Federal Court Cour fédérale

Date: 20220803

Docket: IMM-5274-20

Citation: 2022 FC 1161

Ottawa, Ontario, August 3, 2022

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

DEMILADE KAYODE OLADELE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Demilade Kayode Oladele, seeks judicial review of the failure of Immigration, Refugees and Citizenship Canada ("IRCC") to process the Applicant's application for permanent residence within Canada on humanitarian and compassionate ("H&C") grounds pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act,* SC 2001, c 27 ("*IRPA*") in a timely and lawful manner. Furthermore, the Applicant seeks an order in the nature

of *mandamus* requiring the Respondent, the Minister of Citizenship and Immigration, to render a final decision on the Applicant's pending application for permanent residence on H&C grounds.

[2] The Applicant submits that IRCC's delay is unreasonable and that he has met all of the requirements for an order in the nature of *mandamus* to require the Respondent to render a final decision on his H&C application.

[3] For the reasons that follow, I find an order of *mandamus* is warranted. The Respondent has not provided an adequate justification for the unreasonable delay in rendering a final decision on the Applicant's H&C application. I therefore grant this application for judicial review.

II. **Facts**

A. *Background*

[4] The Applicant is a 45-year-old citizen of Nigeria. He is married to a Canadian citizen, Ms. Jennifer Oladele ("Oladele"). Together, they have four children, all of whom are Canadian citizens: Grace (age 5), Ethan (age 10), Manasseh (age 11), and Jayden (age 18), who is the Applicant's stepson.

[5] On October 24, 2005, the Applicant entered Canada at Pearson International Airport in Toronto, where he was detained and made a refugee claim. The Applicant was released from detention on December 5, 2005. The Minister of Public Safety intervened in the Applicant's

refugee claim proceedings, seeking his exclusion from refugee protection under Article 1F(a) of the *United Nations Convention Relating to the Status of Refugees,* 189 U.N.T.S. 150.

[6] On June 3, 2008, an inadmissibility report was written against the Applicant pursuant to section 44 of the *IRPA* regarding his inadmissibility under paragraph 35(1)(a) of the *IRPA,* based on the Applicant's previous involvement with the Neo Black Movement of Africa ("NBMA"). The Applicant's refugee claim hearing was suspended pending the outcome of the admissibility hearing. The Applicant applied for leave and judicial review of the section 44 report, but his application was dismissed by this Court.

[7] On December 24, 2008, a second section 44 report was written against the Applicant, pursuant to paragraph 37(1)(a) of the *IRPA*. This report was also based on the Applicant's previous involvement with the NBMA.

[8] In 2009, the Applicant became romantically involved with Ms. Oladele. Soon after, Ms. Oladele and her son, Jayden, moved in with the Applicant. The Applicant states that he became a father figure to Jayden, and despite the uncertainty of his status, he made his best efforts to support his family and become established. This included supporting Ms. Oladele with daily tasks, as she suffers from a degenerative disc disease, and working two jobs as a caregiver for adults with special needs.

[9] On August 12, 2010, the Immigration Division ("ID") issued a deportation order against the Applicant, finding him inadmissible pursuant to sections 35(1)(a) and 37(1)(a) of the *IRPA*.

The Applicant's refugee proceedings were terminated. The Applicant applied for leave and judicial review of the ID's inadmissibility determination, but was denied leave by the Court.

[10] On October 18 2010, the Applicant applied for a Pre-Removal Risk Assessment ("PPRA"). He also submitted an application for permanent residence under the Spouse/Common Law partner in Canada class ("Sponsorship Application"). The PPRA application was denied on December 16, 2010.

[11] In January 2011, the Applicant filed his application for permanent residence on H&C grounds. In his application, he requested a waiver of his inadmissibility to Canada.

[12] On April 23, 2011, the Applicant's son, Manasseh, was born. On July 24, 2011, the Applicant and Ms. Oladele were married.

