Federal Court  Cour fédérale

Date: 20230516

Dockets: T-1074-21
T-1863-21

Citation: 2023 FC 689

Ottawa, Ontario, May 16, 2023

PRESENT: The Honourable Mr. Justice Régimbald

BETWEEN:

HUSEIN GIUMA ABOUDLAL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Husein Giuma Aboudlal, is a citizen of Libya. On October 7, 2010, he became a permanent resident of Canada. In 2014, along with his spouse and children, he applied for Canadian citizenship. However, it was discovered that the Applicant had not been present in Canada for 1,095 days over a four-year period (the applicable period at the time), which was the

required number of days under subparagraph 5(1)(c)(i) of the *Citizenship Act*, RSC 1985, c C-29 [Act]. The Applicant did not meet that threshold because he travelled to and from Libya for employment purposes.

[2] The Applicant's file was suspended under section 13.1 of the Act on April 12, 2016, after several interviews and inquiries. From there, no substantive work was done on the file until 2021, when the Applicant applied for a *mandamus.*

[3] On November 19, 2021, the Applicant's application for citizenship was refused because he was not present in Canada for the required number of days and misrepresented his stay in Canada. Consequently, the decision maker found him ineligible to be granted citizenship pursuant to the Act. Moreover, the decision maker found that, due to the misrepresentation, the Act prohibited the Applicant from being granted citizenship for a period of five years.

[4] The Applicant is seeking judicial review of that decision. Considering that the citizenship application was received on May 29, 2014, but that the decision was rendered only on November 19, 2021, the main issue is whether the delay constitutes an abuse of process.

[5] For the following reasons, the applications for judicial review are granted. In my view, the Applicant did not meet the threshold required by the residency requirement. However, and while the delay did not impair the Applicant's ability to respond to the allegations made against him, the delay for the decision maker to conclude and communicate the decision was inordinate and caused the Applicant significant prejudice. The significant prejudice is that he is now

precluded from applying to obtain citizenship until 2026, whereas he could have been eligible to apply by 2022 had the decision been made in due course. The impact of the delay is therefore manifestly unfair and brings the administration of justice in disrepute.

II. Background

[6] On May 21, 2014, the Applicant (along with his wife and family members) submitted his application for Canadian citizenship under subsection 5(1) of the Act. The application was received on May 29, 2014.

[7] The residence period is calculated from the day of permanent residence up to the day of application for citizenship. In this case, that period was from October 7, 2010, to May 21, 2014.

[8] In his application for citizenship, the Applicant included a residence calculator providing information such as the arrival date, permanent residence date, application date, days absent, and physical presence. The Applicant declared to have been physically present in Canada for 1,321 days. He also declared zero days of absence from Canada.

[9] As part of the initial triage process, Immigration, Refugees and Citizenship Canada [IRCC] requested additional information prior to the Applicant's "program integrity" interview in order to ensure that the residency requirement had been met.

[10] On October 8, 2014, IRCC issued a Residence Questionnaire [RQ] to the Applicant. On October 24, 2014, the Applicant submitted his completed RQ, with supporting documents, from

Tripoli, Libya. In his response to the RQ, the Applicant indicated that he had nine absences from Canada, totaling 179 days. It was later determined that the nine absences declared by the Applicant in fact totaled 187 days.

[11] On March 2, 2015, the Applicant appeared for a citizenship exam and program integrity interview at the IRCC's Ottawa office. He passed the citizenship exam. During the interview, his re-entries to Canada were verified against the Integrated Customs Enforcement System [ICES] report and passport stamps, along with his Libyan passports.

[12] On April 12, 2016, the Applicant's file was assigned to an IRCC supervisor for review for possible misrepresentation, contrary to paragraph 22(1)(e.1) of the Act. On that same date, the file was suspended under section 13.1 of the Act.

[13] The record demonstrates that as of April 12, 2016, IRCC was already in possession of all the information necessary – and that it ultimately used – to make the final decision. The evidence already demonstrated that the Applicant had not been physically present in Canada for the required number of days (1,095 days in Canada over the four prior years, as applicable at the time). IRCC was also in possession of the Applicant's citizenship application noting zero days of absence, the Applicant's responses to the RQ indicating that he had in fact been absent for at least 179 days, and the Applicant's passport information indicating that he had indeed left and returned to Canada several times.

