Federal Court Cour fédérale

Date: 20231011

Docket: IMM-1471-22

Citation: 2023 FC 1354

Toronto, Ontario, October 11, 2023

PRESENT: Madam Justice Go

BETWEEN:

QASIM HERSI FARAH

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr. Qasim Hersi Farah [Applicant], a citizen of Somalia, arrived in Montreal in April 2005 to attend a United Nations conference. Shortly following his arrival, the Applicant applied for refugee protection.

[2] The Applicant's refugee claim was suspended, then terminated, on grounds of inadmissibility, per para 35(1)(b) of the *Immigration and Refugee Protection* Act, SC 2001, c 27 [*IRPA*] because he allegedly served as a senior official under the Siad Barre government. The Applicant applied for a Pre-Removal Risk Assessment [PRRA] in September 2007. The PRRA Officer approved the Applicant's PRRA in August 2014, finding that the Applicant would be subject to risks identified in section 97 of the *IRPA*, he did not constitute a danger to Canada, and the acts of the Siad Barre regime could not be imputed to him.

[3] The Applicant applied for a Ministerial relief application in July 2016 pursuant to section 42.1 of the *IRPA* as he remains inadmissible and is not eligible for permanent residence, after having lived in Canada for more than a decade. No decision has been made on the Applicant's Ministerial relief application.

[4] Before this court, the Applicant seeks a *mandamus* order on the basis that there has been an unreasonable delay in the processing of his Ministerial relief application and that he has suffered myriad adverse impacts as a result. The Respondent consents to the issuance of a *mandamus* order, but disagrees with the Applicant's proposed timeline.

[5] For the reasons set out below, I grant the Applicant's judicial review application and issue a writ of *mandamus* based on the Applicant's proposed timeline, with costs to the Applicant.

II. Issues and Standard of Review

[6] The issues raised by this application for judicial review are: a) whether the circumstances warrant the issuance of a writ of *mandamus*, b) what is the appropriate timeline for the processing of the Ministerial relief application, and c) whether there are special reasons justifying an award of costs.

III. Analysis

A. *Ministerial Relief Framework*

[7] Pursuant to section 42.1 of the *IRPA*, which is found at Appendix A, Ministerial relief is a discretionary, non-delegable decision of the Minister that is available to a foreign national deemed inadmissible on grounds of security (section 34, *IRPA*), human rights or international rights violations (paras 35(1)(b) and (c), *IRPA*), and/or organized criminality (subsection 37(1), *IRPA*).

B. *Criteria to Issue Mandamus*

[8] The criteria to issue *mandamus* was confirmed by the Federal Court of Appeal in *Apotex v Canada (Attorney General)*, 1993 CanLII 3004 (FCA), [1994] 1 FC 742 (CA), [*Apotex*], at pages 766-769:

1) There must be a public duty to act;
2) The duty is owed to the Applicant;
3) There is a clear right to performance of that duty:
    i. The applicant has satisfied all conditions precedent giving rise to the duty;

ii. There was (1) a prior demand for performance of the duty; (2) a reasonable time to comply with the demand unless refused outright; and (3) 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:

i. 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”;

ii. *Mandamus* is unavailable if the decision-maker’s discretion is characterized as being “unqualified”, “absolute”, “permissive” or “unfettered”;

iii. In the exercise of a “fettered” discretion, the decision-maker must act upon “relevant”, as opposed to “irrelevant”, considerations;

iv. *Mandamus* is unavailable to compel the exercise of a “fettered discretion” in a particular way; and

v. *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; and

8) On a “balance of convenience” an order in the nature of *mandamus* should (or should not) issue.

C. *A Case for Mandamus Has been Made Out*

[9] As noted above, the Respondent agrees to the Applicant’s request for a *mandamus* order.

[10] In my view, the Applicant has made out a case for a *mandamus* order. The Applicant first submitted his application for Ministerial relief seven years ago. The Applicant has satisfied all of the conditions precedent giving rise to the duty to render a decision, and there have been numerous prior demands for performance of the duty over the years. A considerable amount of time has passed, and the Respondent has yet to make a decision, which has resulted in an unreasonable delay for which the Applicant is not responsible.

[11] The Applicant cites several decisions in which shorter delays in the Ministerial relief process were found to be unreasonable: *Esmaeili-Tarki v Canada (Public Safety and Emergency Preparedness)*, 2010 FC 697 [*Esmaeili-Tarki*], *Douze v Canada (Citizenship and Immigration)*, 2010 FC 1337 [*Douze*], *Tameh v Canada (Public Safety and Emergency Preparedness),* 2017 FC 288 [*Tameh*], *Aghdam v Canada (Public Safety and Emergency Preparedness)*, 2011 FC 131 [*Aghdam*], *Yassin v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 423 and *Thomas v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 164 [*Thomas*].

[12] I agree with the Applicant that the delay in this case is exorbitant.

