Dhahbi v. Canada (Minister of Citizenship and Immigration), 2004 FC 1702 (CanLII)

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IMM-8436-03

2004 FC 1702

Yousr Dhahbi (*Applicant*)

v.

The Minister of Citizenship and Immigration (*Respondent*)

Indexed as: Dhahbi v. Canada (Minister of Citizenship and Immigration) (F.C.)

Federal Court, Martineau J.--Montréal, November 3; Ottawa, December 3, 2004.

Citizenship and Immigration -- Status in Canada -- Permanent Residents -- Applicant seeking permanent residence for herself, husband, child under former Immigration Act, now Immigration and Refugee Protection Act (IRPA) -- Security concerns about husband -- Application still undecided three years, nine months after being filed -- Under IRPA, ss. 9, 20, 21, permanent resident status granted to foreign national who meets selection criteria of province, not inadmissible -- Designated immigration officer awaiting favourable recommendation re: husband from CSIS -- Security check not complete -- Imperative for security check initiated by CSIS to be completed, final decision by designated officer made within reasonable time -- Court must strike balance between protection of public, Canada's interests, those of applicant, dependants -- Incomplete evidence as to length of time such security check normally takes favouring further hearing.

Administrative Law -- Judicial Review -- Mandamus -- Application for mandamus requiring respondent to make final decision in application for permanent residence -- Applicant, husband, son wishing to settle in Quebec -- Security check of husband necessary -- Application for leave, judicial review for issuing of writ of mandamus authorized by Court -- Application for permanent residence still undecided three years nine months after filing -- Designated immigration officer still awaiting favourable recommendation from CSIS regarding husband -- Conditions required for delay to be found unreasonable -- Significant deficiency in respondent's evidence concerning time necessary for security check -- Court not prepared to allow respondent to delay decision indefinitely -- No order disposing of application for judicial review until additional hearing to admit evidence currently missing from record, to hear additional submissions by parties.

This was an application for a writ of *mandamus* requiring the respondent Minister of Citizenship and Immigration to make a final decision concerning the applicant's application for permanent residence. The applicant is a citizen of Tunisia and an electrical engineer. On February 8, 2001, she made an application for permanent residence as a qualified worker, in which she declared her husband, Adel Khribi, as a dependant. The application was made pursuant to the former *Immigration Act*, which was repealed when the *Immigration and Refugee Protection Act*

(IRPA) came into effect. Section 190 of the IRPA provides that the new Act now applies to the application. The couple and their son wished to settle in Quebec. They were selected by the province of Quebec. The applicant supplied all the documents and information requested by the designated officer for processing her application. All the medical formalities were also completed. However, it was decided that a security check was necessary. Mr. Khribi has had three interviews with security liaison officers. On September 26, 2003, the applicant sent the respondent a notification asking that a final decision be made in her case without delay. An application for leave and judicial review for the issuing of a writ of *mandamus* was filed on October 28, 2003, and subsequently authorized by the Court. Three years and nine months after the filing of her application for permanent residence, the applicant has still not received a decision on that matter. The designated immigration officer is still awaiting a favourable recommendation from the Canadian Security Intelligence Service (CSIS) regarding Mr. Khribi. The main issue was whether the applicant had a right to a final decision concerning her application for permanent residence.

Held, the application should not be finally disposed of until after an additional hearing is held to admit evidence missing from the record and to hear additional submissions by the parties.

The *mandamus* remedy is exercised by filing an application for judicial review which is itself subject to the filing of an application for leave made pursuant to subsection 72(1) of the IRPA in cases, such as this, where a decision or matter falls within the scope of the IRPA. If the Court is satisfied that the designated immigration officer responsible for considering an application for permanent residence is refusing to exercise his jurisdiction, has illegally failed or refused to do anything he is legally required to do or has unreasonably delayed doing it, the Court may direct the designated officer to conclude his investigation and render a decision within a deadline which it may then set. In the case at bar, under a federal-provincial agreement, it is the province of Quebec which is exclusively responsible for selecting foreign nationals who wish to settle as permanent residents. Under the IRPA, permanent resident status is granted to a foreign national who, first, meets the selection criteria of the province and second, is not inadmissible. The legal duty to act exists in favour of the applicant and her dependants if these two conditions are met.

The respondent did not dispute the fact that the first condition mentioned in paragraph 9(1)(*a*) of the IRPA (meeting the province's selection criteria) had been met at the time these proceedings were initiated by the applicant. That left the second condition mentioned in paragraph 9(1)(*a*) (not being inadmissible). The final decision in the applicant's case is being delayed by the particular situation of the applicant's husband, Mr. Khribi, about whom "security concerns" were raised. The fact that the security checks have not been completed was the explanation for the additional delay incurred in a final decision being made on the application. The IRPA and the Regulations adopted thereunder do not impose specific limits or deadlines on designated immigration officers for the determinations they must make on permanent residence applications. However, unless there is an adequate explanation, an unreasonable delay in processing a permanent residence application may be regarded as a refusal to act. In such a case, when the usual conditions (legal duty, clear law, absence of other remedy and balance of convenience) for obtaining a writ of *mandamus* have also been met, the Court may make an order to the respondent that the designated immigration officer should make a final decision on the permanent residence application. In *Conille v. Canada (Minister of Citizenship and Immigration)*, Tremblay-Lamer J. stated that there are three conditions for a delay to be found unreasonable: (1) the delay in question has been longer than the nature of the process required *prima facie*; (2) the applicant and his counsel are not responsible for the delay; and (3) the authority responsible for the delay has not provided satisfactory justification. Ordinarily, the processing in Paris of a permanent residence application for a qualified worker with a confirmed job offer is between five and nine months. At first blush, the actual delay certainly appeared longer than the nature of the process seems to require *prima facie*. Since the medical certificates and documents were provided, there was a further delay of two years and three months which the respondent sought to justify by the ongoing security check. The evidence in the record did not indicate how much time such a security check usually takes, which was a significant deficiency in the respondent's evidence. The three interviews to which Mr. Khribi has been called understandably resulted in further delays. The most recent interview took place 15 months ago. The questions put at those interviews seemed legitimate since they had a rational connection to the question of whether there were "reasonable grounds" to believe that the admission of Mr. Khribi to Canada might be "a danger to the security of Canada".