[14] At the hearing, it was conceded by the Respondent that there was little to no evidence of substantive communication and development in the Applicant's investigation between the suspension of the file on April 12, 2016, and the ultimate decision on November 19, 2021. The record demonstrates very low activity on the file, and nothing suggesting that a substantive investigation was under way.

[15] In October 2020, more than four years after the Applicant's file was suspended by IRCC (unbeknownst to him), the Applicant sent a letter to IRCC demanding that a decision be made by November 14, 2020, failing which an application seeking a *mandamus* would be brought. On November 24, 2020, the Applicant filed an application for leave and judicial review seeking a "writ of Mandamus compelling the Respondent to process and make a decision on [his] Application for Canadian Citizenship…" This application was discontinued on May 9, 2022.

[16] On March 2, 2021, a subsequent assessment made by IRCC detailed all of the Applicant's absences using a new residence calculator. It is important to note that this assessment was conducted using the information that was already in the possession of IRCC since April 12, 2016. The assessment indicated a total absence period of 435 days and 13 absences (with two of these absences being of unconfirmed length), which contradicted the previous figures of nine absences for 179 or 187 days.

[17] On March 17, 2021, IRCC sent a procedural fairness letter [First PFL] to the Applicant by email, notifying the Applicant as follows:

> On a balance of probabilities, the evidence seems to indicate that you misrepresented yourself in the citizenship process by

> withholding material facts, namely your actual absences from Canada during the relevant period in an attempt to simulate your physical presence in Canada; as such, your inaccurate declaration of material facts could have induced an error in the administration of the Act.

[18] In response, on May 18, 2021, the Applicant submitted that the passage of time was such that his recollection of the relevant travel dates (and that of potential witnesses) would be limited, and that travel documents might have been destroyed or lost. Further, the Applicant requested that IRCC "abandon the misrepresentation proceedings," and cited the delay as an abuse of process.

[19] On July 7, 2021, a second procedural fairness letter was sent to the Applicant [Second PFL]. This Second PFL provided the Applicant with a new opportunity to respond to the misrepresentation concerns at an interview set to take place on July 15, 2021. The Second PFL denied the Applicant's request to stay the misrepresentation proceedings because of the evidence, "which indicates that the [Applicant] has directly or indirectly misrepresented or withheld material circumstances relating to a relevant matter (i.e., his absences from Canada), which induces or could induce an error in the administration of the *Citizenship Act* (i.e., a grant of citizenship without fulfilling the necessary residency requirements)." Lastly, the Second PFL indicated that since no decision had yet been made on the misrepresentations, "it would be premature to speculate" on the outcome of the decision without providing the Applicant with an opportunity to respond to the allegations set out in both PFLs.

[20] On July 7, 2021, the Applicant filed an application for leave and judicial review seeking an order staying the misrepresentation proceeding against him (Court File No. T-1074-21). That is the second application for judicial review that is the subject of this decision.

[21] The interview ultimately took place by telephone on October 26, 2021, since the Applicant was in Libya. The Respondent claims that the purpose of this call was to give the Applicant an opportunity to respond to the allegations of misrepresentation.

[22] On November 19, 2021, the Applicant's application was refused [Decision].

III. The Decision

[23] The Decision notes that pursuant to subsection 5(1) of the Act, the Applicant "must have resided in Canada for the required period, at least 1095 days of residence during the four years immediately before the date of his… application [a period of four years applied at the time]. Therefore, the relevant period for [his] citizenship application [was] from October 7, 2010 to May 21, 2014."

[24] The Decision states that, in addition to the requirements of having resided in Canada for 1,095 days during the applicable period, applicants for citizenship must also not be subject to prohibitions under section 22 of the Act. In particular, paragraph 22(1)(e.1) provides that applicants must not have misrepresented or withheld information that could induce an error in the administration of the Act.

[25] The Decision letter then summarizes the discrepancies in the absences declared by the Applicant (first, zero absences in the initial 2014 application; then nine absences for a total of 179 days on the RQ (corrected by IRCC to 187 days), and those determined by IRCC (13 absences totalling at least 435 days, including two absences of unknown duration)).

[26] The Decision also noted that in 2014, the Applicant provided copies of his two Libyan passports that did not contain any entry or exit stamps dated after 2011. However, the Applicant provided the same passports at a later date that did include entry or exit stamps dating from 2012, 2013, and 2014, each falling within the relevant four-year period (applicable at the time). From this, the IRCC officer noted that it appeared that the Applicant's initial 2014 application package had withheld relevant and material circumstances, including relevant entry/exit stamps relating to the Applicant's absences from Canada.

