Court File No.: T-2506-14

FEDERAL COURT

BETWEEN:

ANIZ ALANI

Applicant

and

THE PRIME MINISTER OF CANADA, THE GOVERNOR GENERAL OF CANADA and THE QUEEN'S PRIVY COUNCIL FOR CANADA

Respondents

RESPONDENTS' MOTION RECORD
[Applicant's Motion to Expedite Returnable June 30, 2015]

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INDEX - MOTION RECORD

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BETWEEN:

Aniz ALANI

Applicant
(Moving Party)

and

THE PRIME MINISTER OF CANADA,
THE GOVERNOR GENERAL OF CANADA and
THE QUEEN'S PRIVY COUNCIL FOR CANADA

Respondents
(Responding Parties)

WRITTEN REPRESENTATIONS

I/ Overview

1. Mr. Alani wants to have his judicial review application in relation to Senate vacancies heard prior to the next federal election, expected on October 19, 2015. Accordingly, Mr. Alani asks the Court to immediately set a pre-election hearing date, and to order the deadlines for the remaining procedural steps in his application to be abridged if necessary to accommodate such a hearing.

2. The Respondents ("Canada") are not opposed in principle to the fixing of a reasonable hearing date or the establishment of a reasonable schedule for the completion of pre-hearing steps, once they are in a position to know how much time will be required. However, Canada does not agree that the timing of the next federal election is a valid factor that warrants being taken into account when scheduling Mr. Alani's application.

3. In particular, Mr. Alani's personal desire to have his case heard before an election ought not to compromise the parties' abilities to properly prepare their respective cases, nor should it result in scheduling that is inconvenient to the court or opposing counsel. It

certainly does not warrant prioritizing Mr. Alani's case over those of other litigants who are seeking access to justice before the Federal Court. In other words, Mr. Alani should not be permitted to "jump the queue" to the detriment of others.

4. Accordingly, it is Canada's position that Mr. Alani's application ought not to be afforded any special treatment in terms of scheduling. His application is not urgent and he has not demonstrated that any prejudice will ensue if it is not heard prior to the next election. The application should presumptively follow the ordinary procedural deadlines, with a hearing date to be fixed once the application is perfected and the parties can properly indicate the estimated duration and their respective availabilities.

II/ Background

5. After reading a December 4, 2015 article in the Toronto Star that quoted a response by the Prime Minister to a reporter's question about Senate vacancies, Mr. Alani commenced an application for judicial review seeking declaratory relief that the Prime Minister must advise the Governor General to summon a qualified person to the Senate within a reasonable time after a vacancy occurs.[1] Mr. Alani filed this lawsuit even though the quoted words of the Prime Minister in this article were simply: "I don't think I'm getting a lot of calls from Canadians to name more senators right about now" and that "we will be looking at this issue, but for our government the real goal is to ensure the passage of our legislation by the Senate and thus far, the Senate has been perfectly capable of fulfilling that duty."[2]

6. Canada responded to Mr. Alani's application with a motion to strike on the basis that it is not justiciable and outside of the statutory jurisdiction of the Federal Court. That motion was heard by the Court (Harrington J.) on April 23, 2015. As part of his response to the motion, Mr. Alani sought to have his notice of application amended.[3]

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[1] Affidavit of Aniz Alani made June 22, 2015 ("Alani Affidavit") at paras. 2 to 4
[2] Alani Affidavit, Ex. A.
[3] *Alani v. Canada*, 2015 FC 649

7. On May 21, 2015, after reserving judgment for one month, the Court dismissed Canada's motion to strike as the motions judge decided that it was not plain and obvious that Mr. Alani's application is not justiciable or outside of the Court's jurisdiction. However, the Court did not express in its reasons any criticism of Canada's response and, significantly, did not sanction Canada by awarding Mr. Alani his costs of the motion in any event of the cause, as Mr. Alani had requested. Furthermore, the Court remarked upon the insufficiency of the particulars provided by Mr. Alani in his original notice of application and implicitly acknowledged the need for it to be remedied by allowing some (but not all) of the amendments Mr. Alani requested. The Court also effectively indicated in the concluding paragraph of the reasons that the application should start afresh with Mr. Alani serving and filing his amended notice of application, after which the normal delays should be followed.[4]