[13] On December 9, 2011, the Applicant was removed from Canada to Nigeria. Soon after, Ms. Oladele, Jayden and Manasseh visited him in Nigeria. Ms. Oladele was pregnant at the time. The Applicant states that this trip was difficult for Ms. Oladele and the children: the conditions in Nigeria are dangerous, and they were harassed because they are an inter-racial family. The Applicant states that he and Ms. Oladele assessed whether the family should relocate to Nigeria. However, they came to the difficult realization that the poor conditions in Nigeria—including the high unemployment rate, the poor quality of public education and health services, the high cost of living, the culture shock, and the lack of security—were unsuitable for

the children. Ms. Oladele and the children returned to Canada without the Applicant. On June 12, 2012, the Applicant and Ms. Oladele's son Ethan was born.

[14] On August 14, 2012, IRCC denied the Sponsorship Application, finding that the Applicant no longer met the requirements of the class since he was residing outside of Canada.

[15] In September 2014, Ms. Oladele and the children joined the Applicant in Uganda, where he was living under a temporary student visa. The Applicant states that the move to Uganda caused the family a great deal of practical, financial, physical and emotional hardship. Life in Uganda was challenging. Living conditions were poor with regular water shortages and power outages, which caused them all anxiety and affected the children's mental health. While the Applicant and Ms. Oladele attempted to secure work in Uganda, they could not find employers to sponsor their work permits and their savings rapidly depleted. In late 2014, Jayden suffered a medical crisis that could not be properly treated in Uganda. In 2015, Ms. Oladele began experiencing trouble with her vision. Medical professionals in Uganda could not diagnose the cause, so she returned to Canada for medical testing. Doctors in Canada determined that the vision impairment was caused by brain lesions resulting from multiple sclerosis. Ms. Oladele returned to Uganda, despite her doctors' wishes for her to remain in Canada for treatment, because it was too difficult for the family to remain separated.

[16] In February 2015, an IRCC officer ("Officer") referred the Applicant's H&C application to the IRCC Case Management Branch in Ottawa for consideration of a waiver of the Applicant's inadmissibility to Canada.

[17] In April 2016, Ms. Oladele became pregnant with a fourth child. Since the Applicant's status in Uganda was coming to an end, he returned to Nigeria. Ms. Oladele and the children returned to Canada and the family was again separated. The Applicant states that in his absence, Jayden's mental health deteriorated and he expressed symptoms of anxiety and paranoia. Ms. Oladele gave birth to their daughter, Grace on January 23, 2017.

[18] Since he submitted his H&C application in January 2011, the Applicant, through his counsel and with Ms. Oladele's support, contacted IRCC on several occasions to update his H&C application. This included updates on the birth of the Applicant's children, new country condition documentary evidence, information about his family's time in Uganda, and information about Ms. Oladele's health.

[19] In May 2016, the Applicant applied to the Federal Court for a writ of *mandamus* for a decision on his pending H&C application. IRCC made a settlement offer and the Applicant discontinued the litigation.

[20] By letter dated December 6, 2016, IRCC refused to grant the Applicant a waiver from his inadmissibility. The H&C application was denied. The Applicant sought judicial review of the negative decision, and on September 25, 2017, my colleague Justice Manson granted the application for judicial review (see: *Oladele v Canada (Citizenship and Immigration)*, 2017 FC 851 ("*Oladele 2017*")).

[21] On October 4, 2017, the Applicant's counsel informed IRCC of this Court's decision in *Oladele 2017* and advised that the Applicant wished to make updated submissions. Updated documents were sent to IRCC on November 5, 2017.

[22] The Applicant states that he and Ms. Oladele wanted to avoid the expense of pursuing another Application for *mandamus* with this Court. On February 15, 2018, via counsel, the Applicant reached an agreement with IRCC that a decision would be made on his H&C application within 60 days of further updated submissions. However, a decision was made on May 8, 2018 without receipt of the Applicant's further updated submissions. By letter dated May 14, 2018, IRCC agreed to set aside that decision and render a new decision within 60 days of receipt of any new submissions. On June 4, 2018, the Applicant's counsel submitted the further documents, meeting the deadline set in IRCC's letter.

