Federal Court  Cour fédérale

Date: 20140128

Docket: IMM-11890-12

Citation: 2014 FC 96

Ottawa, Ontario, January 28, 2014

PRESENT: The Honourable Mr. Justice Boivin

Docket: IMM-11890-12

BETWEEN:

DOUGLAS MICHAEL KEARNEY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

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*, SC 2001, c 27 (the Act) of the respondent's failure to process and render a decision with respect to the applicant's application for permanent residence in the investor category. The applicant seeks an order of *mandamus* requiring the respondent to process and render a final decision on his application for permanent residence.

Factual Background

[2] This application is part of a group of seven (7) applications for judicial review pertaining to applications for permanent residence in the investor category that were filed between June 2009 and June 2010 at four (4) different foreign offices: the Consulate General of Canada (CGC) in Hong Kong, the Visa Office in Beijing, the Canadian High Commission (CHC) in London and the Visa Office in Berlin.

[3] Since the filing of the applications, Citizenship and Immigration Canada (CIC) global network was restructured and many foreign offices were consolidated. In late 2012, the CGC in Hong Kong became responsible for all business immigration cases previously submitted to the Beijing office (Affidavit of Stephen Hum at para 2). In April and May 2012, the Berlin and Belgrade offices were closed and their inventories were transferred to the Vienna Visa Office (Affidavit of Donald Gautier at para 5). Finally, because of security concerns in Pakistan, all the business immigration files were transferred from the Islamabad office to the CHC in London (Affidavit of Gaynor Rent at para 9).

Legislative changes to the federal Immigrant Investor Program

[4] All seven (7) applications for permanent residence were received by the respondent before important changes were made to the federal Immigrant Investor Program (IIP).

[5] In the Ministerial Instructions (MI-2), published on June 26, 2010, the respondent stated that the processing of investor permanent residence applications received after the coming into force of upcoming changes to the Immigration and Refugee Protection Regulations, SOR/2002-227 (the

Regulations) would be done concurrently with the old inventory. It also set an "administrative pause", specifying that the respondent would stop accepting immigrant investor applications until the changes to the Regulations were made (Ministerial Instructions (MI-2), June 26, 2010, vol 144, no 26, online: <http://gazette.gc.ca/rp-pr/p1/2010/2010-06-26/html/notice-avis-eng.html#archived>).

[6] On December 1, 2010, subsection 88(1) of the Regulations was amended to modify the definition of the "investment" an investor candidate needs to make in order to become a business migrant, raising it from $400,000 to $800,000.

[7] In the Operational Bulletin 252, published on December 2, 2010, the respondent provided that, as "a general rule, visa offices should process applications under the federal IIP in a 2:1 case processing ratio of old inventory applications to new applications received on or after December 1, 2010. The concurrent case processing ratio of 2:1 …" (Operational Bulletin 252, December 2, 2010, online: <http://www.cic.gc.ca/english/resources/manuals/bulletins/2010/ob252.asp>). In other words, for each two (2) "old" $400,000 applications received before December 1, 2010, the respondent must process one (1) "new" $800,000 investor application received on or after December 1, 2010.

[8] In the Ministerial Instructions (MI-3), published on July 1, 2011, the respondent introduced a cap on the number of applications to be processed and provided that a maximum of "700 new federal Immigrant Investor applications will be considered for processing each year" (Ministerial

Instructions (MI-3), July 1, 2011, vol 145, no 26, online: <http://gazette.gc.ca/rp-pr/p1/2011/2011-06-25/html/notice-avis-eng.html>).

[9] Finally, in the Ministerial Instructions (MI-5), published on July 2, 2012, the respondent put into place a second administrative pause in the acceptance of new immigrant investor applications, a pause that remains in effect to this date (Ministerial Instructions (MI-5), July 2, 2012, vol 146, no 26, online: < http://gazette.gc.ca/rp-pr/p1/2012/2012-06-30/html/notice-avis-eng.html#d118>).

The current application - IMM-11890-12 (London)

[10] Douglas Michael Kearney, the applicant, is a citizen of the United Kingdom. On June 4, 2010, Mr. Kearney applied for permanent residence in the IIP to the CHC in London. His wife is included in his application. Mr. Kearney claims to have been told by the respondent upon filing that processing of his file would commence in 12 to 18 months, i.e. by January 4, 2012. He also claims that his file was supposed to be brought forward in September 2012, but that it was not.