8. Following adjudication of the motion to strike, Mr. Alani initiated correspondence with counsel for Canada seeking agreement to an expedited schedule for the pre-hearing steps, failing which Mr. Alani would seek relief from the Court. Mr. Alani did not initially explain why he felt that there is any particular urgency to his application. Accordingly, counsel for Canada advised Mr. Alani that while they are amenable to fixing a reasonable schedule that affords the parties the time they require to properly prepare their cases, Canada will not agree to an aggressively expedited and prejudicial timetable.[5]

9. In a letter to the Court dated May 29, 2015, Mr. Alani finally stated the reason he wishes the procedural timelines to be abridged: he would like his application to be heard prior to the next federal election, which is expected to be held on October 19, 2015.[6]

10. Mr. Alani's apparent rationale as to why his application warrants being heard before the election was twofold. First, Mr. Alani indicated his apparent belief that the electorate may not be able to express its "political dissatisfaction" with Senate

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[4] *Alani v. Canada,* 2015 FC 649, esp. paras. 15 and 41-49.
[5] Alani Affidavit, paras. 35 to 39, exhibits Y, Z, AA, BB and CC
[6] Alani Affidavit, para. 39, exhibit CC

vacancies in the absence of a Federal Court judgment that adjudicates his case. Second, he was concerned that there may be further political developments regarding Senate vacancies following the election that might render his application moot, in particular:

(a) the possibility that the Senate vacancies may be filled;

(b) the possibility that there may be a change of government resulting in a change of policy in respect of Senate appointments; and

(c) the possibility that there may be a continuation of the "existing policy of inaction [in relation to Senate vacancies] but without a clear expression of that policy or 'decision'".[7]

11. Canada advised Mr. Alani that it does not find these rationales to be persuasive, and that the timing of the next federal election is not a factor that ought to govern the determination of either the procedural deadlines or the hearing date of this application. Furthermore, in response to Mr. Alani's request for their availabilities in the three weeks prior to October 19th, counsel for Canada informed Mr. Alani that they are not available from September 28 to October 16 inclusive as a result of previously scheduled court hearings and out-of-town business travel commitments.[8]

12. On June 17, 2015, Mr. Alani commenced the present motion to expedite his application with a view to having it heard prior to the anticipated October 19, 2015 federal election.[9] The Case Management Judge (Lafrenière P.) has ordered that Mr. Alani's motion be heard at general sittings on June 30, 2015.

III/ Issue

13. The only issue raised by this motion is whether Mr. Alani has demonstrated a sufficient justification for the Court to exercise its discretionary power to exceptionally expedite this application in order to accommodate Mr. Alani's wish that it be heard prior to the next election.

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[7] Alani Affidavit, para. 39, exhibit CC
[8] Alani Affidavit, paras. 50, 55 and 56, exhibit II
[9] Notice of Motion dated June 17, 2015

IV/ Submissions

The Legal Test to Abridge Time in Order to Expedite a Hearing

14. Rule 8 of the *Federal Courts Rules* authorizes the Court to "extend or abridge a period provided by these Rules or fixed by an order". While Rule 8 does not set out any particular test for the exercise of this discretionary authority, the relatively few cases in which a Court has considered whether to abridge timelines in order to expedite a proceeding so that it can be heard prior to a particular event have focused on four factors that can be summarized as follows:

    (a) whether prejudice will ensue to the moving party if the matter is not expedited (i.e., is the alleged urgency genuine, or simply a preference of the party);
    (b) whether prejudice will ensue to the responding party if the matter is expedited;
    (c) whether the matter will become moot if it is not expedited; and
    (d) whether expediting the matter will prejudice other Federal Court litigants by "queue jumping".[10]

15. A Rule 8 motion to expedite an application must be adjudicated with the understanding that the scheduling deadlines presumptively imposed by Part 5 of the *Federal Court Rules* are designed as a "compromise" between the need to have applications heard in a summary way, and the need to ensure that the parties have enough time to properly prepare their cases. As such, any departure from these rules—especially an abridgement—is exceptional. Furthermore, the burden to show that such an exceptional departure is warranted lies on the party seeking the abridgement.[11]

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[10] *Canadian Wheat Board v. Canada,* 2007 FC 39 at para. 13; *Trotter v. Canada,* 2011 FC 498 at paras 5-7; *Conacher v. Canada,* 2008 FC 1119 at para. 16; *May v. CBC/Radio Canada,* 2011 FCA 130 at paras. 12 and 13; *Dragan v. Canada,* 2003 FCA 139 at para. 7; *Gordon v. Canada,* 2004 FC 1642 at para. 11

[11] *Canadian Wheat Board v. Canada,* 2007 FC 39 at para. 14; *Gordon v. Canada,* at para. 17; *Conacher v. Canada* at para. 14

16. For the reasons set out below, when the facts of this case are considered in relation to the four factors listed at paragraph 14 above, it is clear that Mr. Alani has not met his burden to show that his application exceptionally deserves to be expedited.