[23] In a decision dated October 11, 2018, IRCC refused the Applicant's H&C application. The Applicant sought judicial review of the decision.

[24] On November 12, 2019, my colleague Justice Heneghan granted the Applicant's application for judicial review (see: *Oladele v Canada (Citizenship and Immigration),* 2019 FC 1410 ("*Oladele 2019*")). Since then, no decision has been made on the Applicant's H&C application, yet the Applicant has continued to provide IRCC with updates to his H&C application.

[25] At the hearing, it was brought to the Court's attention that on June 24, 2022, the Applicant received a letter from IRCC requesting additional documentation.

III. **Issue and Standard of Review**

[26] The sole issue in this application is whether a writ of *mandamus* directing the Respondent to render a final decision on the Applicant's pending H&C application is warranted.

[27] The jurisdiction of this Court with respect to the issuance of a writ of *mandamus* is set out in section 18(1) of the *Federal Courts Act*, RSC, 1985, c F-7 ("*Federal Courts Act*"). Paragraph 18.1(3)(a) of the *Federal Courts Act* stipulates that, on an application for judicial review, the Federal Court may "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."

[28] An order of *mandamus* compels the performance of a particular statutory duty. It is an extraordinary remedy and *mandamus* applications must be assessed on the particular facts of each case (*Tapie v Canada (Citizenship and Immigration)*, 2007 FC 1048 at para 7). The standard of review with respect to whether *mandamus* should be issued is set out in the test outlined in in *Apotex Inc v Canada (Attorney General)*, 1993 CanLII 3004 (FCA) ("*Apotex*"). *Apotex* identifies eight preconditions that must be met for an application to be entitled to an order of *mandamus.* These requirements were most recently summarized by this Court in *Sharafaldin v Canada (Citizenship and Immigration),* 2022 FC 768 at paragraph 34, in the following way:

> (1) there must be a public legal duty to act;
>
> (2) the duty must be owed to the applicant;
>
> (3) there must be a clear right to performance of that duty;
>
> (4) where the duty sought to be enforced is discretionary, certain additional principles apply;
>
> (5) no other adequate remedy is available to the applicant;
>
> (6) the order sought will have some practical value or effect;
>
> (7) there is no equitable bar to the relief sought; and
>
> (8) on a balance of convenience an order of mandamus should be issued.

[29] In addition to the balance of convenience, the issue of whether to grant *mandamus* in this case concerns the clear right to the performance of IRCC's duty to determine the Applicant's permanent residency application, or more accurately, the reasonableness of the delay during which no such performance has occurred (*Abdolkhaleghi v Canada (Minister of Citizenship and Immigration)*, 2005 FC 729 at para 13).

IV. **Analysis**

A. *The Applicant's Position*

[30] The Applicant submits that he meets the *Apotex* requirements for an order of *mandamus.*

[31] First, the Applicant submits that both the applicable legislative provisions and the legitimate expectations of the Applicant create an obligatory public legal duty for the Minister to

make a final decision on the Applicant's application for permanent residence. The Applicant argues that the Minister's legal duty is further entrenched by the objectives of family reunification and the prompt processing of immigration applications under subsection 3(1) of the *IRPA*. This Court has found that an Applicant's legitimate expectations can ground a public duty to act (*Apotex* at paras 122-123, 128). In his case, the Applicant had a legitimate expectation that his application would be processed within a reasonable time.

[32] Second, by submitting an application for permanent residence on H&C grounds in January 2011, the Applicant submits he satisfied the conditions precedent that give rise to the duty. Since then, he and Ms. Oladele have made many updates to his H&C application, totalling over 2500 pages of documentation and submissions, and have received no indication that the application is incomplete. The H&C application has also been successfully subject to judicial review twice, following negative determinations. The Minister has had over 11 years to process the H&C application, and over two years have gone by since this Court set aside the most recent refusal of the H&C application. This is an extraordinary amount of time to process the application. In *Dragan v Canada (Minister of Citizenship and Immigration),* 2003 FCT 211 ("*Dragan*"), the Court found that neglect to perform a duty or unreasonable delay in performing it may be deemed an implied refusal to perform (at para 45). The Applicant submits that the delay in his case is unreasonable, and satisfies each branch of the test in *Conille v Canada (Minister of Citizenship and Immigration),* 1998 CanLII 9097 (FC) ("*Conille*").