The rule of law requires that the acts of government be consistent with the law and that relations between government and individuals be also governed by law. The applicant or her dependants are not entitled to enter

Canada if they do not meet the requirements of the IRPA. This implies that, in performing her duties, the designated immigration officer must be satisfied that the admission of the applicant and her dependants to Canada would not contravene *inter alia* subsection 34(1) of the IRPA. The designated officer must be able to rely on the assistance of agencies specializing in security matters. But allowing CSIS to indefinitely delay the conclusion of its investigation and so prevent the designated immigration officer from making a final decision on a visa application amounts to usurping powers conferred exclusively by the Act on the respondent or the person designated by him, which is obviously contrary to the Act and allows the Court to intervene in such a case. The respondent should not be allowed to delay his decision indefinitely. It is imperative for the security check initiated by CSIS to be completed and the final decision by the designated officer made within a reasonable time.

As to the balance of convenience, the Court must seek a balance between protecting the public and Canada's interests and those of the applicant and her dependants. On the other hand, the incomplete nature of the respondent's evidence strongly favoured a further hearing being convened, instead of allowing the *mandamus* application, and ordering that the final decision be made within a specific time. In order to arrive at a solution which is just and as expeditious and economical as possible, it was determined that no order should be made finally disposing of the application for judicial review. Instead, there would be a further hearing to admit evidence currently missing from the record and to hear additional submissions.

statutes and regulations judicially

considered

Act respecting immigration to Québec, R.S.Q., c. I-0.2 (as am. by S.Q. 1994, c. 15, s. 12).

Federal Courts Act, R.S.C., 1985, c. F-7 , ss. 1 (as am. by S.C. 2002, c. 8, s. 14), 18 (as am. by S.C. 1990, c. 8, s. 4; 2002, c. 8, s. 26), 18.1(3) (as enacted by S.C. 1990, c. 8, s. 5; 2002, c. 8, s. 27), (4) (as enacted by S.C. 1990, c. 8, s. 5; 2002, c. 8, s. 27).

Immigration Act, R.S.C., 1985, c. I-2 , ss. 8(1), 19 (as am. by S.C. 1992, c. 47, s. 77; c. 49, s. 11; 1995, c. 15, s. 2; 1996, c. 19, s. 83; 2000, c. 24, s. 55).

Immigration and Refugee Protection Act, S.C. 2001, c. 27, ss. 9(1), 11, 15(1),(2), 16(1),(2), 20(1)(*a*), (2), 21(1), 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 72(1), 76 (as am. by S.C. 2002, c. 8, s. 194), 77 (as am. *idem*), 78, 79 (as am. *idem*), 80, 81, 82, 83, 84, 85, 86, 87, 112, 115, 190.

Immigration and Refugee Protection Regulations, SOR/2002-227 , ss. 6, 30(1)(*a*).

Regulation respecting the selection of foreign nationals, R.R.Q., 1981, c. M-23.1, r. 2.

cases judicially considered

applied:

Conille v. Canada (Minister of Citizenship and Immigration), 1998 CanLII 9097 (F.C.), [1999] 2 F.C. 33; (1998), 15 Admin. L.R. (3d) 157; 159 F.T.R. 215 (T.D.); *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 (CanLII), [2002] 1 S.C.R. 3; (2002), 208 D.L.R. (4th) 1; 37 Admin. L.R. (3d) 152; 90 C.R.R. (2d) 1; 18 Imm. L.R. (3d) 1; 281 N.R. 1; 2002 SCC 1; *Charkaoui (Re)*, 2003 FC 1419 (CanLII), [2004] 3 F.C.R. 32; (2003), 253 F.T.R. 22; 2003 FC 1419.

distinguished:

Kang v. Canada (Minister of Citizenship and Immigration) 2001 FCT 1118 (CanLII), (2001), 212 F.T.R. 305; 2001 FCT 1118; *Singh v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1096 (T.D.) (QL); *Chaudhry v. Canada (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 213 (F.C.T.D.); *Aowad v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 1581 (T.D.) (QL).

considered:

Almrei v. Canada (Minister of Citizenship and Immigration), 2004 FC 420 (CanLII), [2004] 4 F.C.R. 327; (2004),

249 F.T.R. 53; 2004 FC 420.

referred to:

