

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

Vadim Esin,

Plaintiff,

v.

Alejandro Mayorkas, in his official capacity as Secretary of the Department of Homeland Security; Ur M. Jaddou, in his official capacity as Secretary of the Director of the United States Citizenship and Immigration Services (USCIS); and Patricia Menges, in her official capacity as Director of the New York Asylum Office of USCIS,

Defendants.

By ECF

Civil Action No. 1:23-cv-05074

COMPLAINT AND ACTION IN MANDAMUS

INTRODUCTION

1. For generations, the United States has been a haven for immigrants seeking opportunity and upward mobility. *See, e.g.*, John F. Kennedy, *Nation of Immigrants* (1958); Emma Lazarus, *The New Colossus* (1883) (welcoming “your tired, your poor, your huddled masses”). After the failures of the global community to protect refugees during World War II and the Holocaust, the United States and the international community recognized that “[a]ll human beings are born free and equal in dignity and rights” and that “[e]veryone has the right to seek and to enjoy in other countries asylum from persecution.” The Universal Declaration of Human Rights (Dec. 10, 1948), Art. 1, 14.

2. Plaintiff Vadim Esin (“Esin”) came to the United States to escape life-threatening persecution and obtain asylum. Esin is a homosexual man who fled harassment, threats, and violence in Russia. Esin lives in constant fear of being sent back to Russia, where he may be killed or attacked due to the prevalence of persecution of homosexual people.

3. Esin is not hiding in this country. He lawfully presented to the United States Citizenship and Immigration Service (“USCIS”) his meritorious claim for asylum in March 2017. Since then, USCIS has failed to comply with its duty to adjudicate his claim. Immigration and Nationality Act (“INA”), § 208(a), 8 U.S.C. § 1158(a). Instead, Esin has waited more than six years without USCIS scheduling his asylum interview or adjudicating his claim for asylum, and there is no likely end in sight to his waiting for a chance to have his claim heard.

4. Under policies USCIS enacted in January 2018, USCIS placed Esin’s asylum application in de facto indefinite suspension and may never adjudicate his claim. Defendants have, therefore, violated their non-discretionary, statutory duty to schedule his asylum interview and adjudicate his asylum claim.

5. USCIS' inaction has left Esin in limbo, suffering uncertainty and an inability to settle into a stable and secure life.

JURISDICTION AND VENUE

6. This Court has jurisdiction over the claims asserted in this action pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1361, and 28 U.S.C. § 1651 because Esin asks this Court to compel Defendants, officers of the United States, to perform their duty owed under INA § 208(d)(5)(A)(ii)-(iii), 8 U.S.C. § 1158(d)(5)(A)(ii)-(iii).

7. Jurisdiction is also conferred on this Court pursuant to 5 U.S.C. § 704 as Esin is aggrieved by adverse agency action which this Court is authorized to remedy under the Administrative Procedures Act, 5 U.S.C. §§ 702 *et seq.*

8. The jurisdiction of this Court is also invoked pursuant to 28 U.S.C. §§ 2201-02 which authorizes the issuance of declaratory judgments.

9. Esin seeks costs and fees pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504 and 28 U.S.C. §§ 2412(2) *et seq.*

10. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(e) because this judicial district is where the Defendants, acting through the New York Asylum Office of the United States Citizenship and Immigration Services, have failed to take action required by law.

THE PARTIES

11. Plaintiff Vadim Esin is a citizen of Russia who currently lives in Brooklyn, New York. Esin submitted an Asylum Application to USCIS on March 14, 2017. Esin's asylum application was assigned to the New York Asylum Office, which has yet to schedule his interview.

12. Defendant Alejandro Mayorkas is the Secretary of the DHS and oversees DHS. In his official capacity, he is charged with the administration and enforcement of the INA, has the

authority to determine the refugee status of applicants pursuant to 8 U.S.C. § 1158(b)(1)(A), and is authorized to delegate such powers and authority to employees of DHS, including those of USCIS. *See* 8 U.S.C. § 1103(a)(1). Defendant Mayorkas is named in this complaint in his official capacity.

13. Defendant Ur M. Jaddou is the Director of USCIS, the Agency charged with scheduling Plaintiff's asylum interview and adjudicating Plaintiff's Asylum Application. Defendant Jaddou is named in her official capacity.

14. Defendant Patricia Menges is the Director of the New York Asylum Office, USCIS, to which Plaintiff's asylum case has been assigned. The Office has direct authority and responsibility to schedule Plaintiff's asylum interview and adjudicate his Asylum Application. Defendant Menges is named in her official capacity.