Factor One: Prejudice to the Moving Party (Genuine Urgency or Simple Preference?)

17. Mr. Alani's primary argument regarding the alleged urgency of his application is his assertion that if the Federal Court dismisses his application on the basis of a lack of justiciability after the 2015 election is held, "the Canadian voting public may be deprived of a singular opportunity to effect an obviously available political remedy".[12] Mr. Alani does not, however, argue that the possibility of any other outcome of his application (e.g., if it is allowed, if it is dismissed on the merits, if it is dismissed on jurisdictional grounds, etc.) would be prejudicial if it were to occur after the election.

18. Frankly, and with all due respect, Canada has great difficulty understanding Mr. Alani's argument on this point. At best, it appears to be an assertion that the Canadian electorate requires the benefit of a Federal Court adjudication of Mr. Alani's application for judicial review in relation to Senate vacancies in order to make an informed decision when voting in the next election.

19. However, Mr. Alani has led absolutely no evidence to support such an assertion. Indeed, not only is his affidavit completely silent on the impact his litigation will have on Canadians' ability to exercise their democratic rights in relation to the 2015 election, Mr. Alani does not even allege that his own personal ability to participate in this election will be prejudiced if the Federal Court's decision in relation to his case is rendered after October 19th.

20. This is not surprising since, as a matter of common sense, voters do not require a court judgment in relation to Senate vacancies in order to make informed political decisions about which candidates to vote for. No matter how the Federal Court ultimately

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[12] Applicant's Motion to Expedite Written Representations ("Written Representations"), paras. 94 to 96

adjudicates Mr. Alani's lawsuit, Canadians will always be free to support or reject candidates on the basis of their political positions in relation to the Senate, or any other political issue that is of importance to the voter.

21. A further flaw in Mr. Alani's argument relates to the nature of the relief that he has requested on this motion. Presumably conscious of the fact that it would be unseemly to request an order that would purport to bind the Court to issue a judgment by a certain date, Mr. Alani is only seeking an order that would provide that his case is to be heard on or before October 19, 2015. However, simply setting an earlier hearing date does not guarantee that a judgment will in fact be released sufficiently in advance of the election so that voters can learn of it and decide what impact, if any, it should have on their voting preferences.

22. In addition, no matter what the outcome of his application for judicial review, it is most probable that the unsuccessful party will appeal to the Federal Court of Appeal. As such, even if a judgment is rendered by the Federal Court prior to October 19, 2015, it is very unlikely that it will be a final judgment on the issues raised by Mr. Alani on his application and by Canada in response.

23. Mr. Alani's apparent argument on this point is analogous to one of those advanced by the applicant in *Canadian Wheat Board v. Canada*. The Board was challenging a Governor in Council direction prohibiting it from advocating for the retention of its monopoly powers and argued that the application had to be expedited so that it could be heard prior to the completion of a plebiscite on the marketing of barley. Mr. Justice de Montigny expressed his disagreement with the Board's assertion that the potential impact of the direction on the outcome of the plebiscite justified expediting the application, as follows:

> [16] There are at least three problems with this submission. First of all, there is no evidence before this Court that the producers will be prevented from making an informed decision if the CWB is not allowed to take a stand and campaign, or even to communicate with the producers and explain the advantages of the current system. This is a debate that has been going on for a long time, and there are other sources of information (including the

media) ensuring that an open and transparent clash of opinions will take place.[13]

24. Paraphrasing the words of Mr. Justice de Montigny and applying them to the case at bar, there is also no evidence that Canadians will be prevented from making an informed decision about Senate vacancies if the Federal Court does not decide Mr. Alani's case before the election. Furthermore, public debate about the Senate has been going on for a long time, and there are other sources of information than Federal Court jurisprudence (including the media) to ensure that an open and transparent clash of opinions will take place.