Lu v. Canada (Minister of Citizenship and Immigration), 2004 FC 239 (CanLII), 2004 FC 239; [2004] F.C.J. No. 375 (QL); *John Doe 2004 v. Canada (Minister of Citizenship and Immigration)* 2004 FC 360 (CanLII), (2004), 40 Imm. L.R. (3d) 157; 2004 FC 360; *Karavos v. Toronto and Gillies*, [1948] 3 D.L.R. 294; [1948] O.W.N. 17 (Ont. C.A.); *Apotex Inc. v. Canada (Attorney General)*, 1994 CanLII 47 (S.C.C.), [1994] 3 S.C.R. 1100; (1994), 29 Admin.L.R. (2d) 1; 59 C.P.R. (3d) 82; 176 N.R. 1; *Khalil v. Canada (Secretary of State)*, 1999 CanLII 9360 (F.C.A.), [1999] 4 F.C. 661; (1999), 176 D.L.R. (4th) 191; 16 Admin. L.R. (3d) 193; 1 Imm. L.R. (3d) 155; 243 N.R. 369 (C.A.); *Kalachnikov v. Canada (Minister of Citizenship and Immigration)* 2003 FCT 777 (CanLII), (2003), 236 F.T.R. 142; 2003 FCT 777; *Mohamed v. Canada (Minister of Citizenship and Immigration)* (2000), 195 F.T.R. 137; 10 Imm. L.R. (3d) 90 (F.C.T.D.); *Dragan v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 211 (CanLII), [2003] 4 F.C. 189; (2003), 224 D.L.R. (4th) 739; 227 F.T.R. 272; 27 Imm. L.R. (3d) 157; 2003 FCT 211; *Civil Service Association of Alberta, Branch 45 and Alberta Human Rights Commission et al. (Re)* (1975), 62 D.L.R. (3d) 531 (Alta. S.C.); *Reference re Secession of Quebec*, 1998 CanLII 793 (S.C.C.), [1998] 2 S.C.R. 217; (1998), 161 D.L.R. (4th) 385; 55 C.R.R. (2d) 1; 228 N.R. 203; *Roncarelli v. Duplessis*, 1959 CanLII 1 (S.C.C.), [1959] S.C.R. 121; (1959), 16 D.L.R. (2d) 689; *Reference re Manitoba Language Rights*, 1985 CanLII 33 (S.C.C.), [1985] 1 S.C.R. 721; (1985), 19 D.L.R. (4th) 1; [1985] 4 W.W.R. 385; 35 Man. R. (2d) 83; 59 N.R. 321; *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, 1997 CanLII 317 (S.C.C.), [1997] 3 S.C.R. 3; (1997), 204 A.R. 1; 156 Nfld. & P.E.I.R. 1; 150 D.L.R. (4th) 577; [1997] 10 W.W.R. 417; 121 Man. R. (2d) 1; 49 Admin. L.R. (2d) 1; 118 C.C.C. (3d) 193; 11 C.P.C. (4th) 1; 217 N.R. 1.

authors cited

Canadian Embassy in France, "Visas and Immigration: Average Processing Times", online: Government of Canada < http//www.dfaitmaeci.gc.ca/canadaeuropa/ france/visas/delais-en.asp > .

APPLICATION for a writ of *mandamus* requiring the respondent Minister of Citizenship and Immigration to make a final decision concerning the applicant's application for permanent residence. Decision delayed until after an additional hearing is held to admit evidence currently missing from the record and to hear additional submisssions by the parties.

appearances:

Michelle Langelier for applicant.

Sylviane Roy for respondent

solicitors of record:

Michelle Langelier, Montréal, for applicant.

Deputy Attorney General of Canada for respondent.

The following is the English version of the reasons for order and order rendered by

[1]Martineau J.: The applicant Yousr Dhahbi is applying to the Court for an order in the nature of a writ of *mandamus* to be made requiring the respondent Minister of Citizenship and Immigration, and in particular the immigration officer attached to the Canadian Embassy in France who is responsible for considering her application for permanent residence, to make a final decision in her case.

FACTUAL BACKGROUND

[2]The applicant is a citizen of Tunisia. She is an electrical engineer. On February 8, 2001, she made an application for permanent residence as a qualified worker (the application), in which she declared her husband

Adel Khribi as a dependant.

[3]Mr. Khribi is also a citizen of Tunisia. He was born on June 11, 1968. He is a practising Muslim. Mr. Khribi began residing in Canada in October 1993. An earlier application for permanent residence was denied in 1997 because he did not meet the requirements. At the time the application was made by the applicant, Mr. Khribi was operating a small data processing company in Tunisia and Montréal and engaged in import-export. He was also registered full time at the University of Quebec in Montréal and studying chemistry. His study permit was then valid until August 2004.

[4]While the application was being processed the applicant and her husband had a child, Selmene, who was born on May 5, 2002. The latter was added as a dependant in the month after his birth. The spouses and their son (collectively, the members of the family) wish to settle in Quebec.

[5]The members of the family were selected by the province of Quebec. Certificates indicating that they met the province's requirements pursuant to the *Act respecting immigration to Québec*, R.S.Q., c. I-0.2 [as am. by S.Q. 1994, c. 15, s. 12], and the *Regulation respecting the selection of foreign nationals*, R.R.Q., 1981, c. M-23.1, r. 2, were issued by the Quebec ministère des Relations avec les citoyens et de l'Immigration on January 11, 2001 and June 10, 2002, respectively. These certificates are valid for three years, so that the spouses' certificates have expired since January 11, 2004, and their son's certificate will expire on June 10, 2005. These certificates were provided to the designated officer considering the application. In the case at bar, the applicant supplied all the documents and information requested by the designated officer for processing her application. All the medical formalities were also completed.

[6]It was decided that a security check was necessary. On September 30, 2002, Mr. Khribi was summoned to an initial interview, which took place on October 10, 2002, at Mr. Khribi's request. A second interview took place the following day. There was a third interview on November 14, 2003. The interviews were conducted by security liaison officers.

[7]On September 26, 2003, the applicant, through her counsel, sent the respondent a notification asking that a final decision be made in her case without delay. On October 28, 2003, an application for leave and judicial review for the issuing of a writ of *mandamus* was filed. This was subsequently authorized by the Court.