FACTS

A. Defendants Have a Statutory Duty to Process Plaintiff's Asylum Application

15. Individuals who fear persecution in their countries of origin can affirmatively seek asylum in the United States. In order to do so, applicants must submit an Asylum Application to USCIS. After receiving the Asylum Application, USCIS is responsible for scheduling an asylum interview in order to process the Asylum Application. Under INA 208 § 1158(a), 8 U.S.C. § 1158(a), USCIS has a non-discretionary duty to adjudicate Plaintiff's asylum claim.

16. “[I]n the absence of exceptional circumstances, the initial interview or hearing on the asylum application *shall* commence *not later than 45 days* after the date an application is filed.” Immigration and Nationality Act, INA 208 § 1158(d)(5)(A)(ii), 8 U.S.C. § 1158(d)(5)(A)(ii) (emphasis added). Following this interview, USCIS must issue a decision on the application. The relevant statute provides that, “in the absence of exceptional circumstances,

final administrative adjudication of the asylum application, not including administrative appeal, shall be completed within 180 days after the date an application is filed.” 8 U.S.C. § 1158(d)(5)(A)(iii).

17. As set forth in greater detail below, Plaintiff Esin fears persecution in his home country and has a meritorious claim for asylum. He filed the requisite Asylum Application but, at the time this Complaint is being filed, USCIS has not scheduled him for an asylum interview despite USCIS’ statutory duty and despite him having filed his application more than six years ago.

B. Plaintiff’s Meritorious Claim for Asylum

18. Plaintiff Vadim Esin is a homosexual man who fled Russia after experiencing persecution for being homosexual.

19. Individuals perceived to be gay face grave persecution in Russia. Homosexual Russians are at a high risk of being attacked, extorted, and even killed.

20. The Russian police and government are unwilling and unable to protect homosexuals in Russia because homophobia is state sponsored in Russia. The Russian government has passed many anti-gay laws, including so-called gay propaganda laws, which criminalize the dissemination or distribution of “non-traditional” materials (that is, literature or media inclusive of homosexuality).¹

21. In view of the past persecution he has suffered and his knowledge of the persecution of other Russians who are homosexual or perceived to be homosexual, Esin has a well-founded

¹ See, e.g., Ivana Kottasová & Anna Chernova, *Putin Signs Expanded Anti-LGBTQ Laws in Russia, in Latest Crackdown on Rights*, CNN (Dec. 5, 2022, 11:28 AM), <https://www.cnn.com/2022/12/05/europe/russia-lgbtq-propaganda-law-signed-by-putin-intl/index.html>.

fear that he will be persecuted on account of his membership in the social group of homosexual Russians.

22. Esin grew up in Krasnodar, Russia with his parents and a younger brother. He was forced to live a fake life in Russia because openly living as a gay man in Russia was simply too dangerous and impossible.

23. When he was in grade school, he made the mistake of creating a social media profile indicating that that he was a male looking for relationships with men. When the profile was discovered, Esin was both physically and emotionally abused on a regular basis, by his classmates, teachers, and even the administrators of the school.

24. Esin was not able to confide in his family about what he was going through when he was in Russia because his parents were homophobic. As a result, his parents did not know he was homosexual until several years after he left Russia.

25. In 2011, three boys from Esin's school attacked Esin because he is homosexual. They gave him a bloody nose, a split lip, and bruises all over his face. He had to leave school and get medical care.

26. Esin was attacked again for being homosexual in 2014 when he was 20 years old. In that instance, he was pushed to the ground by some men who yelled homophobic slurs at him. This occurred in front of several police officers, who looked at him and said that the only thing they could do would be to help the people who attacked him.

27. As a result of the treatment he faced in school, in his community, and at home, Esin frequently considered suicide throughout his adolescence.

28. Esin sees a major difference in the treatment of LGBT people between the United States and Russia. In Russia, he would fear passing groups of men who taunted him and threatened

to beat him up. He had to be careful not to tell other people his address and he always had to stay with his friends when he went outside.

29. Esin fears returning to Russia due to the threat of him being attacked, beaten, or killed. There are no laws to protect homosexual people, and Esin faces an even greater risk of persecution now because of the increasing trend of homophobia and intolerance toward minority groups in Russia.

C. Defendants' Failure to Comply With Their Statutory Duty to Adjudicate Plaintiff's Asylum Claim Has Prejudiced Plaintiff By Leaving Him in Legal Limbo For Years

30. Esin filed his affirmative asylum application on March 14, 2017. His application has now been pending for more than six years. During that time, Defendants have not taken any steps to schedule his asylum interview or adjudicate his asylum application.