25. Mr. Alani's secondary argument regarding the alleged urgency of his application is the simple assertion that "the nature of the application itself, which raises a significant constitutional issue of public interest, also militates in favour of exercising the Court's discretion to order an expedited hearing".[14] However, even if it is acknowledged that Mr. Alani's case has attracted some media attention, there is no evidence before the Court that there is any concrete public interest in the outcome of Mr. Alani's case by individual Canadians who genuinely feel that their rights and freedoms will be impacted by its outcome. This is not a matter in respect of which the Court can take judicial notice and it was incumbent upon Mr. Alani to provide evidence in support of this assertion, which he did not.

26. Mr. Alani's tertiary argument regarding the alleged urgency of his application is that his wife is expected to give birth to their second child on or around November 24, 2015, and that she would prefer Mr. Alani to be present and available during her labour and in the period following delivery.[15] Such an argument is obviously independent of and unconnected to the question of whether Mr. Alani's application should be expedited so

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[13] *Canadian Wheat Board v. Canada,* 2007 FC 39 at para. 16
[14] Written Representations, para. 97
[15] Written Representations, para. 98; Alani Affidavit, paras. 70 to 72

that it can be heard prior to next federal election, anticipated over one month prior to the time when Mr. Alani's second child is expected to arrive.

27. That said, Mr. Alani's availabilities in light of his personal circumstances is a matter that can and should be taken into account when this matter is ripe for scheduling after the application is perfected. This information should be included in the requisition for hearing when it is time for it to be filed. It is not, however, a justification for expediting Mr. Alani's application for judicial review and departing from the ordinary timelines established by the *Federal Courts Rules*.

28. In sum, it is clear that Mr. Alani's interest in having his matter heard prior to October 19, 2015, the anticipated date of the next federal election, is a not a "real urgency". Mr. Alani has not established that he or anyone else will be prejudiced if his case is not heard before the election. Instead, his desire for a pre-October 19, 2015 hearing is nothing more than a personal preference that does not merit having his application expedited.

Factor Two: Prejudice to the Responding Party

29. Mr. Alani asserts that his request to expedite will not unduly prejudice Canada in the circumstances of this case as (1) he is not requesting a modification to the current deadline for Canada's affidavits (July 31, 2015 as per the Court's order of June 2, 2015); (2) the parties are already prepared to argue the jurisdiction and justiciability issues that were canvassed on the motion to strike; and (3) any abridgements to the remaining deadlines (cross-examinations on affidavits and preparation of application records) should not have a significant impact on the parties' ability to address the "relatively straightforward" remaining issues.[16]

30. Without a specific indication of the exact hearing date(s) on which the application is proposed to be heard and the particular procedural deadlines that would be imposed in order to have the application perfected in time for the hearing, it is not possible for

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[16] Written Representations, paras. 68 to 75

either party to make cogent arguments about the potential prejudice that may or may not be inflicted by an expedited hearing. For example, if the Court were to entertain the notion that this matter ought to be scheduled during the period from September 28 to October 16th this would impact upon the practice obligations of counsel for Canada (as they are unavailable during that period due to previously scheduled court hearings and out-of-town business travel), which is a factor that the Federal Court of Appeal has said should be taken in to account on a motion to expedite.[17]

31. Therefore, in the absence of particulars in relation to the proposed hearing date and necessary abridgments of the outstanding procedural steps, Mr. Alani has not established that expediting his application to ensure a pre-election hearing will not cause prejudice to Canada and its counsel.

Factor Three: Mootness

32. Mr. Alani does not allege that his application will become moot if it is not heard prior to the next federal election. Instead, he says that his application could become moot if the Prime Minister "resiles from his stated intention not to appoint Senators", either before or after the election. In other words, Mr. Alani is concerned that the Senate vacancies he now complains of might be filled before his application is heard.[18]

33. Obviously, the "mootness" factor that is to be considered on a motion to expedite cannot be satisfied if the moving party's only concern is that that the underlying dispute might be independently resolved in a manner that affords the applicant with the relief he or she is seeking. If the Senate vacancies are filled, there would be no logical reason for Mr. Alani to expend the time and resources necessary to pursue this application any more since the apparent objective of his litigation would have been achieved.

34. That said, the fact that Mr. Alani has advanced this argument speaks volumes about the extent to which he actually has a genuine interest in this proceeding. It demonstrates

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[17] *Canada v. Dragan,* 2003 FCA 139 at paras. 6 and 13; Alani Affidavit, para. 55.
[18] Written Representations, para. 76

that Mr. Alani would apparently prefer the status quo of outstanding Senate vacancies to persist just so that he has an ostensible justification for pursuing a lawsuit against Canada in the Federal Court.