[8]To date, that is three years and nine months later, the applicant has still not received a decision on her application. In the meantime, on May 12, 2004, the visa authorizing Mr. Khribi to enter Canada to study in Montréal was not renewed.

[9]The designated immigration officer, Ms. Terrier, is still awaiting a favourable recommendation from the Canadian Security Intelligence Service (CSIS) regarding Mr. Khribi (affidavit of Constance Terrier, paragraph 12, and CAIPS [Computer Assisted Immigration Processing System] notes). In her affidavit she also stated she was told that the processing would take longer than expected, but she could not be given a definite date. In fact, the designated immigration officer is also unable to say at this time what part of the applicant's husband's background raised questions, since this is in the hands of another department.

LEGAL DUTY

[10]Like the other extraordinary remedies or prerogative writs mentioned in section 18 [as am. by S.C. 1990, c. 8, s. 4; 2002, c. 8, s. 26] of the *Federal Courts Act*, R.S.C., 1985, c. F-7 [s. 1 (as am. by S.C. 2002, c. 8, s. 14)], as amended, the *mandamus* remedy is exercised by filing an application for judicial review; the latter is itself subject to the filing of an application for leave made pursuant to subsection 72(1) of the IRPA [*Immigration and Refugee Protection Act*] in cases where a decision or matter falls within the scope of the IRPA. That is the case here. If the Court is satisfied that the designated immigration officer responsible for considering an application for permanent residence is refusing to exercise his or her jurisdiction, has illegally failed or refused to do anything he or she is legally required to do or has unreasonably delayed doing it, the Court may direct the designated officer to conclude his or her investigation and render a decision within a deadline which the Court may then set (subsections 18.1(3) [as enacted by S.C. 1990, c. 8, s. 5; 2002, c. 8, s. 27] and (4) [as enacted by S.C. 1990, c. 8, s. 5; 2002, c. 8, s. 27] of the *Federal Courts Act*). In his or her discretion, when a judge hears an application for judicial review seeking a writ of *mandamus*, he or she may *inter alia* consider the time that has already elapsed

and the reasons given for any further delay, while taking into account the hardship occasioned to the two parties.

[11]The application for permanent residence was made pursuant to the *Immigration Act*, R.S.C., 1985, c. I-2. This was repealed when the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the IRPA), came into effect on June 28, 2002. Under section 190 of the IRPA, it is the IRPA which now applies to the application. It should be noted in this connection that under section 6 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations), also applicable here, a foreign national may not enter Canada to remain on a permanent basis without first obtaining a permanent resident visa. This is issued by the immigration officer designated by the respondent (here Ms. Terrier), when the officer is satisfied that the conditions laid down in the IRPA and the Regulations have been met.

[12]In the case at bar, in Quebec, under a federal-provincial agreement, it is the province itself which is exclusively responsible for selecting foreign nationals who wish to settle as permanent residents. Under paragraphs 9(1)(*a*) and 20(1)(*a*) and subsections 20(2) and 21(1) of the IRPA, permanent resident status is granted to a foreign national who, first, meets the selection criteria of the province, and who, secondly, is not inadmissible. That describes the legal duty to act, which of course exists in favour of the applicant and her dependants if the two aforementioned conditions are met.

[13]On the first condition, under subsection 20(1) of the IRPA a foreign national covered by subsection 9(1) of the IRPA is required to provide evidence that he or she has a selection certificate from the province. Under subsection 15(1) of the IRPA, the officer may proceed with an examination of any application. That being said, under subsection 15(2) of the IRPA, in the case of a foreign national referred to in subsection 9(1), an examination of whether the foreign national complies with the applicable selection criteria is to be conducted solely on the basis of documents delivered by the province indicating that the competent authority of the province is of the opinion that the foreign national complies with the province's selection criteria.

[14]As to the second condition, under subsection 11(1) of the IRPA, "the [permanent resident] visa . . . shall be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act" (emphasis added). The acts described in sections 34-41 of the IRPA make an applicant inadmissible. In particular, engaging in terrorism, in general "being a danger to the security of Canada", engaging in acts of violence that would or might endanger the lives or safety of persons in Canada or being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts of terrorism make the applicant inadmissible on security grounds pursuant to section 34 of the IRPA. Further, under section 42 of the IRPA the fact that an accompanying family member is inadmissible makes a foreign national inadmissible.

BURDEN OF PROOF AND CONFIDENTIALITY OF PROTECTED INFORMATION

[15]I note that there is no provision in the IRPA exactly reproducing the wording of subsection 8(1) of the repealed *Immigration Act*, which stated clearly that the burden of proving that "that person has a right to come into Canada or that his admission would not be contrary to this Act or the regulations rests on that person". Taken together with the fact that, *inter alia*, section 19 [as am. by S.C. 1992, c. 47, s. 77; c. 49, s. 11; 1995, c. 15, s. 2; 1996, c. 19, s. 83; 2000, c. 24, s. 55] of the repealed *Immigration Act* created inadmissible classes of persons, this Court has in the past held that it is for a visa applicant to provide all the necessary information to show that he or she is not inadmissible to Canada (*Lu v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 239 (CanLII), 2004 FC 239). That being said, I note that subsection 16(1) of the IRPA states that a person who makes an application must answer truthfully all questions put to him or her for the purposes of the examination, must provide information and "all relevant evidence" and must give the officer the visas and documents required. In the case of a foreign national, under subsection 16(2) of the IRPA the "relevant evidence" referred to includes photographic and fingerprint evidence, and the foreign national must submit to a medical examination on request. In the case of the applicant, her husband and their son, however, the medical examination was compulsory under paragraph 30(1)(*a*) of the Regulations.

