Federal Court  Cour fédérale

Date: 20131126

Docket: IMM-11479-12

Citation: 2013 FC 1185

Montréal, Quebec, November 26, 2013

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

ZEINA ALI JABER

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act), for judicial review of the respondent's failure to render a decision with respect to the applicant's application for Canadian permanent residence. The applicant requests an order in the nature of *mandamus* requiring the respondent to render a final decision on the applicant's application for permanent residence.

Factual Background

[2] Zeina Ali Jaber (the applicant) is a citizen of Lebanon. She landed in Canada in 2003 and claimed refugee status the same day.

[3] On February 15, 2005, the applicant was recognized as a Convention refugee and filed an application for permanent residence in the Protected persons class on February 26, 2005.

[4] On May 26, 2005, Citizenship and Immigration Canada (the respondent) began processing the applicant's application for permanent residence.

[5] On June 26, 2005, a security inquiry was launched to investigate the applicant's background.

[6] On July 6, 2010, the respondent informed the applicant that before a decision could be rendered in connection with her application for permanent residence, an update of her file was required. The respondent requested that the applicant provide various personal certificates and financial documents within thirty (30) days.

[7] On August 4, 2010, the applicant provided the respondent with the requested documents.

[8] Between September 7, 2006 and March 5, 2010, the respondent made various investigations regarding a possible intervention in Jaafar Mohamad Sbeiti's refugee protection claim. The applicant divorced Mr. Sbeiti on March 19, 2002, while they were living in the United States. On

February 28, 2007, the two remarried in Canada. On April 16, 2010, Mr. Sbeiti obtained refugee status in Canada. On May 10, 2010, the respondent began processing Mr. Sbeiti's application for permanent residence.

[9] On December 6, 2010, security inquiry was triggered in order to investigate Mr. Sbeiti's background.

[10] The respondent decided that given the ties between the applicant and Mr. Sbeiti and the many overlaps in their declarations, it would wait for the result of Mr. Sbeiti's security inquiry before rendering a final decision pertaining to the applicant's application for permanent residence.

[11] On January 19, 2011, the applicant sent a letter to the respondent asking whether the requested documents were received, if any further information was required and when the respondent believed her application would be finalized.

[12] On February 2, 2011, the respondent replied and confirmed that the requested documents had been received, that no further information was required and that it was unable to confirm when the application would be finalized.

[13] On September 19, 2012, the applicant sent a further letter to the respondent requesting an update on the processing of her application.

[14] On September 24, 2012, the respondent replied that the application was "currently in queue to be reviewed" and that the processing delay could not be confirmed "as it varies according to the number of applications in process, the complexity of the file and the availability of the results of all statutory requirements for [the applicant] and her family".

[15] On November 9, 2012, the applicant applied for leave and for judicial review for the respondent's non-action "in respect of its failure to process in a timely manner the applicant's application for permanent residence in Canada" seeking, amongst other things, an "Order for a Writ of *Mandamus*".

[16] On January 17, 2013, the Minister of Public Safety and Emergency Preparedness (the MPSEP) filed an application under paragraphs 108(1)(*a*) and 108(1)(*e*) of the Act for the purpose of a cessation of the refugee status in Canada of the applicant and of Mr. Sbeiti. This application was based on the alleged contradictions in the files of the applicant and of Mr. Sbeiti, as well as security concerns.

Issue

[17] The only issue raised in this application is whether the applicant is entitled to an order of *mandamus* with respect to its application for permanent residence.

[18] The applicant alleges that the respondent failed in its duty to enforce the provisions of the Act in a prompt manner. She submits that the eight (8) year processing delay of her application for

permanent residence is unreasonable (*Conille v Canada (Minister of Citizenship and Immigration)* (TD), [1999] 2 FC 33, 159 FTR 215 [*Conille*])

[19] The applicant emphasizes that she provided the respondent with the requested additional information in a timely manner, that she is not responsible for the delay at issue and that no satisfactory explanation has been provided by the respondent. On this basis, the applicant contends that she meets all the requirements for an order of *mandamus* to be issued as set out in *Apotex Inc v Canada (Attorney General)* (CA), [1994] 1 FC 742, 18 Admin. LR (2d) 122, aff'd [1994] 3 SCR 1100 [*Apotex*];

[20] In response, the respondent refers to subsection 21(3) of the Act recently enacted in 2012 and submits that granting an order of *mandamus* while an application for cessation of refugee protection is pending would serve no purpose because, if granted, such an application would annul any right to permanent residence: *Tapie v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1048 at para 9, [2007] FCJ No 1368 (QL); *Kang v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1118 at paras 24-27, [2001] FCJ No 1544 (QL) [*Kang*].

[21] Furthermore, the respondent argues that the applicant does not meet the requirements for an order of *mandamus* to be issued as the delay can be satisfactorily explained (Respondent's Memorandum and Affidavit at paras 18-28). The respondent also points out that the Act does not prescribe any timeframe for the processing of applications for permanent residence. Finally, the respondent emphasizes that pursuant to paragraph 3(1)(*h*) of the Act, it has the responsibility to

protect the health, safety and to maintain the security of Canadians and consider any potential grounds for inadmissibility under sections 34 to 39 of the Act.

Analysis

[22] The Court is of the view that, considering all the circumstances of the case at hand, an order of *mandamus* cannot be issued.

[23] Before turning to its analysis as set forth below, the Court recalls that at the outset of the hearing before the Court, the respondent provided the Court with a letter, an affidavit and a chain of e-mails. The information contained in those documents indicates that the Immigration and Refugee Protection Division has not yet ruled upon the respondent's January 2013 application for cessation of refugee protection. The applicant objected to the introduction of this information. However, the Court is of the view that the information provided by the respondent is relevant to this case and that there is no prejudice to the applicant. It shall thus be considered by the Court.