[11] The CHC in London has 2130 business cases in inventory and approximately 900 federal Investor cases. As of February 25, 2013, 670 of these cases were awaiting active processing, and 60% of them are files that were transferred from Islamabad. Among these 670 files, 80 IIP applications were received on or after December 1, 2010. According to the First Secretary in the Immigration Section of the CHC in London, the applicant's file was at approximately number 750 in a line of 900 Investor applications, and at around 1650-1700 in the total cue of 2130 business cases. Mr. Kearney's file is thus several years away from active processing (Affidavit of Gaynor Rent at paras 10-11).

Issues

[12] This case raises the following issues:

(a) Should the respondent be compelled, by an order of *mandamus* or based on the legitimate expectations of the applicant, to assess on the basis of the current selection criteria and to finalize the application within a specified time-frame?

(b) Should the respondent be barred, by a writ of prohibition, from assessing the application with more stringent selection criteria than those in place when the file was lodged?

(c) Should the respondent, if he elects not to finalize this application on the merits, pay $5.0 million to both the applicant and, if applicable, his dependent?

(d) Should the respondent pay significant litigation costs to the applicant?

Relevant Provisions

[13] Section 87.3 of the *Immigration and Refugee Protection Act* provides the Minister with the power to give instructions to set the order of files to be processed and the amount of files to be processed in a given year:

PART 1	PARTIE 1
IMMIGRATION TO CANADA	IMMIGRATION AU CANADA
…	[…]
DIVISION 10	SECTION 10
GENERAL PROVISIONS	DISPOSITIONS GENERALES
Instructions on Processing Applications and Requests	*Instructions sur le traitement des demandes*

Application

87.3 (1) This section applies to applications for visas or other documents made under subsections 11(1) and (1.01), other than those made by persons referred to in subsection 99(2), to sponsorship applications made under subsection 13(1), to applications for permanent resident status under subsection 21(1) or temporary resident status under subsection 22(1) made by foreign nationals in Canada, to applications for work or study permits and to requests under subsection 25(1) made by foreign nationals outside Canada.

Attainment of immigration goals

(2) The processing of applications and requests is to be conducted in a manner that, in the opinion of the Minister, will best support the attainment of the immigration goals established by the Government of Canada.

Instructions

(3) For the purposes of subsection (2), the Minister may give instructions with respect to the processing of applications and requests, including instructions

(*a*) establishing categories of

Application

87.3 (1) Le présent article s'applique aux demandes de visa et autres documents visées aux paragraphes 11(1) et (1.01) – sauf à celle faite par la personne visée au paragraphe 99(2) – , aux demandes de parrainage faites au titre du paragraphe 13(1), aux demandes de statut de résident permanent visées au paragraphe 21(1) ou de résident temporaire visées au paragraphe 22(1) faites par un étranger se trouvant au Canada, aux demandes de permis de travail ou d'études ainsi qu'aux demandes prévues au paragraphe 25(1) faites par un étranger se trouvant hors du Canada.

Atteinte des objectifs d'immigration

(2) Le traitement des demandes se fait de la manière qui, selon le ministre, est la plus susceptible d'aider l'atteinte des objectifs fixés pour l'immigration par le gouvernement fédéral.

Instructions

(3) Pour l'application du paragraphe (2), le ministre peut donner des instructions sur le traitement des demandes, notamment des instructions :

a) prévoyant les groupes de demandes à l'égard desquels

applications or requests to which the instructions apply;	s'appliquent les instructions;
(*a.1*) establishing conditions, by category or otherwise, that must be met before or during the processing of an application or request;	*a.1*) prévoyant des conditions, notamment par groupe, à remplir en vue du traitement des demandes ou lors de celui-ci;
(*b*) establishing an order, by category or otherwise, for the processing of applications or requests;	*b*) prévoyant l'ordre de traitement des demandes, notamment par groupe;
(*c*) setting the number of applications or requests, by category or otherwise, to be processed in any year; and	*c*) précisant le nombre de demandes à traiter par an, notamment par groupe;
(*d*) providing for the disposition of applications and requests, including those made subsequent to the first application or request.	*d*) régissant la disposition des demandes dont celles faites de nouveau.
…	[…]

[14] Subsection 88(1) of the Immigration and Refugee Protection Regulations provides the following definitions that are relevant to the case at bar:

PART 6	PARTIE 6
ECONOMIC CLASSES	IMMIGRATION ÉCONOMIQUE
…	[…]
DIVISION 2	SECTION 2
BUSINESS IMMIGRANTS	GENS D'AFFAIRES
Interpretation	*Définitions et champ d'application*

Definitions

88. (1) The definitions in this subsection apply in this Division.