[16]Further, while it is true that in general the burden of proof always rests with the applicant (*John Doe 2004 v. Canada (Minister of Citizenship and Immigration)* (2004), 40 Imm. L.R. (3d) 157 (F.C.), at paragraph 10), involving the assessment by the designated immigration officer of acts making applicants inadmissible on security grounds (section 34), on grounds of violating human or international rights (section 35), serious criminality

(section 36) and organized criminality (section 37), section 33 of the IRPA states that unless otherwise provided the acts in question are assessed on the basis of "reasonable grounds" to believe that they have occurred or may occur.

[17]This assumes that following the examination mentioned in section 11 of the IRPA the designated immigration officer, before making a final decision, must consider information which was not provided by an applicant but which may come from other sources. In this connection, in order to provide protection for Canadians and promote the efforts of Canada and other countries engaged in the struggle against international terrorism, it must be recognized that in investigations relating to national security caution and confidentiality are of the first importance. Further, sections 76-87 [ss. 76 (as am. by S.C. 2002, c. 8, s. 194), 77 (as am. *idem*), 79 (as am. *idem*)] of the IRPA set out specific procedures for protection and examination by an independent judicial authority of information on security or criminality, and information obtained in confidence from a source in Canada, from the government of a foreign state, from an international organization of states or from an institution of either of them (the protected information).

[18]In the current state of the record, the designated immigration officer is awaiting a favourable recommen-dation from CSIS. According to her affidavit and the CAIPS notes, the designated immigration officer has at present no reasonable grounds to believe that the applicant and her dependants are inadmissible. However, the security check is not complete. If it were to disclose a legal obstacle to their admission to Canada, then a report would have to be prepared and forwarded to the designated immigration officer so that a final decision could be made pursuant to the Act. In such a case, there is a good chance that the application for permanent residence would be denied (on the basis of "reasonable grounds to believe"). Nevertheless, the present difficulty in the case at bar is that the immigration officer is completely unaware of how far the security check has progressed and why a favourable recommendation by CSIS is still being awaited.

[19]That being said, in the case at bar involving an application for judicial review the respondent chose not to file affidavits from the two security liaison officers who questioned Mr. Khribi in 2002 and 2003. At no time in the proceedings did the respondent indicate to the Court that the nature of the information currently being considered, or likely to be considered, in connection with the examination carried out pursuant to section 11 of the IRPA required that the instant application for judicial review should be heard by a designated judge. Subsection 87(1) of the IRPA, which is contained in Division 9, "Protection of Information", expressly provides that in the course of a judicial review the Minister may make an application to the "judge" for non-disclosure of any information protected under subsection 86(1) or considered under section 11, 112 or 115: accordingly, this includes protected information which the designated immigration officer may have obtained from various sources as a result of the examination carried out pursuant to section 11 of the IRPA. In this regard, subsection 87(2) of the IRPA states that section 78 of the IRPA applies to the determination of the application, with any modifications that the circumstances require, except for the provisions relating to the obligation to provide a summary. Of course, an application under section 87 of the IRPA and the protected information will be considered exclusively by a designated judge (section 76 of the IRPA).

RIGHT TO DECISION WITHIN REASONABLE TIME

[20]The respondent is not disputing the fact that the first condition mentioned in paragraph 9(1)(*a*) of the IRPA (meeting the province's selection criteria) had been met at the time the proceedings at bar were initiated by the applicant. That leaves the second condition mentioned in paragraph 9(1)(*a*) of the IRPA (not being inadmissible). It may be noted at the outset that the health of the members of the family is not at issue here: in the cases mentioned in section 38 of the IRPA, a foreign national's health may make him or her inadmissible. What is actually delaying the final decision in the applicant's case is the particular situation of the applicant's husband, Mr. Khribi. In his memorandum the respondent mentioned that in carrying out his or her duties the designated immigration officer must *inter alia* be satisfied that the admission of the applicant and her dependants to Canada would not contravene subsection 34(1) of the IRPA. [translation] "Security concerns" were raised in Mr. Khribi's case. As appears from the two affidavits submitted by the respondent, the security checks have not been finished and this is the reason for the additional delay incurred in a final decision being made on the application.

[21] It should be noted that the IRPA and the Regulations adopted pursuant to that Act do not impose specific limits or deadlines on designated immigration officers for the determinations they must make on permanent

resident applications. However, it is well settled that unless there is an adequate explanation an unreasonable delay in processing a permanent resident application may be regarded as amounting to a refusal to act. In such a case, when the usual conditions (legal duty, clear law, absence of other remedy and balance of convenience) for obtaining a writ of *mandamus* have also been met (*Karavos v. Toronto and Gillies*, [1948] 3 D.L.R. 294 (Ont. C.A.); *Apotex Inc. v. Canada (Attorney General)*, 1994 CanLII 47 (S.C.C.), [1994] 3 S.C.R. 1100; *Khalil v. Canada (Secretary of State)*, 1999 CanLII 9360 (F.C.A.), [1999] 4 F.C. 661 (C.A.)), this Court may make an order to the respondent that the designated immigration officer should make a final decision on the permanent residence application (*Conille v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 9097 (F.C.), [1999] 2 F.C. 33 (T.D.); *Kalachnikov v. Canada (Minister of Citizenship and Immigration)*, (2003), 236 F.T.R. 142 (F.C.T.D.); *Mohamed v. Canada (Minister of Citizenship and Immigration)* (2000), 195 F.T.R. 137 (F.C.T.D.); *Dragan v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 211 (CanLII), [2003] 4 F.C. 189 (T.D.)).