31. Defendants' failure to schedule his asylum interview and adjudicate his asylum application has been prejudicial to Esin. Plaintiff wants to live safely and build a permanent life in the United States, where he will be free from the persecution and threats to his life that he faced in Russia. However, having his claim for asylum unadjudicated makes it impossible for Plaintiff to make long-term plans for the future and leaves him in perpetual uncertainty about his legal status in this country.

32. In March and April 2022, Esin had to seek mental health counseling because the renewal of his work permit was delayed. He was extremely anxious about losing his job and being unable to pay his bills while waiting for the permit renewal and an asylum interview.

33. Defendants' delay in adjudicating Plaintiff's claim is prejudicing Plaintiff's ability to obtain asylum. With the passage of years, Plaintiff's memories will fade, increasing the risk

that he will forget details and unknowingly give inconsistent testimony, and it will be harder to obtain evidence and witnesses to corroborate his claims.

D. Defendants Violated Their Duty to Schedule Plaintiff's Asylum Interview and Adjudicate His Claim for Asylum

34. In January 2018, USCIS adopted a “last in, first out” policy for scheduling asylum interviews. Under this policy, applicants are divided up into three pools. First priority applicants are those being rescheduled for interviews that were previously cancelled by either the applicant or USCIS. Second priority goes to new applications pending 21 days or fewer. Third priority goes to those in the asylum backlog who are waiting for interviews, starting with the most recently added applicant.² Under these procedures, Defendants have effectively placed Plaintiff's asylum application in an indefinite suspension, such that his claim may never be adjudicated. Moreover, under this policy, USCIS has clearly failed to perform its statutory non-discretionary duty to adjudicate Plaintiff's asylum claim.

35. Statistics released by USCIS illustrate that it will be nearly impossible for Plaintiff and others in the backlog to receive an interview. This is because applicants in the backlog will only be scheduled for an interview if all newly filed applications have already received interviews. But, based on publicly available information and on information and belief, every month USCIS adjudicates thousands fewer asylum applications than it receives. Thus, the number of applicants waiting in the backlog increases each month, and applicants are not being pulled from the backlog to receive interviews.

36. By way of example, during the period from October 2022 to December 2022, the most recent quarter for which USCIS statistics are publicly available, USCIS received 100,139

² See *Affirmative Asylum Interview Scheduling*, USCIS (May 31, 2022), <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/affirmative-asylum-interview-scheduling>.

asylum applications but only adjudicated 7,918 applications, increasing the backlog of pending applications to 708,099 applications.³ This was a quarter-to-quarter increase of more than 100,000 pending applications, up from 605,027 pending applications at the end of September 2022.⁴ It is also more than double the backlog that existed in January 2018, when USCIS adopted the new last-in-first-out policy and had 313,995 cases pending.⁵

37. The number of pending applications in the New York Office has also continued to grow, from 49,349 pending applications in January 2018, when the last-in-first-out policy was implemented, to 52,993 pending applications at the end of September 2022, the most recent quarter for which office-specific statistics are publicly available.⁶ The backlog of asylum seekers in legal limbo remains enormous and continues to grow with no end in sight.

38. Defendants created a system where some new applicants are randomly selected to receive an interview immediately and have their claims adjudicated within weeks. Other new applicants and applicants who applied before the change in policy are arbitrarily placed in the backlog indefinitely and, on information and belief, will never receive interviews under USCIS procedures.

39. Defendants could have implemented additional procedures to mitigate the harm caused by their last-in-first-out policy, such as prioritizing applicants waiting longer than a “five-

³ See *All USCIS Application and Petition Form Types (FY2023 Q1)*, USCIS (Apr. 05, 2023), available at https://www.uscis.gov/sites/default/files/document/data/Quarterly_All_Forms_FY2023_Q1.pdf.

⁴ See *Asylum Division Quarterly Statistics for FY2022 Q4*, USCIS (Jan. 19, 2023), available at https://www.uscis.gov/sites/default/files/document/data/AsylumDivisionQuarterlyStatsFY22Q4_I589_Stats_revised_I589_FilingCompletionPending.csv.

⁵ See *Affirmative Asylum Statistics: January 2018*, USCIS (May 1, 2018), available at https://www.uscis.gov/sites/default/files/document/data/PED_AsylumOfficeWorkloadJan2018.pdf.