[13] I also agree that no other adequate remedy is available to the Applicant. Due to the restriction on requests for humanitarian relief in subsection 25(1) of the *IRPA*, the Ministerial relief application is the only possible avenue for the Applicant to overcome his inadmissibility.

[14] Finally, I find that a writ of *mandamus* will be of practical value to the Applicant and there is no equitable bar to the relief.

D. *Terms of the Mandamus Order*

[15] While the parties agree that a writ of *mandamus* is warranted in this case, they disagree on the terms of such an order.

[16] The Applicant requests an order compelling the Respondent to:

a) issue a draft Ministerial relief recommendation within 60 days from the date of the Court's order, to which the Applicant can respond within 30 days; and

b) render a final decision on the Ministerial relief application within 120 days of the Court's order.

[17] The Applicant argues that the Respondent has had more than a reasonable amount of time to come to a decision on the Applicant's request for Ministerial relief. The Applicant also argues that although no timeline exists on the issuance of Ministerial relief discretion, the case law is clear that the absence of a timeline does not excuse indefinite delay: citing *Hanano v Canada (Citizenship v Immigration)*, 2004 FC 998, at paras 13 and 22.

[18] In their written submission, the Respondent proposed a more detailed timeline to deal with the Applicant's request.

[19] Just prior to the hearing, the Respondent submitted a new proposal for the *mandamus* order:

1. Within 30 days of the Court's Order, the Applicant may provide additional submissions and supporting materials to the Ministerial Relief Unit [MRU] of the Canada Border Services Agency [CBSA].

2. The CBSA will thereafter have 150 days to disclose its draft Ministerial relief recommendation [MRR] to the Applicant for comment.

3. The Applicant will have up to 30 days from the disclosure of the draft MRR to provide any further submissions to the MRU.

4. Within 60 days of receiving the Applicant's post-disclosure response, the CBSA will provide its recommendation to the Minister for decision.

    a) In the event that the CBSA's amendments to the MRR necessitate further disclosure to the Applicant, an updated recommendation would be provided to the Applicant within 45 days.

    b) In the event of 4(a), the Applicant would have up to 30 days to provide additional submissions, if any, following which the CBSA would have 60 days to provide the recommendation to the Minister for decision.

5. The Minister shall make a final decision on the Applicant's Ministerial relief application within 60 days of receiving a final recommendation from the CBSA.

6. $5,000 in costs to the Applicant.

[20] At the hearing, the Applicant objected to the 150 days that the Respondent proposed for the CBSA to disclose its draft MRR, and argued that clauses 4(a) and (b) are unnecessary. The Applicant noted that the Minister had more than enough time to resolve this matter, including the year and a half since the Applicant filed leave for judicial review. The Applicant further noted that the Respondent did not file any evidence with this court, and did not contest the leave for judicial review or the Applicant's request for a *mandamus*.

[21] The Applicant also submitted that while not anticipating there would be any further disclosure from the CBSA, the Applicant would not agree to build in additional time if such disclosure becomes necessary, and rather asked the Court to remain seized of the matter and hold a case conference to discuss the need for any additional time.

[22] In response, the Respondent submitted that it would be prudent to include the possibility for additional disclosure and time. The Respondent reiterated that the timeline set out in *Thomas* is similar to what the Minister is proposing.

[23] I note that the latest proposal from the Respondent differs from their previous proposal in that the current proposal shortens the response time for the Applicant, and includes a timeline for the Minister to make a final decision.

[24] However, even with this new proposal, the Applicant may not get a decision of his Ministerial relief application until up to 465 days from the Court Order, assuming there is further disclosure from the CBSA. Even without further disclosure, the Applicant may have to wait for up to 330 days for the Minister's final decision.

[25] This Court has not shied away from mandating the Minister to make a final determination in a *mandamus* order with respect to a Ministerial relief application: see, for example, *Esmaeili-Tarki*, *Douze* and *Aghdam*. In *Douze*, the Court gave the Minister just three months to render a final decision, even though the delay in that case was considerably shorter at 3 years.

[26] By now, the Applicant has waited seven years for a decision on his Ministerial relief application. In his affidavit for judicial review, the Applicant describes the impact of the delay on him and his family, both in Canada and abroad. The Applicant has two Canadian born daughters whom he co-parents with their mother. The Applicant notes the emotional and psychological impact on his Canadian family as a result of his uncertain future. The Applicant also has children in Kenya and elderly parents in the United States from whom he has been separated for years due to his precarious status. The Applicant could not defend his PhD dissertation at the International Islamic University in Malaysia as he could not leave Canada to complete a course requirement. The Applicant had to pay international student fees throughout his PhD program in maritime policy at York University in view of his status.