[22]In view of the reasons given by the Alberta Supreme Court in *Civil Service Association of Alberta, Branch 45 and Alberta Human Rights Commission et al. (Re)* (1975), 62 D.L.R. (3d) 531, Tremblay-Lamer J., who rendered this Court's decision in *Conille*, stated that there are three conditions which must be met for a delay to be found unreasonable:

(1) the delay in question has been longer than the nature of the process required, *prima facie*;

(2) the applicant and his counsel are not responsible for the delay; and

(3) the authority responsible for the delay has not provided satisfactory justification.

[23]Ordinarily, according to public documents, the processing in Paris of a permanent resident application for a qualified worker with a confirmed job offer is between five and nine months (Canadian Embassy in France, "Visas and Immigration: Average Processing Times", online Government of Canada < http// www.dfaitmaeci.gc.ca/canadaeuropa/france/visas/delais- en.asp > . At first sight, the actual delay certainly appears longer than the nature of the process seems to require *prima facie*. As to who is responsible for the delay, the medical certificates and other documents required by the designated immigration officer have already been provided by the applicant and in this regard the record was complete on July 30, 2002, so that at the present time it can be said that there has been a further delay of two years and three months which the respondent is seeking to justify by the currently ongoing security check.

SECURITY CONCERNS

[24]According to the affidavit of Ms. Terrier, designated immigration officer at the Canadian Embassy in Paris, the forwarding of files to the background check section is routine for all persons of Tunisian nationality whose permanent resident applications are being processed. In Mr. Khribi's case, the security liaison officer decided that a more in-depth check was necessary. However, the evidence in the record does not indicate how much time such a security check usually takes. It is a significant deficiency in the respondent's evidence. In his affidavit, Mr. Khribi provided several details on questions put to him by the security liaison officers involved in the applicant's case. I note that the latter submitted no affidavits and that Mr. Khribi was not cross-examined, so that at this stage I am willing to take the facts alleged by Mr. Khribi in his affidavit as proven.

[25]On October 10, 2002, Mr. Khribi had an initial interview with one Éric, the [translation] "security liaison officer" at the Canadian Embassy in Paris. The latter put several questions to him regarding the activities of his company, his employees and the companies with which his company was doing business in Tunisia and Montréal, as well as the reasons for his visit. The officer was also very interested in obtaining details about his religious observances, the mosques he attended, his personal opinions about religious fundamentalism, his friends and his relations. In particular, the officer questioned him about certain persons with Arab names who allegedly went to his business in Montréal regularly. It was then agreed that the interview would continue on the following day, and at that time the officer would show him photos of these persons.

[26]On October 11, 2002, Mr. Khribi again met with the same officer, and at that time the latter showed him three large photos in which three different persons appeared. In his affidavit, Mr. Khribi admitted that he identified a man he had already seen at the mosque and who was a customer of his store in Montréal.

[27]A third meeting with Mr. Khribi was held some 10 months later, on August 14, 2003. Once again the interview took place in Paris. It was conducted by another officer, the [translation] "security liaison officer responsible for the Paris area". In his affidavit, Mr. Khribi mentioned that the same questions he had already answered in October 2003 were again put to him by the officer. Mr. Khribi considered that several questions were of a personal nature. He was reluctant to speak about his religion and his religious beliefs, but he nevertheless answered the questions asked. Further, several questions were also put regarding political demonstrations in which he might have taken part in Tunisia in the 1990s and regarding disputes he may have had with the Tunisian police. At one point in the interview, the officer asked Mr. Khribi [translation] "Do you belong to a Tunisian Islamic organization, En Nahda or any other?" The officer also asked him whether he had been to Saudi Arabia, Pakistan or Afghanistan. Mr. Khribi answered all these questions in the negative. He also denied that he knew any of the people appearing in the three photos shown to him in October 2002. According to Mr. Khribi's affidavit, the officer apparently did not like his last replies. The officer then decided to terminate the interview, telling him that he was "not serious" and that it was "a pity" that he did not want "to cover the matter thoroughly" with him.

[28]Further, at paragraphs 16, 17 and 18 of the affidavit of Mr. De Rose, a senior officer attached to the Canadian Embassy in Paris, dated September 10, 2004, the following can be found:

The case of Mr. Adel Khribi, the Applicant's spouse, displays many aspects which, when viewed holistically, have led to concerns for the safety and security of Canada. Mr. Khribi is a citizen of Tunisia. He has lived abroad, more particularly in Montreal, a city in which islamic militants are known to operate, and would, therefore, be a more valuable target for recruitment by a terrorist organization. Finally, he is studying chemistry, and while this is a legitimate field of study it is also a field which has the potential to be of assistance to an organization seeking to obtain, acquire, or develop weapons of mass destruction.

The officer responsible for the Applicant's application for permanent residence has assessed all aspects of the application and has identified legitimate concerns for the safety and security of Canada. He has therefore initiated detailed enquiries with partner agencies to ascertain wheth er or not Mr. Khribi does pose a threat. Naturally, such in-depth enquiries require considerable time and effort to ensure that the Canadian public is protected. The results of these enquiries have not yet been received.

In matters of security, if there are concerns, these must be addressed. If the individual presents a threat to the safety and security of Canada and Canadians, his application must be denied. Conversely, if a visa officer has concluded that an applicant does not pose a threat, then the case should be processed as expeditiously as possible. In this case, full information has yet to be received which would permit the officer to render a decision.

[29]The respondent submitted in this Court that there were "security concerns in the present case": questioning which is all the more legitimate, the respondent argued, considering the very content of Mr. Khribi's affidavit, the main points of which have been noted above. Further, the respondent also relied on the affidavit of David De Rose, who is generally involved in matters of security, and who explained that the application was referred to CSIS and other related agencies for security checks to be made before a final decision was taken by the designated immigration officer.