[33] Third, the Applicant submits that this Court's intervention is warranted, and nothing short of the remedy of *mandamus* compelling the Minister to discharge his duty will ensure the Applicant's right to the fair processing of his application for permanent residence.

[34] Fourth, the Applicant maintains that there can be no doubt that the granting of *mandamus* will have a practical effect, because it will require the Minister to process the Applicant's permanent residence application, a decision to which he is entitled under the *IRPA*. The order sought will also have a real practical value for the Applicant and his family – who are suffering as a result of lengthy separation. Furthermore, there is no equitable bar to the relief sought in this case: the Applicant has "clean hands" and is not responsible for the lengthy delays in processing his application.

[35] Finally, the Applicant argues that the balance of convenience is in his favour, as he has been waiting for over 11 years for a final decision on his application. He and his family have suffered and have been separated due to his state of limbo.

B. *The Respondent's Position*

[36] The Respondent submits that the Applicant has not established that an order in the nature of *mandamus* in respect of his H&C application is appropriate. The Respondent notes that approximately 2.5 years have elapsed since the Court granted a judicial review of the Applicant's previous H&C decision on November 12, 2019 and ordered that it be re-determined (*Oladele 2019*). Given the complex nature of this file, involving inadmissibility for security issues and the

review of extensive country condition documentation, the Respondent maintains that this delay is not unreasonable in the circumstances of this case.

[37] The Respondent also submits that restrictions imposed during the COVID-19 pandemic further limited IRCC employees in their ability to access their offices to perform their duties. This included limited access to remote secured systems required to review the Applicant's application. Due to the impacts of the COVID-19 pandemic, the Respondent could not, and still cannot, process applications at a normal pace. For example, as noted on IRCC's website, the current processing time for applicants for permanent residence in the Express Entry category is now undetermined. The Respondent therefore maintains that the Applicant's case involves a complex issue for which the processing time of approximately 2.5 years cannot be considered undue delay.

[38] To support this position, the Respondent relies on *Seyoboka v Canada (Minister of Citizenship and Immigration),* 2005 FC 1290 ("*Seyoboka*"), which involved an application for judicial review for an order of *mandamus* to compel the respondent to make a definitive decision on the applicant's permanent residence application following the granting of his refugee status (paras 1-4). In *Seyoboka,* nine years had elapsed since the applicant filed his application for permanent residence. The applicant inquired several times about the status of his application and the respondent replied that a security check was ongoing. This Court found the nine-year delay in that case to be reasonable, given how the applicant had made significant additions to his application and the need for the respondent to complete the security investigation. The Court also held that it was not necessary to issue an order of *mandamus,* as the decision regarding

whether to grant the applicant refugee status could be nullified, thus directly impacting the permanent residence application (at paras 8-9).

C. *Analysis*

[39] First, I agree with the Applicant's position that the legislative framework and legitimate expectations of the Applicant create a public duty for the Respondent to make a final decision on the Applicant's H&C application. Subsection 3(1) of the *IRPA* explicitly lists family reunification, at paragraph 3(1)(d), and "prompt processing", at paragraph 3(1)(f), as objectives of the *IRPA:*

Objectives - immigration	**Objet en matière d'immigration**
3 (1) The objectives of this Act with respect to immigration are	**3 (1)** En matière d'immigration, la présente loi a pour objet :
[…]	[…]
(d) to see that families are reunited in Canada;	d) de veiller à la réunification des familles au Canada;
[…]	[…]
(f) to support, by means of consistent standards and prompt processing, the attainment of immigration goals established by the Government of Canada in consultation with the provinces;	f) d'atteindre, par la prise de normes uniformes et l'application d'un traitement efficace, les objectifs fixés pour l'immigration par le gouvernement fédéral après consultation des provinces;

[40] As noted by this Court in *Dragan*, "The content of the officer's duty of assessment under IRPA should certainly be interpreted in light of its other provisions, including the reference to

"consistent standards and prompt processing" in paragraph 3(1)(f)" (at para 43; see also *Shahid v Canada (Citizenship and Immigration)*, 2010 FC 405 ("*Shahid*") at para 19).