35. Mr. Alani also advances under the rubric of "mootness" a concern over a potential "ripeness" issue if this matter is not heard before the October 19, 2015 election. In particular, Mr. Alani posits that if the Prime Minister does not remain in office following the election, Mr. Alani's application may be subject to challenge on the basis that is is premature "unless and until the new Prime Minister states a similar intention not to appoint Senators". However, this speculative hypothetical concern also does not justify expediting Mr. Alani's application. To the contrary, by its very nature, the Canadian political landscape is not static and will always be subject to the possibility of change. This provides a clear demonstration of why the timing of federal elections ought not to be a factor in scheduling applications for judicial review such as the one brought by Mr. Alani.

Factor Four: Prejudice to Other Litigants (Queue Jumping)

36. Mr. Alani candidly and properly notes his lack of awareness of the Court's existing availability to hear the application following the perfection of the application records, or the likelihood of cancellation of other hearings should Mr. Alani's application be expedited, and he therefore does not expressly argue that his request for an expedited hearing will not cause prejudice to other litigants before the Federal Court who may alredy be in the "queue" and waiting for a hearing date. Canada is similarly unaware of the Federal Court's current capacity for scheduling hearings that are ready to proceed.

37. That said, there can be no doubt that the Court must take this factor into account when adjudicating motions to expedite hearings such as the one in the case at bar. In *Dragan v. Canada,* the Federal Court of Appeal accepted that the moving party on such a motion must demonstrate that "[the proceeding] will not be heard to the detriment of others whose matters have already been scheduled for hearing". In that case, however,

this concern (described as "queue jumping") was not an issue because there had been a fortuitous cancellation of a previously scheduled hearing on the proposed date.[19]

38. Indeed, because of the finite resources of the Federal Court, it is self-evident that early scheduling of a proceeding will necessarily eliminate a scheduling possibility for other litigants who may in fact have commenced their lawsuits earlier than the one that is being sought to be expedited. It is for this reason that fairness requires that, absent exceptional circumstances, most Federal Court applications should follow the ordinary timelines set out in the *Federal Courts Rules*, including the Rule 314 requirement to submit a requisition for hearing only once both parties' application records are perfected.

39. Mr. Alani is effectively asking that he be exempted from the Rule 314 pre-condition for obtaining a hearing date. His application, however, is not so urgent or so exceptional that such an exemption is warranted.

Conclusion: The Ordinary Timelines Should Apply

40. It is notable that there a number of jurisprudential examples of cases where applicants have sought to expedite judicial review applications because of concerns relating to the timing of a federal election. For example:

    (a) *May v. CBC/Radio Canada*: the leader of the Green Party, Ms. Elizabeth May, applied for judicial review of a Canadian Radio-television and Telecommunications Commission ("CRTC") bulletin that impacted her ability to participate in the 2011 federal election leaders' debate; she sought to expedite the application in order so that it could be heard prior to the debate.[20]

    (b) *Trotter v. Canada*: Ms. Trotter applied for judicial review in order to make public an Auditor General's report that would have been tabled in Parliament had the 2011 federal election not been called; she sought to expedite the application so that it could be heard prior to the election[21]; and

    (c) *Conacher v. Canada*: Mr. Conacher applied for judicial review of the Prime Minister and Governor General's actions culminating in the calling of the 2008

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[19] *Canada v. Dragan*, 2003 FCA 139 at paras. 7 and 8
[20] *May v. CBC/Radio Canada*, 2011 FCA 130
[21] *Trotter v. Canada*, 2011 FC 498

election; he sought to expedite the application so that it could be heard prior to the election.[22]

41. In none of these cases were the motions to expedite allowed as the judges who adjudicated the motions all found that the applicants had not met their burden to justify early scheduling of hearing dates and commensurate abridgements of procedural timelines.

42. Mr. Alani has not met his burden either. While he may want his application to be heard prior to the next federal election, this is simply his personal preference. It is not a genuine urgency that would justify the Court affording Mr. Alani's application any exceptional treatment in relation to its scheduling by the Federal Court.

IV/ Order Sought

43. Canada respectfully requests that this motion be dismissed with costs in any event of the cause.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED AT VANCOUVER, this 26th day of June, 2015.

