Federal Court  Cour fédérale

Date: 20240524

Docket: IMM-262-23

Citation: 2024 FC 789

Ottawa, Ontario, May 24, 2024

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

ABDI ELMY HERSY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Adbi Elmy Hersy, seeks an order in the nature of *mandamus* requiring the Respondent to render a final decision on his pending permanent residence application.

[2] For the following reasons, I dismiss this request.

II. **Analysis**

A. *Background*

[3] The Applicant is a 55-year-old citizen of Somalia.

[4] In 1999, the Applicant arrived in the United States. In 2006, the Applicant was working as a respiratory therapist in Minnesota, USA.

[5] Two unsettling allegations arose from this period of work. Both were from individuals unbeknownst to one another. They stated that the Applicant had sexually abused them while they had been his patients. The first incident was alleged to have occurred on July 13, 2006; the second set of incidents, in November 2006.

[6] On July 14, 2006, the first complainant notified the hospital of the incident. On July 15, 2006, the police were notified. On August 1, 2006, the police interviewed the Applicant and the complainant. The police did not lay formal charges for this allegation.

[7] On November 23, 2006, the second complainant notified the hospital of the incidents. On November 27, 2006, the Applicant was interviewed by the hospital. On December 12, 2006, the Applicant was terminated from his work at the hospital. The Applicant's work permit had also expired on December 9, 2006.

[8] On December 21, 2006, the hospital notified the police. On December 22, the police interviewed the complainant. The following day, on December 23, the Applicant came to Canada.

[9] On January 26, 2007, the Applicant completed a refugee intake form, signed on February 1, 2007. This form included asking whether he had committed, been charged with, or convicted of a crime or offence in any country. He answered that he had not.

[10] On February 22, 2007, charges were brought against the Applicant for six counts of sexual offences in the United States.

[11] In May 2008, the Applicant was granted refugee status. On May 22, 2008, the Applicant submitted his application for permanent residence as a protected person. On April 7, 2009, the Applicant was sent a letter informing him that processing of his permanent residence application had been completed.

[12] On November 2, 2009, Canadian immigration authorities became aware of an extradition warrant from the United States. On December 3, 2009, the Applicant's case was referred to Canada Border Services Agency ("CBSA").

[13] In September 2010, the Applicant returned to the United States. He was incarcerated in Minnesota and paid a USD $10,000 bail. He was released to the immigration authorities, who

removed him from the country. As of 2020, his warrant remained outstanding in the United States.

[14] Thus began a series of proceedings to vacate the Applicant's refugee status. On October 3, 2012, an application to vacate the Applicant's refugee status was brought to the Refugee Protection Division ("RPD"). In May 2013, the application was allowed. On December 22, 2014, this Court granted judicial review of this decision and remitted the matter for redetermination (court file number IMM-3964-13).

[15] On June 2, 2015, the vacation application was reheard by the RPD. On June 25, 2015, the RPD vacated his status once more. On February 12, 2016, this Court granted judicial review of this decision and remitted the matter for reconsideration (*Hersy v Canada (Citizenship and Immigration)*, 2016 FC 190 ("*Hersy 1*")).

[16] On July 11, 2017, the vacation application was reheard by the RPD. On November 15, 2017, the application was dismissed. The Minister did not challenge this decision.

[17] Throughout these proceedings, CBSA prepared two reports under section 44 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*") maintaining that the Applicant was inadmissible for serious criminality under the *IRPA*, and that did not lead to a finding of inadmissibility. In a decision dated August 10, 2020, an officer of Immigration, Refugees and Citizenship Canada ("IRCC") was not satisfied that there was sufficient evidence to establish

that the Applicant was inadmissible to Canada for serious criminality under paragraph 36(1)(c) of the *IRPA*.

[18] The Applicant states in his affidavit for this application that he has made previous requests for updates on his permanent resident application. This includes four previous applications that included requests for *mandamus*. The first was discontinued in January 2012. The second was dismissed on January 29, 2013. The third was dismissed on August 24, 2018. The fourth was discontinued on August 11, 2020.

[19] The Applicant has maintained his innocence throughout these proceedings.