[27] The Decision noted that during the telephone call that had taken place on October 26, 2021, the Applicant admitted to having had at least 435 days of absence from Canada. The Decision further noted that when asked for an explanation for having initially declared zero days of absence, the Applicant was not able to respond except to submit that it had been a misunderstanding and that any error had not been on purpose. Further, the IRCC officer also determined that the Applicant was unable to provide an explanation for the passport discrepancies.

[28] The IRCC officer concluded that, on a balance of probabilities, the Applicant had "misrepresented material circumstances related to a relevant matter which could induce an error

in the administration of the Act." As a result, the officer found the Applicant not only ineligible to be granted citizenship, but also prohibited from being granted citizenship for a period of five years from the date of the Decision pursuant to paragraph 22(1)(e.2) of the Act – until November 19, 2026.

[29] Notably, the parties informed the Court at the hearing that the Applicant's spouse and children were granted citizenship in January 2023.

IV. Issues

[30] In my view, this application for judicial review raises the following issues:

A. Was there abuse of process in the proceedings?

   a. Did the delay impair the Applicant's ability to respond to the allegations against him?

   b. Alternatively, did the delay cause significant prejudice bringing the administration of justice into disrepute?

B. If the delay is manifestly unfair and brings the administration of justice in disrepute, what is the appropriate remedy?

V. Preliminary matter: Court Files T-1074-21 and T-1863-21

[31] Since Court Files T-1074-21 and T-1863-21 are mutually germane, a single judgment and set of reasons is appropriate to dispose of both matters. This judgment and accompanying reasons shall therefore be placed on each file.

VI. Standard of Review

[32] An abuse of process in an administrative proceeding is an issue of procedural fairness (*Law Society of Saskatchewan v Abrametz*, 2022 SCC 29 [*Abrametz*] at paras 26-30, 38). As such, the judicial review is on a correctness standard (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Mission Institution v Khela*, 2014 SCC 24 at para 79) or subject to a "reviewing exercise… 'best reflected in the correctness standard' even though, strictly speaking, no standard of review is being applied" (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [*CPRC*] at para 54; *Ganeswaran v Canada (Citizenship and Immigration)*, 2022 FC 1797 at paras 21-28). The focus of the reviewing court is essentially on whether the procedure followed allowed the applicant to know the case to meet and have a full and fair opportunity to respond (*CPRC* at paras 54-56; *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35).

[33] In *Canada (Citizenship and Immigration) v Parekh*, 2010 FC 692 [*Parekh*], Madam Justice Danièle Tremblay-Lamer reviewed the Supreme Court of Canada's decision in *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 [*Blencoe*] and held that:

[24] Generally speaking, a court will find that an attempt to apply or enforce legislation has become an abuse of process when the public interest in the enforcement of legislation is outweighed by the public interest in the fairness of administrative or legal proceedings; see *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, at par. 120, where the test is set out as follows:

> In order to find an abuse of process, the court must be satisfied that, "the damage to the public interest in the fairness of the administrative process should the proceeding go ahead would exceed the harm to the public interest in the enforcement of the legislation if the proceedings were halted" ([Brown, Donald J. M., and John M. Evans. *Judicial Review of Administrative Action in Canada*. Toronto: Canvasback, 1998 (loose-leaf)], at p. 9-68). According to L'Heureux-Dubé J. in [*R. v. Power*, 1994 CanLII 126 (SCC), [1994] 1 S.C.R. 601], at p. 616, "abuse of process" has been characterized in the jurisprudence as a process tainted to such a degree that it amounts to one of the clearest of cases. In my opinion, this would apply equally to abuse of process in administrative proceedings. For there to be abuse of process, the proceedings must, in the words of L'Heureux-Dubé J., be "unfair to the point that they are contrary to the interests of justice" (p. 616). "Cases of this nature will be extremely rare" (*Power*, *supra*, at p. 616). In the administrative context, there may be abuse of process where conduct is equally oppressive.

[25] Such a situation can arise as a result of undue delay in the enforcement of legislation. This will often be so when delay causes the hearing of the matter to become unfair (for example, because memories of witnesses have faded or evidence has otherwise become unavailable). However, Justice Bastarache, speaking for the majority of the Supreme Court in *Blencoe*, above, at par. 115, was "prepared to recognize that unacceptable delay may amount to an abuse of process in certain circumstances even where the fairness of the hearing has not been compromised." Justice Lebel, dissenting in part, but not on this issue, put the point more forcefully, at par. 154: "[a]busive administrative delay is wrong and it does not matter if it wrecks only your life and not your hearing."