Jan Brongers

for **Oliver Pulleyblank**

Counsel for the Respondents

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[22] *Conacher v. Canada,* 2008 FC 1119

Canada (Minister of Citizenship and Immigration) v. Dragan, 2003 FCA 139 (CanLII)

Date: 2003-03-12
Docket: A-133-03
Other citations: 303 NR 112; [2003] FCJ No 434 (QL); 122 ACWS (3d) 7; 25 Imm LR (3d) 163
Citation: Canada (Minister of Citizenship and Immigration) v. Dragan, 2003 FCA 139 (CanLII), <http://canlii.ca/t/4h7k> retrieved on 2015-06-25

Date: 20030312

Docket: A-133-03

Neutral citation: 2003 FCA 139

PRESENT: ROTHSTEIN J. A.

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellant

and

LAURENTIU DRAGAN

Respondent

Heard at Toronto, Ontario, on March 12, 2003.

Order delivered from the Bench at Toronto, Ontario,

on March 12, 2003.

REASONS FOR ORDER BY:
ROTHSTEIN J.A.

Date: 20030312

Docket: A-133-03

Neutral citation: 2003 FCA 139

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellant

and

LAURENTIU DRAGAN

Respondent

REASONS FOR ORDER

(Delivered from the Bench at Toronto, Ontario

on March 12, 2003.)

ROTHSTEIN J.A.

[1] This is a motion to expedite the hearing of an appeal of the judgment of Kelen J. of February 21, 2003, ordering writs of mandamus requiring the Minister to assess 102 applicants for immigrant visas in accordance with the *Immigration Regulations, 1978*, SOR/78-172 (the former regulations).

[2] The appeal is filed pursuant to a question being certified for appeal by Kelen J. on March 7, 2003. By virtue of Kelen J.'s Order and subsection 361(3) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, (*IRPR*), brought into force on June 28, 2002, these assessments must be made on or before March 31, 2003.

[3] The Minister says that Kelen J. erred in finding that the Minister had an implied duty to use his reasonable best efforts to assess these applications before March 31, 2003. Further, he says that Kelen J.'s order requires the Minister to follow recommendations of a standing committee of Members of Parliament, which has never

been the basis of a public law duty on a Minister. The Minister says these are important questions of principle that this Court should decide on appeal.

[4] On or before March 31, 2003, the Minister has a right to appeal by virtue of the certified question for appeal having been ordered by Kelen J.. However, after March 31, 2003, the regulatory basis in subsection 361(3) of the *IRPR* for the writs of mandamus will no longer have application. The Minister says that will render the appeals subject to objection on account of mootness. Even if the respondents do not raise mootness, the Court of its own motion could simply refuse to hear and decide the appeal because it is moot after March 31, 2003. The Minister therefore says that his appeal right may be rendered nugatory, and he will therefore suffer irreparable harm, if the motion to expedite is not granted and the appeal is not scheduled to be heard before March 31, 2003.

[5] The respondents raise a number of objections. They say the appeal will be more complex than the Minister indicates. Kelen J.'s implied duty reasoning was not argued by the respondents before him and they will have to do research to support Kelen J.'s finding. They also say that they will argue that Kelen J. erred in finding that section 190 of *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (*IRPA*) had retroactive or retrospective effect. In addition, they say they intend to cross-appeal in respect of the 22 applications that Kelen J. dismissed.

[6] Counsel for the respondents also submits that by reason of subsection 361(3) of the *IRPR* and the Order of Kelen J., they are, over the period between now and March 31, 2003, preparing clients for the interviews ordered by Kelen J. that must be scheduled by the Minister on or before March 31, 2003. Each of the five counsel before me have advised, as Officers of the Court, that they must prepare 4, 9, 9, 20 and 42 clients respectively for interviews before March 31, 2003. This is in addition to their other court and hearing work in their immigration practices. As a result, they say that an expedited appeal to be heard before March 31, 2003, will severely prejudice their practices and, specifically, the clients who must be prepared for interview before March 31, 2003.

[7] The Minister argues that the proper test for determining whether a motion for an expedited hearing should be granted is derived from *Apotex Inc.* v. *Wellcome Foundation Ltd.* (1998), 228 N.R. 355. The Minister says a moving party must demonstrate:

(a) Irreparable harm will result if the hearing is not expedited;

(b) A timetable can be agreed upon which is convenient to the Court and counsel for the parties for the hearing of the appeal; and

(c) The appeal will not be heard to the detriment of others whose matters have already been scheduled for hearing.