[30]The respondent also referred the Court to *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 (CanLII), [2002] 1 S.C.R. 3 and *Charkaoui (Re)*, [2004] 3 F.C.R. 32 (F.C.). I entirely concur with the general principles set forth in those judgments. The imperatives of national security undoubtedly explain the fact that in general, since September 11, 2001, security checks are conducted with the aid of external agencies, so that they take longer. However, each case is *sui generis*. Also, I am not sure that by themselves, and without any other precise and specific justification directly relating to the case, such factors can justify an investigation dragging on until the delay becomes unreasonable (*Conille*; *Kalachnikov* and *Mohamed*).

[31]Further, I note that in *Suresh* and *Charkaoui*, and *Almrei v. Canada (Minister of Citizenship and Immigration)*, [2004] 4 F.C.R. 327 (F.C.), the respondent had not only relied on general principles relating to national security but also submitted a number of disturbing, serious and very specific items of evidence involving the applicants in question. In *Suresh*, the certification rested on CSIS's opinion that Mr. Suresh was a member of the LTTE [Liberation Tigers of Tamil Eelam], an organization which according to CSIS was engaged in terrorism in Sri

Lanka and active in Canada under the auspices of the World Tamil Movement. In *Charkaoui*, the Minister believed Mr. Charkaoui was a member of Usama bin Laden's network. I also note that in these cases the designated Judge did not rely only on the opinion of CSIS. The designated Judge had the opportunity to personally examine the protected information filed in support of the certificate and the arrest warrant. Further, I also note that in *Almrei*, the designated Judge was dealing with the review of detention of a foreign national under subsection 84(2) of the IRPA.

[32]I do not think *Kang v. Canada (Minister of Citizenship and Immigration)* (2001), 212 F.T.R. 305 (F.C.T.D.), is of any assistance here. The facts in *Kang*, are actually very different from those to be found in the case at bar. In *Kang*, the Court considered whether the interests of justice would be well served by issuing a *mandamus* order compelling the respondent to make a decision on the permanent resident application, when the very basis on which that application was made, namely the applicant's refugee status, was the subject of a legal challenge at the time.

[33]I also note that in *Singh v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1096 (T.D.) (QL) and *Chaudhry v. Canada (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 213 (F.C.T.D.), which were also referred to by the respondent, CSIS had filed a security report, which is not the case here. Further, in *Aowad v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 1581 (T.D.) (QL), the existence of a prolonged security check was explained by the fact that the applicant had admitted being associated with the El-Fatah group.

[34]That being said, it seems entirely natural to me for Mr. Khribi to have been called to the three interviews mentioned earlier. This understandably resulted in further delays. The applicant must be prepared to accept such inconvenience. Further, it should be noted, in accordance with subsection 11(1) of the IRPA, that "[t]he visa or document shall be issued if, following an examination, the . . . foreign national is not inadmissible and meets the requirements of this Act" (emphasis added). The most recent security interview took place on August 14, 2003, about 15 months ago. The questions put at those interviews also seem legitimate. It is clear that they have a rational connection with the question of whether there are "reasonable grounds" to believe that the admission of Mr. Khribi to Canada might be "a danger to the security of Canada". In this connection, the fact that the applicant or her dependants do not have a criminal record does not by itself establish that security risks do not exist. Similarly, the presence of Mr. Khribi in Canada in the years preceding the non-renewal of his student visa is not conclusive.

[35]Finally, there is nothing in the record as it stands to allow me to act on the allegation of racial profiling made by counsel for the applicant. This was a gratuitous statement, not supported by the facts in the record. If I refer to the content of Mr. Khribi's affidavit, in view of the evasive or negative replies given by him in the interviews in question, I am willing to accept that in the circumstances additional checks and further investigation could have been required. The question is actually how many months or years after the interviews in question were held such additional checks should be made. Unfortunately, the evidence provided by the respondent does not allow me to answer that question.

RULE OF LAW

[36]As the Supreme Court of Canada has noted in several judgments, the rule of law is at the very basis of our system of government. There is one law for everyone. Among other things, the rule of law requires the creation and maintenance of an actual order of positive laws that preserves and embodies the more general principle of normative order. Similarly, the source of the exercise of any public authority must ultimately be a legal rule. The rule of law requires that the acts of government be consistent with the law. In other words, relations between government and individuals must be governed by law (*Reference re Secession of Quebec*, 1998 CanLII 793 (S.C.C.), [1998] 2 S.C.R. 217, at pages 257-258; *Roncarelli v. Duplessis*, 1959 CanLII 1 (S.C.C.), [1959] S.C.R. 121, at page 142; *Reference re Manitoba Language Rights*, 1985 CanLII 33 (S.C.C.), [1985] 1 S.C.R. 721, at pages 747-752; *Reference re Remuneration of the Judges of the Provincial Court (P.E.I.)*, 1997 CanLII 317 (S.C.C.), [1997] 3 S.C.R. 3, at paragraph 10).

[37]In the case at bar, the applicant or her dependants are not entitled to enter Canada if they do not meet the requirements of the Act (subsection 11(1) of the IRPA). This implies that, in performing his or her duties, the designated immigration officer must, among other things, be satisfied that the admission of the applicant and her dependants to Canada would not contravene *inter alia* subsection 34(1) of the IRPA. As already noted above,

under section 33 of the IRPA, inadmissibility on security grounds is assessed on the basis of "reasonable grounds to believe" that any of the acts mentioned in subsection 34(1) of the IRPA have occurred, are occurring or may occur. It is clear that when security matters are in question, the designated immigration officer must be able to rely on the assistance of agencies specializing in this area. That being said, allowing CSIS to indefinitely delay the conclusion of its investigation and so prevent the designated immigration officer from making a final decision on a visa application amounts to usurping powers conferred exclusively by the Act on the respondent or the person designated by him, which is obviously contrary to the Act and allows the Court to intervene in such a case (*Conille*, at paragraph 26).