VII. Was there abuse of process in the proceedings?

A. *The doctrine of abuse of process*

[34] The question of administrative delay as a form of abuse of process was discussed by the Supreme Court of Canada [SCC] in *Blencoe* and recently revisited in *Abrametz*.

[35] In *Abrametz*, the SCC confirmed its prior instruction that there are two categories in which delay may constitute an abuse of process (*Abrametz* at paras 40-42). The first is when the delay compromises the fairness of a hearing by impairing a party's ability to answer the complaint against them. The second category is when, even without compromising the fairness of the hearing, an inordinate delay causes significant prejudice.

[36] With respect to the second category, a three-step test applies to determine whether the delay amounts to an abuse of process. As summarized by the SCC in *Abrametz* at para 43 (see also paras 72, 101):

> [43] *Blencoe* sets out a three-step test to determine whether delay that does not affect hearing fairness nonetheless amounts to an abuse of process. First, the delay must be inordinate. Second, the delay must have directly caused significant prejudice. When these two requirements are met, courts or tribunals will proceed to a final assessment of whether the delay amounts to an abuse of process. Delay will amount to an abuse of process if it is manifestly unfair to a party or in some other way brings the administration of justice into disrepute.
>
> [Citations omitted]

[37] In this case, the parties argued both categories of abuse of process.

B. *Category 1: the delay did not compromise the Applicant's ability to respond to the misrepresentation investigation to such an extent that it amounts to an abuse of process*

[38] The Applicant relies on *Blencoe* at paragraph 102 and argues that the delay impaired his ability to respond because, on the date of receipt of the PFLs, he no longer: a) had access to travel documents dating from 2014 and before (including passports, boarding passes, etc.); b) had any recollection of his travels or his responses to the RQ and citizenship application; c) had any potential witnesses that could remember his travels.

[39] The Applicant also relies on *Fabbiano v Canada (Citizenship and Immigration)*, 2014 FC 1219 at paragraphs 24-25 and *Beltran v Canada (Citizenship and Immigration)*, 2011 FC 516 at paragraphs 51-54 for the propositions that since he had not received any communications from IRCC, he reasonably concluded that he was not at risk of investigation on his application. He also argues that it was "abusive" for IRCC to withhold information for so long and that he has lost the opportunity to answer the case against him.

[40] In my view, the Applicant has not discharged his burden to demonstrate that IRCC's Decision constituted an abuse of process. The delay did not impair the Applicant's ability to respond.

[41] First, I am not convinced by the Applicant's arguments as to how his ability to respond was impaired. As argued by the Respondent, the Applicant reasonably ought to have been on notice that the number of days he was present in Canada for the relevant period was in question at least as early as October 8, 2014, when IRCC sent him an RQ in which the Applicant

responded and made statements that were inconsistent with his previous citizenship application. Indeed, the absences declared in the in the RQ (179 days) were inconsistent with the declarations in the initial citizenship application of May 21, 2014 (zero days).

[42] Second, on March 2, 2015, the Applicant attended a program integrity interview during which he was asked about his declarations regarding his absences. As noted in the First PFL, "the interviewing officer noted a 4 month absence to Libya [in his interview notes]." The Applicant was able to provide all the necessary evidence to prove his case at that time. Since no other information obtained thereafter was used by the decision maker, the Applicant was not prejudiced by the delay.

[43] Third, as noted by the Respondent, even if the Applicant had been notified of the suspension and investigation, or even if there had been no delay, it is not clear what additional evidence the Applicant could have adduced, or how "lost" documentation or "witnesses" could have affected the record. After all, the Applicant had the opportunity to provide that evidence at the interview on March 2, 2015 and did not do so.

[44] Finally, the Applicant did not contest the findings from the Respondent's report, and in fact agreed with its final determination, that he had been absent from Canada for at least 435 days.

[45] In light of the above, I do not find that the delay compromised the Applicant's ability to respond to the misrepresentation investigation to such an extent as to satisfy the first category of abuse of process.

[46] Indeed, not only was the Applicant's case not compromised by the delay, but the evidence is clear that the Applicant did not meet the residency requirement during the applicable period and therefore, was not eligible for citizenship when he applied on May 21, 2014.