[27] As noted in *Karavos v Toronto & Gillies*, 1947 CanLII 326 (ON CA), [1948] 3 D.L.R. 294 (Ont. C.A.), at page 297, a case cited in *Apotex*:

> It is well to refer at the outset to certain fundamental and well-understood rules and principles relating to the remedy by *mandamus*. It is properly called and recognized as an extraordinary one, and it is not granted by the Court if an applicant for it has any other adequate remedy. The object and purpose of it is to supply the want of other legal remedies. It is appropriate to overcome the inaction or misconduct of persons charged with the performance of duties of a public nature.
>
> [Emphasis added]

[28] The Respondent has provided no evidence to explain why additional time is needed to resolve this matter. While I note that the Court in *Thomas* gave the Minister considerable time to render a decision, I find that the circumstances of this case justify the imposition of a clear – and much shorter – timeline. It is the only just remedy in view of the exorbitant delay and its

resulting negative impact on the Applicant. As such, I adopt the timeline advocated by the Applicant and reject the proposal by the Respondent.

[29] If more time is needed due to certain unforeseen circumstances, the party who needs more time can bring a motion to ask the Court to consider varying the order.

E. *Costs*

[30] The Applicant submits that “special reasons” arise in the circumstances of this case, thereby justifying an award for costs as contemplated under rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, and rule 400(1) in the *Federal Courts Rules*, SOR/98-106.

[31] The Applicant further notes that the Court has frequently determined that unreasonable and unjustified delays in processing applications under the *IRPA* constitute special reasons in justifying an order for costs, such as in *Tameh* and *Esmaeili-Tarki*, where the Court awarded $4,000 and $2,500, respectively.

[32] The threshold for establishing the existence of “special reasons” is high. In *Ghaddar v Canada (Minister of Citizenship and Immigration)*, 2023 FC 946 [*Ghaddar*], a decision cited by the Applicant, Justice Gascon summarizes “special reasons” that may give rise to an awarding of costs in circumstances of unreasonable delay to include “instances where one party has acted in a manner that may be characterized as unfair, oppressive, improper or actuated by bad faith” and where there is “an unreasonable or unjustified delay”: *Ghaddar*, at paras 45-46.

[33] In the case before me, while there is no evidence of bad faith, the Respondent has not offered any justification or explanation for the delay. Further, as noted above, the Respondent has proposed a cost award of $5,000. I see no reason to depart from the Respondent's proposal.

IV. Conclusion

[34] I grant this application of judicial review and order the Minister to issue a final decision within 120 days of the Court's order. The Respondent is to pay the Applicant $5,000 in costs.

[35] I am not seized of the matter.

JUDGMENT in IMM-1471-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.
2. An order of *mandamus* is hereby issued, requiring the Respondent to:
   a. issue a draft Ministerial relief recommendation within 60 days from the date of the Court's order, to which the Applicant can respond within 30 days; and
   b. render a final decision on the Ministerial relief application within 120 days of the Court's order.
3. The Respondents shall pay the Applicant $5,000 in costs forthwith.
4. There is no question for certification.

"Avvy Yao-Yao Go"

Judge

APPENDIX A

***Immigration and Refugee Protection Act* (S.C. 2001, c. 27)**
***Loi sur l'immigration et la protection des réfugiés* (L.C. 2001, ch. 27)**

Inadmissibility	**Interdictions de territoire**
Exception — application to Minister	**Exception — demande au ministre**
42.1 (1) The Minister may, on application by a foreign national, declare that the matters referred to in section 34, paragraph 35(1)(b) and subsection 37(1) do not constitute inadmissibility in respect of the foreign national if they satisfy the Minister that it is not contrary to the national interest.	**42.1 (1)** Le ministre peut, sur demande d'un étranger, déclarer que les faits visés à l'article 34, à l'alinéa 35(1)b) ou au paragraphe 37(1) n'emportent pas interdiction de territoire à l'égard de l'étranger si celui-ci le convainc que cela ne serait pas contraire à l'intérêt national.
Exception — Minister's own initiative	**Exception — à l'initiative du ministre**
(2) The Minister may, on the Minister's own initiative, declare that the matters referred to in section 34, paragraph 35(1)(b) and subsection 37(1) do not constitute inadmissibility in respect of a foreign national if the Minister is satisfied that it is not contrary to the national interest.	**(2)** Le ministre peut, de sa propre initiative, déclarer que les faits visés à l'article 34, à l'alinéa 35(1)b) ou au paragraphe 37(1) n'emportent pas interdiction de territoire à l'égard de tout étranger s'il est convaincu que cela ne serait pas contraire à l'intérêt national.
Considerations	**Considérations**
(3) In determining whether to make a declaration, the Minister may only take into account national security and public safety considerations, but, in his or her analysis, is not limited to considering the danger that the foreign national presents to the public or the security of Canada.	**(3)** Pour décider s'il fait la déclaration, le ministre ne tient compte que de considérations relatives à la sécurité nationale et à la sécurité publique sans toutefois limiter son analyse au fait que l'étranger constitue ou non un danger pour le public ou la sécurité du Canada.

FEDERAL COURT

SOLICITORS OF RECORD

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