[41] I also agree with the Applicant that by submitting his H&C application in January 2011 and updating it regularly since then, the Applicant has satisfied the conditions precedent that give rise to the Respondent's duty to render a final decision on the H&C application. The Applicant also requested, on multiple occasions, that this duty be performed. In accordance with the jurisprudence of this Court, the delay in processing the H&C application can be characterized as an implied refusal to perform (*Dragan* at para 45).

[42] A delay may be unreasonable if the following three criteria are met (*Thomas v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 164 at para 19, citing *Conille* at para 23):

1. the delay in question is *prima facie* longer than the nature of the process required;
2. the applicants are not responsible for the delay; and
3. the authority responsible for the delay has not provided satisfactory justification.

[43] With respect to the first branch of the test, while the Respondent characterizes the processing delay as being one of 2.5 years, I agree with the Applicant that in fact, he has been waiting for over 11 years for the final determination of his H&C application, which was submitted in January 2011. Even where security concerns require additional consideration, 11 years is longer than the nature of the process required.

[44] Next, as noted above, the Applicant has satisfied the conditions precedent and the procedural requirements of the *IRPA,* and I do not find that he and his counsel are responsible for the delay. In fact, the Applicant has demonstrated that he upheld his responsibility of updating his H&C application whenever it was requested by IRCC or when new information arose.

[45] Finally, regarding the third prong of the test, I do not find the Respondent's justification for the delay to be satisfactory. I agree with the Applicant's submission that the Respondent mischaracterizes the delay at issue: since January 2011 multiple IRCC officials have assessed the Applicant's file. It has not been pending for 2.5 years, but rather for over 11 years. Irrespective of the more recent effects of the COVID-19 pandemic on working conditions and access to remote secure systems, IRCC had ample time to process the H&C application since it was first submitted in January 2011. As noted by this Court in *Almuhtadi v Canada (Citizenship and Immigration),* 2021 FC 712 at paragraph 47:

> […] In the absence of evidence to the contrary, COVID-19 also does not negate the Respondents' decision-making capacity for the entirety of time subsequent to March 2020. The pandemic was undoubtedly disruptive, but governmental processes have slowly resumed and decisions are being made.

[46] While the Respondent relies on *Seyoboka,* I find that the case at hand to be distinguishable. In *Seyoboka,* the applicant had made significant additions to his file over the nine years since his permanent residence application was submitted in August 1996: In May 1998 he added that he had been employed by the Rwanda Armed Forces and studies at the Military Academy, and in November 2004, he provided two documents referring to his involvement in the Rwanda genocide (at para 8). Unlike in *Seyoboka,* the Respondent has not

pointed to any material change of information provided by the Applicant, nor has the Respondent indicated that a security investigation is the reason for the delay. While the Applicant has diligently updated his H&C application with new information as the years have gone by, including his family's circumstances, the birth of his children, and more recent country condition evidence, these changes cannot be characterized in the same way as the new facts provided by the applicant in *Seyoboka,* which were found to justify the lengthy delay due to a security investigation.

[47] In *Shahid,* this Court notes, "[…] while it may be possible that the applicants are responsible for some of that delay if their applications contained contradictory information as the Minister asserts, they have provided updated information as soon as they were asked to do so and indeed before they were asked to do so" (at para 19). The same can be said of the Applicant's situation: the Respondent has not identified any contradictory information, and the Applicant diligently updated IRCC with new information as it arose.