C. *Category 2: the Applicant has discharged his burden to demonstrate that he suffered significant prejudice, as a result of inordinate delay, that is manifestly unfair or brings the administration of justice into disrepute*

[47] In my view, and as detailed in the reasons below, the Applicant has discharged his burden to demonstrate that there was an abuse of process under the second category.

(1) The delay was inordinate

[48] At paragraphs 50-51 of *Abrametz*, the SCC has recently re-stated the applicable test:

> [50] That a process took considerable time does not in itself amount to inordinate delay. Rather, one must consider the time in light of the circumstances of the case (Brown and Evans, at § 9:57-9:58; R. W. Macaulay, J. L. H. Sprague and L. Sossin, *Practice and Procedure Before Administrative Tribunals* (loose-leaf), at § 16:81; *Blencoe*, at para. 122). A process that seems lengthy may be justified on the basis of fairness.
>
> [51] In determining whether delay is inordinate, the court or tribunal should consider the following contextual factors: (a) the nature and purpose of the proceedings, (b) the length and causes of the delay, and (c) the complexity of the facts and issues in the case. These factors are not exhaustive, such that additional contextual factors can be considered in a particular case.

(a) *Nature and purpose of the proceedings*

[49] Both parties agree that the rights and interests of the Applicant are at stake and that the purpose of the misrepresentation proceedings is to ensure the integrity of the citizenship process. Moreover, the mandatory character of the statute obliges the Respondent to ensure the accuracy of the information provided in applications for citizenship and pursue available verification avenues, and that process may inherently take time. The length of an investigation is fact-specific.

(b) *Length and causes of the delay*

[50] The application was received on May 29, 2014, and the decision issued on November 19, 2021.

[51] However, as held by the SCC in *Abrametz* at paragraphs 58-59, the duty to be fair applies through the entire procedure, including the investigative stage; and a lengthy delay is not inordinate *per se*. Moreover, the context and causes of the delay may justify it (*Abrametz* at paras 59, 61-62).

[52] In this case, the duration of the delay exceeds seven years. However, its causes do not only originate from the lengthy IRCC investigation, but also from the false information given by the Applicant.

[53] In my view, the process was following its course until IRCC suspended the Applicant's file on April 12, 2016. All the investigative activity before that date was justifiable.

[54] The Respondent conceded that there were not many developments in the Applicant's investigation between the suspension of the file on April 12, 2016, and the ultimate investigation leading to the Decision in November 2021.

[55] While the COVID-19 pandemic may be responsible for some of that delay, it cannot alone explain it completely (*Almuhtadi v Canada (Citizenship and Immigration)*, 2021 FC 712 at para 47).

[56] The difference between the parties' respective calculations boils down to their differing views as to the validity of the section 13.1 suspension between April 12, 2016, and November 19, 2021. The Respondent argues that the suspension was valid and as such, there was no public duty to act (*Canada (Citizenship and Immigration) v Nilam*, 2017 FCA 44 at para 27). Therefore, the Respondent submits that the suspension period should not factor into the calculation unless the Court finds the suspension unreasonable in reliance on this Court's decision in *Gentile v Canada (Citizenship and Immigration)*, 2020 FC 452 (CanLII) [*Gentile*] at paragraph 30. Lastly, the Respondent contends that as held in *Niu v Canada (Citizenship and Immigration)*, 2018 FC 520 [*Niu*] at paragraph 12, the non-disclosure of the suspension to the Applicant is irrelevant to its reasonableness since citizenship officials are required to inform an applicant of a section 13.1 suspension only if specifically asked. Otherwise, as is the case here, the Respondent argues that

there is no obligation to proactively inform an applicant and the failure to do so does not automatically render the suspension unreasonable.

[57] In the present circumstances, as stated, the suspension of the Applicant's file was to allow IRCC to continue its investigation. But the evidence demonstrates that the investigation was not necessary to rule on the matter (as the ultimate decision was made on the basis of evidence existing since 2015), and there does not appear to have been any serious additional investigation.

[58] The suspension of the Applicant's file under section 13.1 of the Act therefore does not affect the calculation of the delay in this case. Section 13.1 of the Act allows the Minister to "suspend the processing of an application for as long as necessary to receive (a) any information or evidence or the result of any investigation or inquiry for the purpose of ascertaining whether the applicant meets the requirement under this Act…." If the evidence had demonstrated that IRCC was continuing its investigation throughout the period, and waiting to receive information, the suspension could be relevant. But in this case, since no substantive activity existed on the file and no investigation resulted in any new relevant information, the suspension under section 13.1 cannot be relied upon to justify the delay.