⁶ See *id.*; *Asylum Division Quarterly Statistics for FY2022 Q4*, *supra* note 4.

year cutoff” period or designating a portion of asylum officers to work “back to front.” In September 2021, forty members of Congress wrote a letter to Defendants Mayorkas and Jaddou expressing concerns about the affirmative asylum application backlog and suggesting that USCIS adopt just such a system.⁷

40. Instead of implementing these mitigation measures, Defendants have adopted a policy that, as applied to Esin and others like him, leaves legitimate asylum seekers in legal limbo indefinitely. Moreover, USCIS’ stated purpose for the policy—i.e., “to deter those who might try to use the existing backlog as a means to obtain employment authorization” by identifying “frivolous, fraudulent or otherwise non-meritorious asylum claims earlier and plac[ing] those individuals into removal proceedings” —cannot take precedence over the agency’s duty to comply with federal law in regard to holding an asylum interview within 45 days and adjudicating asylum claims within 180 days. If allowed to continue prioritizing such “deterrence” goal, the USCIS’ systematic violation of the Immigration and Naturalization Act will never end.

41. Defendants’ delay in processing Esin’s Asylum Application is unreasonable. USCIS’ arbitrary placement of Esin in the backlog, while other applicants are randomly scheduled for near-immediate interviews, renders the delay even more unreasonable. Defendants’ particular implementation of the last-in-first-out policy violates their duty to carry out the adjudicative and administrative functions delegated to them by law with regard to Esin’s claim.

⁷ See Letter from Congress to USCIS (Sept. 9, 2021), *available at* https://www.uscis.gov/sites/default/files/document/foia/Affirmative_asylum_application_backlog-Representative_Cicilline.pdf.

COUNT ONE
Violation of the Administrative Procedure Act
§ 706(1) — Unreasonable Delay

42. Plaintiff repeats and realleges the foregoing paragraphs as if fully set forth herein and incorporates them by reference.

43. Plaintiff has a statutory right to apply for asylum and to be considered for that relief pursuant to INA § 208(a), 8 U.S.C. § 1158(a). Defendants failed to perform this non-discretionary duty and, under Defendants' last-in-first-out policy, will continue to indefinitely delay performing this duty.

44. Plaintiff has no adequate remedy at law and will suffer irreparable harm if Defendants do not promptly adjudicate his Asylum Application.

45. Under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(1), the Court is authorized to compel agency action which has been unreasonably delayed.

46. Defendants' delay in providing an interview to Plaintiff is unreasonable because:

(1) The delay is not governed by a "rule of reason." Moreover, USCIS' decision to adopt a last-in-first-out policy and, thereby, deny adjudication to older filed applications represents a failure of reason as applied to Plaintiff.

(2) Congress has provided a statutory deadline of 45 days to schedule an interview and 180 days for the adjudication of an asylum claim. INA § 208(d), 8 U.S.C. § 1158(d). Plaintiff has waited over six years to receive an interview and have his claim adjudicated.

(3) The delay impacts every aspect of Plaintiff's life, hindering his ability to make permanent plans, move, and find long term employment.

(4) The delay here is especially intolerable because it impacts Plaintiff's health and welfare, as well as his economic interests. Among the injuries Plaintiff has suffered are an inability to see and reunite with his family, an inability to find stable housing and employment due to his uncertain legal status, and the daily psychological trauma of not knowing if he can build a new life in the United States or if he will be sent back to Russia where he will face a severe risk of persecution.

(5) Expediting the delayed adjudication would not impact Defendant agency USCIS' other priorities. Plaintiff does not ask USCIS to devote greater capacity to adjudicating asylum claims; rather he asks the agency to use its existing capacity to adjudicate his Asylum Application in turn.

(6) Finally, Defendants' decision to adopt a last-in-first-out policy was arbitrary and capricious as applied to Plaintiff and has resulted in Plaintiff's inability to obtain an adjudication of his Asylum Application, in contrast to those whose applications have randomly received priority treatment.

47. Having diligently followed the procedures set forth by Defendants, Plaintiff seeks a court order compelling Defendants to schedule and adjudicate his Asylum Application pursuant to 5 U.S.C. § 706(1).

COUNT TWO
Violation of the Administrative Procedure Act
§ 706(2)(C) — Exceeds Statutory Authority

48. Plaintiff incorporates by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

49. Under the APA, courts must "hold unlawful and set aside agency action" that is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C.

§ 706(2)(C). Defendants may only exercise authority conferred by statute. *City of Arlington v. FCC*, 569 U.S. 290, 297-98 (2013).

50. Defendants’ last-in-first-out policy, as applied to Plaintiff, exceeds Defendants’ statutory authority because it violates Plaintiff’s statutory right to apply for asylum and to be considered for that relief pursuant to INA § 208(a), 8 U.S.C. § 1158(a) and the APA’s requirement that Defendants discharge this duty without unreasonable delay.