B. *Issue and standard of review*

[20] The sole issue in this application is whether a writ of *mandamus* ordering the Respondent to render a final decision on the Applicant's pending application for permanent residence is warranted.

[21] The test for whether *mandamus* should be issued is set out in *Apotex Inc v Canada (Attorney General) (C.A.)*, 1993 CanLII 3004 (FCA) ("*Apotex*"). *Apotex* identifies eight preconditions for *mandamus*, as 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.

C. Mandamus *is not warranted*

[22] The Applicant submits that he meets the requirements for an order of *mandamus*. The Applicant maintains that there is a public duty owed, there have been prior demands for performance, and that there will be practical benefits to him and his family for having direction on their immigration status. The Applicant submits that he comes to this Court with clean hands, having fully cooperated with his criminal investigation in the United States and not misrepresenting himself to Canadian immigration authorities.

[23] Furthermore, the Applicant submits that there has been unreasonable delay in processing his application, there having been over 15 years since the time of his application and the Respondent failing to justify this delay. Additionally, the Applicant submits that there is no other adequate remedy to process his permanent residence, that he has suffered prejudice from this processing delay, and that the balance of convenience favours *mandamus*.

[24] The Respondent submits that the Applicant has not met the test for an order of *mandamus*. The Respondent submits that the Applicant claims he was sent letters in 2008 regarding his permanent residence status, but has not included these letters, nor would they include the discovery of his criminal charges in the United States. The Respondent submits that the processing of his permanent residence status began in early 2020, as from 2009-2017 the Applicant's permanent residence application was reasonably suspended by concerns surrounding the vacation of his protected person status. The Respondent submits that there is no evidence that there has been a refusal to perform a duty or that the Applicant's application is not being processed. The Respondent further submits that the balance of convenience is against an order of *mandamus*.

[25] I agree with the Respondent.

[26] On the first two branches of the *Apotex* test, there is no dispute that the Applicant is owed a public duty regarding his permanent residence application decision.

[27] The crux of this matter concerns the clear right to the performance of IRCC's duty to process the Applicant's permanent residence application, specifically the reasonableness of the delay in processing this application under the third branch of the *Apotex* test (*Almuhtadi v Canada (Citizenship and Immigration)*, 2021 FC 712 ("*Almuhtadi*") at para 31, citing *Abdolkhaleghi v Canada (Minister of Citizenship and Immigration)* 2005 FC 729 at para 13). At paragraph 23 of *Conille v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 9097 (FC) ("*Conille*"), the Court set out a three-part test to determine whether a delay is unreasonable:

A. The delay has been longer than the nature of the process required, *prima facie*;

B. The applicant and counsel are not responsible for the delay; and,

C. The authority responsible for the delay has not provided satisfactory justification.

[28] I find that the first branch of the *Conille* test is met. In my view, the delay in this matter has been *prima facie* longer than the standard nature of the permanent resident application process for protected persons (acknowledging the potential differences in average processing times since the following referenced decision, and not accepting the stated average time in that decision as the most current at IRCC, see, for example *Almuhtadi* at paragraph 34).

[29] The second branch of the *Conille* test is also met. The Applicant and counsel have not been responsible for this delay. It appears, by virtue of the Applicant's application being submitted in 2008 and being processed in 2009, that the Applicant has "satisfied the procedural requirements of the *IRPA* and the *IRPR* by providing the necessary supporting documentation and paying the required processing fees" (*Almuhtadi* at para 35).

[30] However, the third branch of the *Conille* is not met. I do not find that there has been an unreasonable delay in processing this application.

[31] The Applicant submitted his application for permanent residence in 2008 and was informed that the processing of this application had been completed in 2009. The vacation and inadmissibility proceedings in this matter spanned from 2012 to 2020. I find, in this case, that the period of 2008-2020 "results from legitimate processes" (*Bhatia v Canada (Minister of*

Citizenship and Immigration), 2005 FC 1244 at para 20). I therefore agree with the Respondent that the relevant start for delay is not 2008. Rather, the relevant period for evaluating delay begins in approximately August 2020.

[32] To justify the delay, the Respondent relies on the impact of COVID-19 and the submission that it is "trite law that [permanent residence] applications involving criminality are not subject to average or normal processing time."