[38]Also, although the present delay was partly explained, as I indicated earlier the respondent's evidence contains significant deficiencies. Also, I am not prepared to allow the respondent to delay his decision indefinitely. At such an advanced stage of the matter (there have already been three interviews with Mr. Khribi) I cannot simply accept the evasive reply given by the designated immigration officer, indicating that no final date could be given for conclusion of the security check. It should be recalled that the permanent resident application was made in February 2001 and it is now December 2004, three years and nine months later. The Court cannot disregard all the time that has elapsed and the fact that at present the respondent is not in a position to say when a final decision might be made in the applicant's case. It is imperative for the security check initiated by CSIS to be completed and the final decision by the designated officer made within a reasonable time. At the same time, the absence of any specific evidence in the record as to the extent of the further delays expected in this matter, and in cases of the same type in which security concerns are raised by the respondent, does not for the moment allow the Court to determine what constitutes a reasonable time in the circumstances.

[39]Having said that, I note that at the hearing counsel for the respondent acknowledged that a further delay of 12 months (the case was heard on November 3, 2004) would undoubtedly be very difficult to justify, and this could make the entire amount of time which has elapsed since the application was filed in February 2001 excessive and unreasonable in the circumstances. However, counsel for the respondent indicated that there is no specific evidence in the record that a final decision could be made within the next 12 months. On the contrary, the particular circumstances of the case at bar perhaps justify the security check being extended even beyond 12 months. This I do not know, as the designated officer and counsel for the respondent also did not know. In the circumstances, it would have been desirable if before submitting an affidavit (even if an application under section 87 of the IRPA was filed), the designated officer had sought information from the agencies concerned and had been in a position to tell the Court (a) the specific reasons why the security check has not yet been completed, and if necessary has to continue for a certain time; and (b) within what additional time, in the particular circumstances of the case at bar, a final decision could be expected (Mr. De Rose's affidavit is incomplete and does not deal with the concerns expressed in these reasons).

BALANCE OF CONVENIENCE

[40]In the case at bar, if I were to dismiss the instant application for judicial review at this time, it would mean that the applicant would again have to file an application for leave and judicial review if the decision awaited was not made within a reasonable time. That assumes that the applicant would have to wait for several months more before initiating another proceeding. With no indication by the Court as to what constitutes a reasonable time, and no information from the respondent as to how much time the ongoing security check will take, the applicant is faced with a serious dilemma. To this should be added the additional delays involved in initiating proceedings, so that a new application for judicial review could be heard by the Court, and the further hardships resulting from the requirement to seek authorization of the Court a second time (authorization which is never assumed or automatically granted).

[41]On the other hand, if I were to issue a writ of *mandamus* at this time directing the designated officer to render her decision within a relatively short time, this might place the respondent in an especially difficult situation if the CSIS security check cannot be completed within that time. The Court has to seek a balance between protecting the public and Canada's interests and those of the applicant and her dependants. On the other hand, the incomplete nature of the respondent's evidence is a factor strongly in favour of a further hearing being convened, in place of allowing the *mandamus* application, and ordering that the final decision be made within a specific time.

[42]Having weighed the inconvenience on either side, and in order to arrive at a solution to the matter which is

just and as expeditious and economical as possible, therefore, I consider that no order should be made at this time finally disposing of the application for judicial review. In the interlocutory order accompanying these reasons, the parties are summoned to a hearing to take place on June 6, 2005. The purpose of this additional hearing will be to admit evidence currently missing from the record and to hear additional submissions by the parties. The further delay resulting from the convening of an additional hearing will allow the respondent and the agencies concerned to proceed with, if not complete, the security aspect of the ongoing investigation. This will also enable the applicant to obtain new selection certificates, if required, even new medical certificates. A teleconferencing call with counsel will be made in February 2005 to discuss the impact of any development affecting the fate of the current application for judicial review (for example, if a final decision is made in the meantime) and questions of evidence and procedure. A schedule for the serving and filing of supplementary affidavits and for the holding of cross-examinations, if any, will be drawn up by the Court at that time. No question of general importance was raised by the parties and no question will be certified by the Court at this stage of the proceeding.

ORDER

THE COURT ORDERS THAT:

1. No final order is made regarding the applicant's application for judicial review;

2. The parties are summoned to an additional hearing in the case at bar to take place in Montréal at 9:30 a.m., on June 6, 2005, and expected to last half a day;

3. In the meantime, counsel for the parties will be summoned by the Registrar to a teleconferencing call to discuss developments in the matter and questions of procedure and evidence, to take place in February 2005;

4. Further directions may be made at any time by direction or order of the Court regarding any question raised in the case at bar, including the disposition of any non-disclosure application for any protected information within the meaning of section 76 of the *Immigration and Refugee Protection Act*, S.C. 2001, as amended;

5. The undersigned Judge retains jurisdiction over the applicant's application for judicial review, subject to the power of the Chief Justice to appoint another judge to replace the undersigned Judge in the event the latter is unable to act or incapacitated;

6. Subject to the right of either party to submit to the Court that the instant application for judicial review should be allowed or dismissed based on developments that have occurred between the date of this order and the date of the hearing convened above;

7. No question of general importance will be certified at this stage.