[59] The delay to investigate and make a decision was therefore longer than necessary. Even if the suspension of the file under section 13.1 of the Act was valid (an issue that is not under review), the activities on the file between the suspension in April 12, 2016, and March 2, 2021, were essentially to transfer the file to other managers or individuals. The record does not demonstrate any substantive investigation in order to find additional information, nor does it

identify what information was sought and required to pursue the investigation. The GCMS notes in particular indicate that there was infrequent or generally low discernible activity on the Applicant's file between the period of 2016 and 2020. For example, the majority of entries appear to be follow-up requests from the office of the Applicant's local Member of Parliament.

[60] Rather, the evidence is clear that the Decision relies on information that existed, and was in the possession of IRCC, as of March 2, 2015. On that date, the Applicant attended a program integrity interview at an IRCC office where his re-entries to Canada were verified against the ICES report and passport stamps, along with his Libyan passports and his RQ.

[61] In the end, to the extent that there was any investigation between April 12, 2016, when the file was suspended under section 13.1 of the Act, and March 2, 2021, that investigation did not result in any new information on which the Respondent relied in making the impugned decision.

[62] To be clear, the Court is not ruling that the section 13.1 suspension was unreasonable. That issue is not before the Court. The Court is also not ruling that a five-year period to conduct an investigation is unreasonable *per se*. However, in the particular circumstances of this case, the evidence demonstrates that an unexplained delay of about five years occurred in the Applicant's investigation (see *Sharafaldin v Canada (Citizenship and Immigration)*, 2022 FC 768 [*Sharafaldin*] at paras 44-46; *Niu* at para 14; *Zhang v Canada (Citizenship and Immigration)*, 2019 FC 938 at para 38; *Gentile* at para 20). That delay was not required for IRCC to make its

ultimate decision. That is the reason why the delay is inordinate in this case, and creates hardship, as will be discussed below.

[63] While the suspension on its own may not be invalid, the evidence demonstrates that it was certainly much longer than reasonably necessary. To the extent that the Decision was rendered on November 19, 2021, and the evidence appears to demonstrate that IRCC resumed its investigation by March 2, 2021, an investigation of about eight months ought to have been sufficient.

[64] The Applicant should therefore have received his negative decision by the end of 2016 (more than eight months following the suspension of his file on April 12, 2016, for IRCC to investigate and make a decision). Instead, he received the Decision on November 19, 2021, almost five years later.

[65] As discussed below, the five-year delay creates a disproportional impact in this case because of the operation of paragraph 22(1)(e.1) of the Act. That impact is that the Applicant is ineligible to apply for citizenship for five years following the date of the Decision. Had the Decision been made by December 31, 2016, for example, the Applicant would have been eligible to re-apply as of December 31, 2021. Because the Decision is dated November 19, 2021, the Applicant is now ineligible until November 19, 2026.

(c) *Complexity of the facts and issues in the case*

[66] The inquiry in this case was not a straightforward misrepresentation investigation. Considering the unreliability of the information provided by the Applicant, IRCC was required to examine discordant declarations, differing copies of the same passports, and ICES information that provided other and conflicting information.

[67] However, the issue in this case is not whether the case was complex or not, but whether it required more than seven years to complete.

[68] As discussed, in my view, even if the issues were complex and resulted from the Applicant's contradictions and misrepresentations, all of the information needed to make a finding of misrepresentation was already in the possession of the IRCC as of March 2, 2015. Moreover, when IRCC finally reviewed the Applicant's file in March 2021, it made its Decision within about eight months (and a delay of 103 days within that eight-month period is attributable to the Applicant). When IRCC eventually proceeded with the decision-making process, the facts and issues were not of such complexity that they required an extended period of time to come to a conclusion (*Parekh* at paras 32, 34, 39-40, 42; *Almrei v Canada (Citizenship and Immigration)*, 2014 FC 1002 at para 57).

(d) *Conclusion: the delay was inordinate*

[69] While I accept the mandatory character of the statutory requirements, as well as the fact that the Applicant might have contributed to the delay of his file, a delay of about seven years

(from 2014 to 2021) is inordinate in this case because IRCC let a multi-year investigation run well past its point of usefulness, only to end up rendering a decision on the basis of information it already had prior to the final stage of the investigation. Notably, it took only about eight months to provide the Applicant with a response once IRCC resumed its decision-making process in March 2021.