[48] Given the significant delay and its effects on the lives of the Applicant and his family, I find that the remedy of *mandamus* and this Court's intervention is warranted in this case. I also agree with the Applicant that the granting of *mandamus* meets the sixth requirement of the *Apotex* test: that the remedy will have a practical effect and value. An order of *mandamus* will ensure a final determination on the Applicant's pending H&C application and will have practical value for the Applicant. In my view, it is clear from the evidence on record that, as a result of his H&C application not being determined in a reasonable time, the Applicant and his family have

suffered significant hardship stemming from family separation, poor living conditions in Nigeria and Uganda, and the stress that comes with the uncertainty of the Applicant's status.

[49] Finally, I find no equitable bar to the relief sought, since the Applicant is not responsible for the delays in processing his H&C application (*Dragan* at para 47), and I agree with the Applicant that the balance of convenience favours him in this case.

V. **Costs**

[50] The Applicant seeks costs based on the special reasons and facts of this case. The Applicant submits that the failure of the Respondent to render a timely decision on the H&C application, without providing any reasonable explanation for the lengthy delay warrants an award of costs.

[51] Under Rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 ("*Rules*"), costs are only awarded in applications for judicial review made pursuant to the *IRPA* for "special reasons":

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 orders.	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 pas lieu à des dépens.

[52] The threshold for establishing "special reasons" is high. It includes instances where one party has acted in a manner that may be characterized as unfair, oppressive, improper or actuated by bad faith (*Taghiyeva v Canada (Citizenship and Immigration)*, 2019 FC 1262 at paras 17-23; *Ndungu v Canada (Citizenship and Immigration)*, 2011 FCA 208 at para 7).

[53] In my view, this matter warrants an award of costs to the Applicant.

[54] As noted above, the Applicant has waited over 11 years for a final decision on his H&C application. I am not convinced by the Respondent's argument that the delay in question was only 2.5 years. Since the Applicant filed his H&C application in January 2011, multiple officials from IRCC have assessed the application and there has not been any substantive or material change in the Applicant's situation, as was the case is *Seyoboka*. Given the significant amount of time that has elapsed since the H&C application was filed, I cannot accept the Respondent's reliance on delays caused by the COVID-19 pandemic to justify the delay in this case.

[55] In response to the Respondent's argument that the Applicant's case is complex and involves the review of a file that is over 2000 pages in length, I note that the Applicant has a duty to keep his file up to date. The Applicant has upheld this duty by continuously and diligently providing IRCC with several updates as he and his family's circumstances changed over the years. The Applicant's file has also grown in size because the Applicant's H&C application has come before this Court on judicial review twice before, and both times the underlying decision was overturned by this Court. The Applicant cannot be faulted for decisions rendered by IRCC

that were found to be unreasonable by this Court. To rely on the size of the Applicant's file as a justification for the delay lacks rational.

[56] The delay in this case is excessive and has led to significant stress and hardship for not only the Applicant, but also his family – who have lived in a state of limbo for over a decade.

[57] For the reasons outlined above, I award the Applicant $5,000 in costs.

VI. **Conclusion**

[58] For the reasons above, I find IRCC's delay in processing the Applicant's H&C application to be unreasonable, and that the Applicant has met the requirements to justify an order of *mandamus* in these circumstances. I therefore grant this application for judicial review, order IRCC to render a final decision on the Applicant's H&C application, and award the Applicant $5,000 in costs. No questions for certification were raised, and I agree that none arise.

JUDGMENT in IMM-5274-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed. An order of *mandamus* is hereby issued, requiring IRCC to promptly render a final decision on the Applicant's H&C application for permanent residence.

2. The Respondent shall pay the Applicant $5,000 in costs forthwith.

3. There is no question to certify.

"Shirzad A."

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5274-20
STYLE OF CAUSE:	DEMILADE KAYODE OLADELE v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	BY VIDEOCONFERENCE
DATE OF HEARING:	JUNE 30, 2022
JUDGMENT AND REASONS:	AHMED J.
DATED:	AUGUST 3, 2022

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