate delay may result in abuse of process and bring the administration of justice into disrepute, and that such delay alone permits intervention by the Court through *certiorari* with *mandamus* in aid, I disagree that such a remedy is available in the circumstances. Abuse of process permits courts to stop proceedings that have become unfair or oppressive, which includes situations where there has been an unacceptable delay resulting in significant prejudice (*Blencoe v British Columbia (Human Rights Commission)*, 2000 CSC 44 at para 101, [2000] 2 SCR 307 [*Blencoe*]). Whether delay is inordinate such that it justifies granting a stay of proceedings depends on all of the circumstances, including the purpose and nature of the case, its complexity, the facts and issues involved, and whether the affected person contributed to or waived the delay (*Blencoe* at para 122). This case is not simple. It is one that at various stages raised, and continues to raise, serious allegations of violations of international and human rights; serious allegations of violations of war crimes and crimes against humanity (which now seem to have been unproven); and a *prima facie* case of serious misrepresentation by an applicant who would seem to have known that he was not being truthful. Finally, there are serious questions, with mixed results by previous decision-makers, about the application of the *Faster Removal of Foreign Criminals Act* and the availability of relief on humanitarian and compassionate grounds. These are not minor matters. They engender complex analyses, such that both decision-makers convoked an oral interview with the applicant.

[9] Mr. Al Khatib cites decisions of this Court in *Beltran v Canada (Citizenship and Immigration)*, 2011 FC 516, 234 CRR (2d) 145 [*Beltran*]; *Fabbiano v Canada (Citizenship and Immigration)*, 2014 FC 1219, 32 Imm LR (4th) 84 [*Fabbiano*]; and *Almrei v Canada (Citizenship and Immigration)*, 2014 FC 1002, 31 Imm LR (4th) 92 [*Almrei*] to support his contention that inordinate delay can result in an abuse of process which warrants relief by way of a stay of proceedings or *certiorari* with *mandamus* in aid. Those cases can all be distinguished from the facts in the present case.

[10] In *Beltran*, Mr. Beltran was granted refugee status in Canada in March 1988 and he applied for permanent residence status two (2) months later. The Canadian Security Intelligence Service interviewed Mr. Beltran in 1989 and concluded in its brief to Citizenship and Immigration Canada that he was not admissible to Canada on security grounds for having been involved in a terrorist organization. It was not until 2009 that he was referred to an inadmissibility hearing. The Court found "Mr. Beltran misrepresented nothing, and all the information necessary to proceed with an admissibility hearing was available for more than twenty years" (*Beltran* at para 42). Despite having the information on hand for so many years, the Minister kept it "up its sleeve" and "d[id] nothing about it" for more than 20 years, which prejudiced Mr. Beltrans's ability to respond to the case against him and locate witnesses to support his case. To make matters worse, Mr. Beltran's application was also denied in 2007 due to his criminal record, which was "clearly wrong" as he had received a pardon in 2001.

[11] In *Fabbiano*, Mr. Fabbiano had lived in Canada for more than 50 years. He applied for Canadian citizenship in 2005. In 2006, he was advised that he might be inadmissible for serious

criminality for being a member of a criminal organization – the Hells Angels – due to which he had received a conviction of drug trafficking in 1999. In 2007, he responded to the allegations with an accompanying request for relief on humanitarian and compassionate grounds. He heard nothing further until 2013, when he was informed that he had been referred for an inadmissibility hearing. With the passing of those 14 years (1999 – 2013), this Court concluded Mr. Fabbiano had lost the opportunity to present relevant evidence. This affected his right to a fair hearing resulting in a stay of the inadmissibility hearing. Moreover, he did not do anything to contribute to the delay.

[12] In *Almrei*, while the facts and judicial history are somewhat complex, one can briefly summarize the matter by observing that the Minister was aware of information for 12 years that could have led to Mr. Almrei's inadmissibility on the basis of organized criminality under paragraph 37(1)(*b*) of the *IRPA*. These inadmissibility concerns had been raised collaterally on two (2) previous security certificate proceedings. This Court did not order a permanent injunction against the holding of an inadmissibility hearing, but, in the circumstances, ordered that the inadmissibility hearing be stayed pending the determination of an underlying judicial review application.

[13] In the present case, Mr. Al Khatib was aware of the substance of the allegations made against him. The Minister did not "sit on" relevant information without informing Mr. Al Khatib. He provided detailed responses to those allegations. It cannot be said that the delays incurred thus far have resulted in a denial of Mr. Al Khatib's right to a fair hearing. The delay has not precluded him from providing relevant evidence to support his case, and the decision-makers did

not make their decisions based on outdated information. Furthermore, I am not satisfied the delay which will arise from remitting this matter for redetermination will result in the denial of a fair hearing.

[14] Finally, on the issue of delays in general, an unexplained delay in processing an application will not necessarily result in an award of costs or justify the application of *certiorari* with *mandamus* in aid. See *Gerges v Canada (Citizenship and Immigration)*, 2018 FC 106. In the circumstances, I am not satisfied there has been an unexplained delay. The case, as already mentioned, is complicated, with part of the complication being the misrepresentation, the responsibility for which rests with Mr. Al Khatib.

[15] That said, while in my view the delay in this case does not warrant granting *certiorari* with *mandamus* in aid or costs in favour of the applicant, I recognize this application has been ongoing for several years at considerable cost to the applicant from a personal, financial and emotional perspective. For that reason, I am ordering that the redetermination be completed and communicated to Mr. Al Khatib within 90 days from the date of the filing of this decision with the Registry.

V. Conclusion

[16] In the circumstances, there will be an order that the matter be remitted to a different Program Manager for redetermination and that the decision be completed and communicated to Mr. Al Khatib within 90 days from the date of the filing of this decision with the Registry. There will be no order for costs. Furthermore, neither party proposed a question for certification to be

considered by the Federal Court of Appeal and none arises from the facts. No question will therefore be certified.

JUDGMENT in IMM-544-19

THIS COURT'S JUDGMENT IS THAT:

1. The application for judicial review is granted and the matter is remitted to a different Program Manager for redetermination;
2. The redetermination shall be completed and communicated to the applicant within 90 days from the date of the filing of this decision with the Registry;
3. No question is certified for consideration by the Federal Court of Appeal;
4. There is no order of costs.

"B. Richard Bell"
Judge

ANNEX

Federal Courts Act, RSC 1985, c F-7	***Loi sur les Cours fédérales***, LRC 1985, ch F-7
Powers of Federal Court	**Pouvoirs de la Cour fédérale**
18.1 (3) On an application for judicial review, the Federal Court may	**18.1 (3)** Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut
(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or	**a)** ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;
(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.	**b)** déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.
Federal Courts Citizenship, Immigration and Refugee Protection Rules (SOR/93-22)	***Règles des cours fédérales en matière de citoyenneté, d'immigration et de protection des réfugiés*** (DORS/93-22)
Costs	**Dépens**
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	**22** Sauf ordonnance contraire rendue par un juge pour des raisons spéciales, la demande d'autorisation, la demande de contrôle judiciaire ou l'appel introduit en application des présentes règles ne donnent

orders.

pas lieu à des dépens.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-544-19
STYLE OF CAUSE:	SAID AL KHATIB v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	OCTOBER 2, 2019
REASONS FOR JUDGMENT AND JUDGMENT:	BELL J.
DATED:	JANUARY 2, 2020

APPEARANCES:

Arghavan Gerami	FOR THE APPLICANT
Thomas Finlay	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Gerami Law PC Ottawa, Ontario	FOR THE APPLICANT
Attorney General for Canada Ottawa, Ontario	FOR THE RESPONDENT