[24] Turning to the requirements for an order of *mandamus*, the Court notes that in *Apotex*, above, the Appeal Division of the Federal Court, as it was then known, affirmed by the Supreme Court of Canada, set them out as follows:

> (a) There must be a public legal duty to act under the circumstances;
> (b) The duty must be owed to the applicant;
> (c) There must be a clear right to performance of that duty, and in particular the applicant,
> i) must have satisfied all conditions precedent giving rise to the duty; and there must have been
> ii) a prior demand for performance of the duty;
> iii) a reasonable time to comply with the demand, unless there was outright refusal; and
> iv) an express refusal, or an implied refusal through unreasonable delay;

(d) No other adequate remedy is available to the applicant;
(e) The order sought must have some practical effect;
(f) In the exercise of its discretion, the Court must find no equitable bar to the relief sought; and,
(g) On a balance of convenience, an order of *mandamus* should issue.

In *Conille*, this Court stated that a delay in the performance of a statutory obligation can be deemed unreasonable if the following is established:

(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.

[25] In the present case, the respondent essentially argues that, because of the pending application for the cessation of the applicant's refugee status, requirement (c) of the *Apotex* requirements is not satisfied. The respondent also alleges that the applicant contributed to the delay in the processing of her application for permanent residence by not dispelling the uncertainty regarding her marital status coupled with the incomplete passport provided by her husband. Thus according to the respondent, the applicant has failed to establish that she is not responsible for the delay as per requirement (b) in *Conille*. The respondent does not dispute that the applicant otherwise meets the requirements set out in both *Apotex* and *Conille*.

[26] The Court acknowledges that the delay in the processing of the applicant's application for permanent residence is in part due to the security inquiries conducted in connection of the applicant's file and the file of her husband. It is also true that the need to conduct security enquiries can potentially be a satisfactory explanation for long processing delays (*Kang*, above at para 21; *Singh v Canada (Minister of Citizenship and Immigration*, [1998] FCJ No 585, (1999) 47 Imm LR

(2d) 83; *Chaudhry v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1695, 157 FTR 213; *Lee v Canada (Secretary of State)*, [1987] FCJ No 1130, 16 FTR 314; *Aowad v Canada (Minister of Citizenship and Immigration)*, [1997] FCJ No 1581, 75 ACWS (3d) 928; *Seyoboka v Canada (Minister of Citizenship and Immigration*), 2005 FC 1290 at para 10, [2005] FCJ No 1611 (QL); *Kaur v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1040, [2002] FCJ No 1373 (QL)).

[27] In the case at bar, more than eight (8) years to date have elapsed since the filing of the applicant's application for permanent residence. The respondent points to a number of documents arguing the complexity of the file and hence the justification for the delay. The respondent was also of the view that the applicant was in part responsible for the delay.

[28] A closer review of those documents indicates that nine (9) out of ten (10) documents referred to the respondent at the hearing before this Court were available to the respondent prior to 2008. The Court also observes that each time the applicant was asked to provide information or documents it seems that she complied within the set timelines.

[29] However, at this juncture, the Court must turn to subsection 21(3) of the Act which provides the following:

Status and Authorization to Enter	*Statut et autorisation d'entrer*
Permanent resident	Résident permanent
21. (1) …	**21.** (1) […]

Pending application — subsection 108(2)	Demande pendante — paragraphe 108(2)
(3) A person in respect of whom the Minister has made an application under subsection 108(2) may not become a permanent resident under subsection (2) while the application is pending.	(3) La personne à l'égard de laquelle le ministre a fait la demande visée au paragraphe 108(2) ne peut devenir résident permanent aux termes du paragraphe (2) tant que cette demande est pendante.

[30] Subsection 21(3) of the Act addresses the question of granting permanent residence in cases where the applicant for same is the subject of an application for cessation of refugee protection. In essence, the respondent is arguing that the Court should refrain from issuing an order of *mandamus* as it is premature.

[31] More particularly, subsection 21(3) of the Act indicates in the English version that a person "may not become a permanent resident" - and in the French version "ne peut devenir résident permanent" – while an application for cessation of refugee protection under subsection 108(2) is pending.

[32] On its face, subsection 21(3) of the Act makes it clear that an application for cessation of refugee protection must follow its course and that any prior pending application for permanent residence cannot be decided until a decision is rendered on the issue of the refugee status. The reason for this is clear: in the event the applicant is deemed inadmissible for refugee protection, it necessary follows that the application for permanent residence will not continue. Conversely, if the applicant's refugee protection is confirmed, then the application for permanent residence can resume. Hence, pending final resolution on the issue of refugee protection, the effect of subsection

21(3) of the Act is that the applicant does not have a "clear right to the performance of that duty" (*Apotex*). To conclude otherwise, would fly in the face of the Act's general framework and purpose.

[33] Finally, the Court observes that the application for a cessation of the applicant's refugee status under subsection 108(2) of the Act was filed two (2) months after the applicant applied for an order of *mandamus*. Although the applicant alleged that the application for a cessation of the applicant's refugee status by the respondent may be used as "an excuse for its inaction and as a defence to the present Application" or an *a posteriori* justification for the processing delays of the applicant's application for permanent residence, there is no evidence before this Court to support the applicant's allegation. It remains, in the circumstances, speculative.

[34] For all of these reasons, the Court cannot grant the relief sought by the applicant. The parties did no submit any question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. This application is denied and no question is certified.

2. Without costs.

"Richard Boivin"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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