(2) The delay caused significant prejudice

[70] In *Abrametz* at paragraph 67, the SCC instructs that "proof of significant prejudice" is required. Further, the SCC also instructs that it is significant prejudice caused by the delay, and not the investigation proceedings, that the reviewing court must consider, unless the prejudice caused by the investigation is exacerbated by inordinate delay (at paragraph 68). The SCC then indicated that prejudice is a question of fact, and included the following examples:

> [69] Prejudice is a question of fact. Examples include significant psychological harm, stigma attached to the individual's reputation, disruption to family life, loss of work or business opportunities, as well as extended and intrusive media attention, especially given technological developments, the speed at which information can travel today and how easy it is to access.

[71] The inordinate delay caused significant prejudice to the Applicant in this case. I do not doubt that the delay caused prejudice in the form of anxiety and stress, financial hardship, limitations in employment for himself and his family members, or that there was psychological harm (see for example *Parekh* at para 47).

[72] However, the affidavit evidence in support of the Applicant's argument on prejudice was not before the decision maker at the time. The Applicant specifically requested that IRCC

"abandon the misrepresentation proceedings" on the basis of a delay, but failed to produce some of the evidence that he now relies on. Because the Court is restricted to the evidentiary record that was before the decision maker, it cannot consider the Applicant's new evidence (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 [*Access Copyright*] at paras 19-20).

[73] Moreover, the Applicant alleges prejudice, but that prejudice may have occurred in any event if the decision had been made in 2016. In my view, the evidence clearly demonstrates that the Applicant was not eligible for citizenship when he made his application in 2014. Therefore, if the Decision had been rendered by December 31, 2016, as I opined above, the Applicant would have been denied citizenship and issued a statutory five-year citizenship prohibition from that point. Several of the prejudices alleged in his affidavit would therefore have occurred in any event and his prejudice must be considered in that context.

[74] The significant prejudice in this case is caused by the delay in conducting the investigation, in combination with the operation of paragraph 22(1)(e.2) of the Act. I reiterate here that the five-year delay in the IRCC investigation, including the suspension of the Applicant's file, is not on its own inordinate and sufficient to cause a significant prejudice. Had IRCC been able to demonstrate that during the suspension it actively investigated and was seeking specific information, for example from partnering agencies, then it could have justified the delay. But IRCC was not able to make that demonstration.

[75] Because of the finding of misrepresentation, the Applicant may not apply for citizenship for a period of five years. The inordinate delay during the investigation, in combination with the eventual finding of misrepresentation and rejection of the Applicant's citizenship application, effectively amounted to a double punishment: first by a five-year delay to his citizenship application; second, by imposing a five-year statutory ban after the Decision. As a result, the Applicant is ineligible to apply for citizenship until November 19, 2026.

[76] I agree with the Applicant's submission that he is essentially punished twice because, had the decision been made promptly in 2016, the prohibition of a citizenship grant would have expired by 2021, instead of November 19, 2026. The fact that the Applicant now has to wait until November 2026 is not because of the misrepresentation, but because of the inordinate delay in IRCC issuing its decision.

[77] As stated in *Abrametz* at paragraph 68, while the delay on its own is not sufficient, the prejudice can be exacerbated by inordinate delay:

> [68] The reality is that an investigation or proceeding against an individual tends to disrupt his or her life. This was so in *Blencoe*, where the majority acknowledged that Mr. Blencoe and his family had suffered prejudice from the moment that sexual harassment allegations against him were made public. The Court concluded, however, that such prejudice could not be said to result directly from the delay in the human rights proceedings, but rather it resulted from the fact that such proceedings were undertaken: para. 133. <u>It is the prejudice caused by inordinate delay that is relevant to the abuse of process analysis</u>. That said, <u>prejudice caused by the investigation of or proceedings against an individual can be exacerbated by inordinate delay</u>. That is to be taken into account: paras. 68-73 and 133.
>
> [Emphasis added.]

[78] In this case, the prejudice is not the fact that the Applicant was not granted citizenship, nor even that the Decision made him ineligible to re-apply for five years. The prejudice is that had there been no delay, the Applicant would have served his punishment and would have been able to re-apply. The inordinate delay therefore causes a significant prejudice (an additional five-year waiting period).

[79] On this basis, I am satisfied that the inordinate delay caused significant prejudice to the Applicant.