…

"investment"
« *placement* »
"investment" means, in respect of an investor, a sum of $800,000 that

(*a*) in the case of an investor other than an investor selected by a province, is paid by the investor to the agent for allocation to all approved funds in existence as of the date the allocation period begins and that is not refundable during the period beginning on the day a permanent resident visa is issued to the investor and ending at the end of the allocation period; and

(*b*) in the case of an investor selected by a province, is invested by the investor in accordance with an investment proposal within the meaning of the laws of the province and is not refundable for a period of at least five years, as calculated in accordance with the laws of the province.

"investor"
« *investisseur* »
"investor" means a foreign national who

Définitions

88. (1) Les définitions qui suivent s'appliquent à la présente section.

[…]

« placement »
"*investment*"
« placement » Somme de 800 000 $:

a) qu'un investisseur autre qu'un investisseur sélectionné par une province verse au mandataire pour répartition entre les fonds agréés existant au début de la période de placement et qui n'est pas remboursable pendant la période commençant le jour où un visa de résident permanent est délivré à l'investisseur et se terminant à la fin de la période de placement;

b) qu'un investisseur sélectionné par une province investit aux termes d'un projet de placement au sens du droit provincial et qui n'est pas remboursable pendant une période minimale de cinq ans calculée en conformité avec ce droit provincial.

[…]

« investisseur »
"*investor*"
« investisseur » Étranger qui, à la fois :

a) a de l'expérience dans

(*a*) has business experience;	l'exploitation d'une entreprise;
(*b*) has a legally obtained net worth of at least $1,600,000; and	*b*) a un avoir net d'au moins 1 600 000 $, qu'il a obtenu licitement;
(*c*) indicates in writing to an officer that they intend to make or have made an investment.	*c*) a indiqué par écrit à l'agent qu'il a l'intention de faire ou a fait un placement.

Analysis

[15] The Court is of the view that the applicant failed to demonstrate that he is entitled to an order of *mandamus*.

Applicant's Affidavits

[16] The affidavit of Pantea Jafari is admissible but can only be afforded very little weight. Indeed, the affidavit provides general background regarding broad issues (*Assn of Universities and Colleges of Canada v Canadian Copyright Licensing Agency*, 2012 FCA 22 at para 20, [2012] FCJ No 93 [*AUCC*]). More particularly, the affidavit of Pantea Jafari deals mostly with the context of Canada's immigration system and with the record of the former Minister of Citizenship and Immigration, but does not provide new evidence relevant to the processing of the applicant's application.

[17] At hearing, the applicant also submitted succinct CAIPS notes that allegedly were not included in the Tribunal Record. The reason, as explained by the respondent, is that the CAIPS system is being decommissioned and the file notes are being transferred to the the new "Global Case Management System" (GCMS). The CAIPS notes will thus be copied into the new GCMS.

Once the CAIPS file is transferred in the GCMS, the CAIPS file is closed and no new information is entered. The GCMS notes will therefore contain the latest information (Respondent's letter requested by the Court, December 18, 2013). Upon nonetheless considering the content of the CAIPS notes, the Court is of the view that their content may confirm the "bring forward date" which was communicated to the applicant. However, they cannot be used to support the applicant's central argument with respect to the alleged processing "pledges" or processing estimates. Further, since no decision was made in the applicant's case, no reasons could be provided. Again, this document can be considered by the Court but remains of little assistance.

The "Québec argument"

[18] The applicant informed the Court at hearing that he would not be pursuing the "*Québec argument*".

[19] The Court will now turn to the specific issues of this case.

(a) Should the respondent be compelled, by an order of mandamus or based on the legitimate expectations of the applicant, to assess on the basis of the current selection criteria and to finalize the application within a specified time-frame?

[20] The applicant submits that the Court should compel the respondent to finalize the processing of the applicant's file within a set timeline, as the applicant fulfills the requirements for the issuance of an order of *mandamus* or the application of the doctrine of legitimate expectations.

[21] The applicant is essentially asking the Court to order the respondent to process his IIP application according to the timelines that were allegedly provided to them upon filing and pursuant to the selection criteria that were in place when they filed.