[33] I note that simply invoking the pandemic's impacts without evidence to the contrary or more detail does not justify delay in decision-making (*Almuhtadi* at para 47; *Bidgoly v Canada (Citizenship and Immigration)*, 2022 FC 283 at paras 40-41).

[34] However, I do not find that the delay in these circumstances is, on a whole, unreasonable. From August 2020 until the date the Applicant filed his notice of application for judicial review on January 3, 2023, approximately 29 months had elapsed. Even counting the time from August 2020 until the date of the hearing for this matter, on April 4, 2024, there has been a delay of approximately 44 months. In the Court's words, "*mandamus* applications must be assessed in accordance with the particular facts of the case" (*Seyoboka v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1290 at para 8). With regard to the particular facts of this case, the Applicant has a complex history of vacation and inadmissibility concerns, as well as numerous unsuccessful *mandamus* applications before the Court. The Respondent has, in my view, justified that the delay has been in large part owing to the Applicant's particular circumstances.

[35] However, on the fifth branch of the *Apotex* test, I agree with the Applicant that there is no other adequate remedy in this matter, the Applicant having contacted immigration authorities to have his permanent residence processed on numerous occasions (see *e.g. Ran v Canada (Citizenship and Immigration)*, 2023 FC 1447 at para 36), as well as having initiated multiple proceedings in this Court.

[36] On the sixth branch of the *Apotex* test, I also agree with the Applicant that obtaining permanent residence will provide the Applicant and his family with the practical benefit of having their immigration status regularized.

[37] On the seventh branch of the *Apotex* test, the Applicant maintains that he did not gain entrance into Canada through misrepresenting his criminal charges in the United States. The facts reflect that United States authorities had not charged him until after he had left the United States. Again, he has maintained his innocence.

[38] The Applicant did not challenge the RPD's finding upon judicial review that he had been aware of his criminal charges before his RPD hearing (*Hersy 1* at para 56). I am also mindful of the fact that the Court did not hold that the RPD unreasonably found that there were serious reasons to consider that the Applicant had committed the crimes alleged, albeit not dealing "with this issue in any detail" (*Hersy 1* at para 57).

[39] Nonetheless, I do not find that there is sufficient evidence for this application for judicial review to support a finding that the Applicant misrepresented his criminal charges when coming

to Canada. This would amount to a misrepresentation finding under section 40(1) of the *IRPA*, which is not the proper subject of this judicial review and does not bear the proper evidence and submissions to support it. I acknowledge that the Applicant travelled back to the United States to face authorities for his criminal charges, and that the Applicant has not been responsible for delaying his application. For the purposes of this matter, I do not find the Applicant has "compromised [his] cause" such that he does not come to Court with clean hands (*Dragan v Canada (Minister of Citizenship and Immigration) (T.D.)*, 2003 FCT 211 (CanLII) at para 47).

[40] On the final branch of the *Apotex* test, however, the balance of convenience does not lie with an order of *mandamus*. The Applicant puts forward little evidence to establish how the delay has negatively affected him, aside from noting the impacts that bear upon any individual who is awaiting regularization of their immigration status. As provided, the delay has not been unreasonable. And there is no evidence that the Respondent has been refusing to process the Applicant's claim.

[41] I will therefore not issue an order of *mandamus*, which, as must be recalled, is an "extraordinary remedy" (*Almuhtadi* at para 30, citing *Tapie v Canada (Citizenship and Immigration)*, 2007 FC 1048 at para 7).

D. *Costs*

[42] The Applicant seeks costs in this matter. Counsel for the Applicant wisely withdrew his baseless allegation at the hearing for this matter that the IRCC did not like his client, and I do not find it necessary to address whether there are "special reasons" to award costs, as per Rule 22 of

the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, given that the Applicant did not convince the Court of the merits of this application (see *e.g. Levy v Canada (Public Safety and Emergency Preparedness)*, 2022 FC 1533 at para 21).

III. **Conclusion**

[43] I dismiss this application for judicial review without costs. The Applicant has not met the requirements for an order of *mandamus*.

JUDGMENT in IMM-262-23

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed without costs.

2. There is no question to certify.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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