51. The last-in-first-out policy, as applied to Plaintiff, is therefore “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right,” in violation of the APA. 5 U.S.C. § 706(2)(C).

52. Defendants’ violation causes ongoing harm to Plaintiff.

COUNT THREE
Violation of the Administrative Procedure Act
§ 706(2)(A) — Not in Accordance with Law

53. Plaintiff incorporates by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

54. Under the APA, a court must set “aside agency action” that is “not in accordance with law.” 5 U.S.C. § 706(2)(A). Defendants’ last-in-first-out policy, as applied to Plaintiff, exceeds Defendants’ statutory authority because it violates Plaintiff’s statutory right to apply for asylum and to be considered for that relief pursuant to INA § 208(a), 8 U.S.C. § 1158(a), and the APA’s requirement that Defendants discharge this duty without unreasonable delay.

55. The last-in-first-out policy as applied to Plaintiff is therefore “not in accordance with law,” as required by the APA. 5 U.S.C. § 706(2)(A).

56. Defendants’ violation causes ongoing harm to Plaintiff.

COUNT FOUR
Violation of the Administrative Procedure Act
§ 706(2)(A) — Arbitrary and Capricious

57. Plaintiff incorporates by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

58. The APA provides that courts must “hold unlawful and set aside” agency action that is “arbitrary, capricious, [or] an abuse of discretion.” 5 U.S.C. § 706(2)(A).

59. Defendants’ last-in-first-out policy is arbitrary and capricious because they effectively created a system where some applicants arbitrarily receive an interview immediately and have their claims adjudicated within weeks. Others, such as Plaintiff, are arbitrarily placed in the backlog indefinitely and, on information and belief, will not ever receive interviews under USCIS procedures. The impact of USCIS’ policy has been to exacerbate the asylum office backlog and leave thousands of legitimate asylum seekers in indefinite legal limbo.

60. Defendants’ last-in-first-out policy is therefore “arbitrary, capricious, [or] an abuse of discretion” in violation of the APA. 5 U.S.C. § 706(2)(A).

61. Defendants’ violation causes ongoing harm to Plaintiff.

COUNT FIVE
MANDAMUS

62. Plaintiff repeats and realleges the foregoing paragraphs as if fully set forth herein and incorporates them by reference.

63. Plaintiff seeks mandamus relief in the alternative. Under the Mandamus Act, 28 U.S.C. § 1361, relief may be granted because Defendants owe Plaintiff a non-discretionary statutory duty and Plaintiff has exhausted all other avenues of relief.

64. Plaintiff has a statutory right to apply for asylum and to be considered for that relief pursuant to the Immigration and Nationality Act. INA § 208(a), 8 U.S.C. § 1158(a). Defendants have failed to perform their nondiscretionary duty.

65. Though USCIS has discretion in granting or denying applications, it has no discretion to decline to schedule interviews and to adjudicate Plaintiff's application for asylum.

66. Aside from claims brought under the APA, *supra*, Plaintiff has no adequate remedy at law, and will suffer irreparable harm if his Asylum Application is not promptly adjudicated.

67. Having diligently followed the procedures set forth by Defendants, Plaintiff seeks a writ of mandamus or in the nature of mandamus to end Defendants' unreasonable delay and refusal to adjudicate his Asylum Application.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests the Court to:

- a. Accept jurisdiction and maintain continuing jurisdiction of this action;
- b. Declare Defendants' actions in this matter an abuse of discretion and not in accordance with the law pursuant to 5 U.S.C. § 706(1), 5 U.S.C. § 706(2)(C), and 28 U.S.C. §§ 2201-02;
- c. Declare that Defendants' last-in-first-out policy as applied to Plaintiff is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law within the meaning of 5 U.S.C. § 706(2)(A);
- d. Issue a permanent injunction pursuant to 28 U.S.C. § 1361 and 5 U.S.C. § 706(1) compelling Defendants to schedule an asylum interview and make a determination on Plaintiff's I-589 Application for Asylum and Withholding of Removal;

- e. Issue a writ of mandamus or in the nature of mandamus, pursuant to 28 U.S.C. § 1361, 28 U.S.C. § 1651, and/or 5 U.S.C. § 706(1), compelling Defendants to schedule an asylum interview and make a determination on Plaintiff's I-589, Application for Asylum and Withholding of Removal;
- f. Grant attorneys' fees and costs of this suit under the Equal Access to Justice Act, 5 U.S.C. § 504 and 28 U.S.C. § 2412(2), *et seq.*; and
- g. Grant such other relief as the Court deems necessary and proper.