[22] A *mandamus* is a discretionary, equitable remedy. The requirements to obtain a *mandamus*, as set out in *Apotex Inc v Canada (Attorney General)* (CA), [1994] 1 FC 742, [1993] FCJ No 1098, aff'd [1994] 3 SCR 1100 [*Apotex*]:

a) There must be a public legal duty to act;
b) The duty must be owed to the applicant;
c) There is a clear right to the performance of that duty;
d) Where the duty sought to be enforced is discretionary;
e) No other adequate remedy is available to the applicant;
f) The order sought will be of some practical value or effect;
g) No equitable bar to the relief sought;
h) On a balance of convenience, an order in the nature of *mandamus* should (or should not) issue.

[23] Pursuant to *Conille v Canada (Minister of Citizenship and Immigration)* (T.D.), [1999] 2 FC 33, [1998] FCJ No 1553 (QL) [*Conille*]. In *Conille*, this Court stated that a delay in the performance of a statutory obligation can be deemed unreasonable if the following requirements are met:

(a) the delay in question has been longer than the nature of the process required, *prima facie*;
(b) the applicant and his counsel are not responsible for the delay; and
(c) the authority responsible for the delay has not provided satisfactory justification.

The issue before the Court is whether the delay alleged by the applicant is longer than the nature of the process requires and, in the affirmative, whether there is a justification for the delay.

The applicant is of the view that the respondent failed to honour his "processing pledge" and commence the processing within the timelines that were communicated to the applicant upon filing. The applicant adds that the respondent, in his responses to the applicant's requests made under Rule 9 of the *Federal Courts Immigration and Refugee Protection Rule*s, SOR/93-22, failed to provide a reason for its decision not to commence processing at the date the file was supposed to be brought up.

[24] The applicant relies on *Liang v Canada (Minister of Citizenship and Immigration)*, 2012 FC 758, [2012] FCJ No 683 (QL) [*Liang*], a case that bears similarities with the current application but distinguishable on key aspects.

[25] In *Liang*, Mr. Liang and Ms. Gurung, who were selected as representatives for two (2) groups applying for permanent residence under the federal skilled worker (FSW) class, – as opposed to the Investor category – were seeking orders of *mandamus* compelling the Minister of Citizenship and Immigration to process their applications for permanent residence. Ministerial instructions modifying selection criteria and creating caps and priority processing, adopted pursuant to section 87.1 of the Act, applied to new applications filed after February 27, 2008. In the case at bar, the instructions apply to existing applications with concurrent processing.

[26] It is also worthy of note that, contrary to the facts in *Liang*, on which the applicant relies, the guidelines and regulations affecting the current application do not set a processing estimate. In *Liang*, the applications were divided into two (2) groups: the first group included applications that were filed before major legislative changes and the time elapsed since filing ranged from 4 ½ to 9

years; the second group comprised of applications that were filed after the guidelines were published and that had been outstanding for 2 to 4 years. The guidelines provided that the applications of the second group "should receive a decision within six to 12 months" (*Liang*, above at para 29). In the present application, there is no evidence of such outstanding delays or that estimates provided have elapsed. Therefore, on the basis of the lack of corroborating evidence of any processing estimates, the absence of formal governmental estimates and the relatively short time periods since the end of the alleged processing timelines, the *Liang* case must be distinguished from the case at bar.

[27] The applicant suggests that the underlying reasons for the processing delays are the new selection criteria, the quotas and the processing priorities that were set out by the Ministerial Instructions MI-2 and MI-3 and the Operational Bulletin 252. The Court can understand that the applicant might be discontent with the current IIP scheme because of its place in the queue, but it was legally set out and implemented in full contemplation of the law, more particularly of the powers adopted by Parliament pursuant to the new section 87.3 of the Act. Also, the applicant's argument regarding the abolishment of pending applications remains speculative and there is no evidence to persuade the Court otherwise.

[28] Furthermore, this conclusion is consistent with this Court's prior determinations on priority processing. In *Vaziri v Canada(Minister of Citizenship and Immigration)*, 2006 FC 1159 at paras 36-37, 53-54, [2006] FCJ No 1458 (QL) [*Vaziri*], the minister had established a ratio between economic and non-economic applications and prioritized spouse and dependent children sponsorships, thus severely delaying the processing of the applicant's sponsorship file. The Court

concluded that it is important to take a broad view when determining if the processing of an application took longer than the nature of the process required, more specifically when there are more applications than Canada can accept. Where the authority in *Vaziri* was only implied, section 87.3 of the Act now provides explicit authority.