I am not entirely convinced that the requirements to be satisfied for an expedited hearing are as stringent as the Minister suggests, especially that an applicant must demonstrate irreparable harm to obtain an order for an expedited appeal. However, the Minister has advanced them and is prepared to have the application decided on the basis of these requirements. For purposes of this application, therefore, I will apply them to the facts. I should add, however, that, even if I were to apply a standard less than irreparable harm, my conclusion would not change.

[8] The third condition, that of queue jumping, is not at issue. The Court could make the afternoon of March 20, 2003, available because of a cancellation.

[9] With respect to irreparable harm, I agree with the Minister that rendering an appeal nugatory by the effluxion of time could constitute irreparable harm. However, if this appeal is not heard before it is moot, I am not convinced that the result will be catastrophic to the Minister. First, this Court may decide to exercise its discretion to hear the appeal even though it is moot. See *Borowski v. Canada (Attorney General)*, [1989] 1. S.C.R. 342 at 353 and 358 *et seq*. Second, if no other applicant for an immigrant visa seeks to have his or her application assessed under the former regulations, any practical or administrative problems the Minister may have will disappear. If, on the other hand, an applicant for an immigrant visa seeks to be assessed under the former regulations and the Minister does not agree, the matter will likely proceed to judicial review. The same or similar considerations pertaining to the Minister's obligation, if there is one, can be argued in those proceedings; and the losing party may seek to have a question certified for appeal so that the matter may ultimately be dealt with by this Court.

[10] The Minister says that unless the matter is dealt with, there will be uncertainty in the law and administrative difficulties may be encountered. If that is the case, the Minister may apply to the Court to expedite any outstanding judicial review and/or subsequent appeal. Provided grounds can be demonstrated, the Court may well order the expedited hearing of the judicial review and/or appeal. In any event, the Minister may seek to have this appeal expedited but on a longer timetable. Of course, the question of mootness will have to be dealt with.

[11] The Minister says that the issue of the recommendation of a parliamentary committee forming the basis of a public law duty on the Minister may not arise again and that this is an important principle of constitutional law that must be dealt with by the Court. I do not minimize the importance of this issue. However, I have not been persuaded that it cannot be dealt with under future judicial reviews or appeals. And, as I have said, this Court may exercise its discretion to hear and decide the appeal in this case even if it is moot.

[12] With respect to the timetable, it is apparent that there is no agreement between the parties. While it is not beyond the power of the Court to impose a timetable on parties if they do not agree, I think to do so the Court would, in most cases, have to conclude that agreement could not be reached because one or both of the parties was being unreasonable. I do not think that is the case here.

[13] While the Minister is not being unreasonable in trying to get the appeal heard and decided before March 31, 2003, the timetable is extraordinarily short. While counsel for the respondents must be prepared to be flexible, I think that what they would be called upon to accommodate in this case would be unfair and prejudicial to them and their clients. They are required to prepare clients for interviews that, as a result of Kelen J.'s Order, the Minister must schedule on or before March 31, 2003. In addition, they have their other practice obligations. It seems to me that to expedite the appeal to be heard on or before March 31, 2003, would require them, at least in some cases, to choose between working on this appeal and preparing their clients for interviews. I do not think that it is fair to them or their clients to put them in that position. For these reasons, I conclude that the Minister has not satisfied the requirements for an expedited hearing before March 31, 2003.

[14] The motion to abridge the time for the service and filing of the motion record will be allowed and the motion record will be ordered to be filed. The motion to expedite the hearing of the appeal will be dismissed without prejudice to any further application the Minister may choose to make.

[15] On consent, the time for the respondents to file a cross-appeal will be extended to March 28, 2003.

[16] The respondents represented by the five counsel appearing on this motion will be entitled to costs of $1,000 in respect of each counsel, inclusive of disbursements, for a total of $5,000 payable by the Minister.

"Marshall Rothstein"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-133-03
STYLE OF CAUSE:	MINISTER OF CITIZENSHIP AND IMMIGRATION
	v. LAURENTIU DRAGAN
PLACE OF HEARING:	Toronto
DATE OF HEARING:	March 12, 2003

REASONS FOR ORDER

RENDERED FROM THE

BENCH: ROTHSTEIN J.A.

APPEARANCES:

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