Legitimate expectations

[29] The applicant also failed to convince this Court it that the doctrine of legitimate expectations applies in the case at bar.

[30] The doctrine of legitimate expectation applies when representations have been given to an applicant concerning the procedure that will be followed. As the Supreme Court of Canada recently observed in *Canada (Attorney General) v Mavi*, 2011 SCC 30 at para 68, [2011] 2 SCR 504,:

> [68] Where a government official makes representations within the scope of his or her authority to an individual about an administrative process that the government will follow, and the representations said to give rise to the legitimate expectations are clear, unambiguous and unqualified, the government may be held to its word, provided the representations are procedural in nature and do not conflict with the decision maker's statutory duty. Proof of reliance is not a requisite.
> [Citations omitted.]

[31] The Court finds that the evidence on record does not support the claim that the respondent made "clear, unambiguous and unqualified" representations of a procedural nature to the applicant. As mentioned above, the applicant failed to satisfactorily establish that the alleged processing estimates were in fact communicated to the applicant. No other evidence was adduced before this Court.

(b) Should the respondent be barred, by a writ of prohibition, from assessing the application with more stringent selection criteria than those in place when the file was lodged?

[32] The Court finds that the applicant does not meet the conditions for the issuance of a writ of prohibition.

[33] The applicant is urging this Court to issue a writ of prohibition pursuant to section 18(1)(*a*) of the *Federal Courts Act*, RSC 1985, c F-7. The Court recalls that the objective of a writ of prohibition is to prevent administrative bodies from exceeding the powers they have been granted and performing acts that are outside of their jurisdiction (*Nagalingam v Canada (Minister of Public Safety and Emergency Preparedness*, 2012 FC 362 at para 18, [2012] FCJ No 390 (QL) [*Nagalingam*]; see also *Canadian Red Cross Society v Canada (Commission of Inquiry on the Blood System in Canada-Krever Commission)*, [1997] 2 FC 36 at para 25, [1997] FCJ No 17 (QL)).

[34] There is no evidence on the record that the respondent has any intention of using different criteria than those in effect at the time of filing. The applicant's argument on this point remains speculative.

(c) Should the respondent, if he elects not to finalize this application on the merits, pay $5 million to both the applicant and, if applicable, his dependent?

[35] The Court is of the view that the current application for judicial review should be dismissed, and hence, there is no need to determine if such a remedy should be issued.

(d) Should the respondent pay significant litigation costs to the applicant?

[36] The circumstances of the present case do not warrant the payment of significant costs and the Court thus declines to consider this issue.

[37] For all of these reasons, the Court's intervention is not warranted and this application for judicial review will be dismissed.

Proposed questions for certification

[38] At the end of the hearing on December 17, 2013, the Court provided counsel for the applicant with time in order to submit questions for certification. Counsel for the applicant on December 23, 2013, provided no less than twenty-one (21) questions for certification.

[39] The Court recalls that proposed questions for certification must transcend the interests of the immediate parties to the litigation, contemplate issues of broad significance of general application and be determinative of the appeal.

[40] The questions for certification submitted by counsel for the applicant amount to a re-argumentation of the hearing held before this Court on December 17, 2013. In a nutshell, the issue is not whether the Minister can set or not priorities. Section 87(3) of the Act is clear and Parliament has granted the Minister with that authority.

[41] The applicant's proposed questions for certification are speculative, they fall outside the scope of this case and they are grounded in policy, not in the legal issues of this application.

[42] However, counsel for the respondent on January 2, 2014, proposed two (2) questions for certification. Upon consideration, the following question is certified:

> Are individuals who will be subject to a lengthy waiting period, prior to the assessment of their immigration applications under the Investor class, due to the effect of annual targets and Ministerial Instructions made under s. 87.3 of the IRPA, entitled to an order of *mandamus* to compel immediate processing?

JUDGMENT

THIS COURT'S JUDGMENT is that

1. This application for judicial review be dismissed;

2. The following question is certified:

> Are individuals who will be subject to a lengthy waiting period, prior to the assessment of their immigration applications under the Investor class, due to the effect of annual targets and Ministerial Instructions made under s. 87.3 of the IRPA, entitled to an order of *mandamus* to compel immediate processing?

3. No costs.

"Richard Boivin"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-11890-12
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