(3) There is an abuse of process

[80] In *Blencoe* at paragraph 120, the SCC held that the Court must be satisfied that "the damage to the public interest in the fairness of the administrative process should the proceeding go ahead would exceed the harm to the public interest in the enforcement of the legislation if the proceedings were halted." In *Abrametz* at paragraph 72, the SCC held that an abuse of process will exist "when the delay is manifestly unfair to the party to the proceedings or in some other way brings the administration of justice into disrepute."

[81] In this case, the delay was manifestly unfair and brings the administration of justice into disrepute. While I accept that the Applicant does not come with clean hands in light of his misrepresentations and lack of candour, I cannot accept that an approximately five-year delay on the Applicant's file was not manifestly unfair.

[82] The Respondent competently argued that the delay was caused by the Applicant's own conduct and dishonest statements. This argument is only partly true. The Applicant's conduct triggered only the investigation — not the ensuing inordinate delay. As I explained in my analysis above on inordinate delay, there was no discernible or convincing reason why the Applicant's file had remained idle for such a long period. While I can see from the GCMS notes in 2019 that the Respondent had been awaiting feedback from an unnamed partner agency, the Respondent's submissions before me failed to shed further light on the related facts. Indeed, the Respondent has not established before me that the Decision was made with any additional information provided by any other partner agency.

[83] Likewise, I am not persuaded by the Respondent's argument concerning the mandatory character of the investigation under the Act. The fact that the statute requires the Respondent to investigate does not grant it licence to drag its feet. I understand that the Respondent has to juggle a heavy administrative load, but I do not consider this factor to be overriding. As is well understood in administrative law, and bearing in mind the SCC's express warning against "*Jordanizing*" administrative delays (*Abrametz* at paras 45-49), administrative decision-making remains subject to the principles of natural justice and the duty of fairness. As such, it was incumbent on the Respondent to properly justify its delay. In this case, it failed to do so.

[84] In these circumstances, the Applicant has suffered a significant prejudice as a result of an inordinate and unexplained delay. While the public has an interest in the enforcement of the legislation, it also has an interest in the fairness of the administrative process. Considering my conclusions as to the insufficiency of the evidence relating to any justification for the

Respondent's inordinate delay, as well as the significant prejudice inflicted upon the Applicant, the public interest in the fairness of the administrative process is undermined.

[85] Consequently, the inordinate delay in this case caused a significant prejudice that amounts to an abuse of process.

VIII. What is the appropriate remedy?

[86] At the hearing, the Court directed the parties to submit additional representations on the appropriate remedy in light of this Court's decision in *Sharafaldin*.

[87] In his Notice of Application, the Applicant was requesting that the Court quash the Decision, stay the misrepresentation investigation, and remit the citizenship application to a different officer for redetermination, with costs to the Applicant. The issue with the Applicant's request is that it does not respond to his circumstances. Indeed, in the Decision, IRCC notes that the Applicant misrepresented his presence in Canada and did not meet the residency requirements during the relevant period to qualify for citizenship.

[88] Granting a stay of proceedings on the issue of misrepresentation and remitting the Decision back for further consideration before a different decision maker, but based on the same information, will not change the fact that Applicant simply did not qualify for residency. His application for citizenship is doomed to fail. Rather, an appropriate remedy must allow the Applicant to submit a new application when he is eligible, and that he be able to do so before November 2026.

[89] In his additional representations, and relying on *Sharafaldin* at paragraphs 76 and 77, the Applicant submits that the Court should remit the Decision but order that a different decision maker cannot deny citizenship on the basis that the Applicant did not meet the residency requirement. In essence, the proposed remedy would combine *certiorari*, *mandamus*, and prohibition. The Applicant argues that such an order would not cause the Minister to act contrary to the Act; rather, it would ensure that the legislation is applied in a manner consistent with the principles of natural justice.

[90] Alternatively, instead of ordering that the decision maker cannot refuse the application on the basis of the Applicant's failure to meet the residency requirement, the Applicant proposes that the Court order the decision maker to consider periods between 2010 and 2021 in order to allow him to meet the residency requirement. In the further alternative, the Applicant suggests that the decision maker consider a period between 2014 and the date of any new application.

[91] The Respondent argues that even if the claim of abuse of process was successful, the circumstances of the case do not reach the severity required to warrant a stay. Citing *Blencoe* and *Abrametz* (at para 83), the Respondent argues that a stay of proceedings is the "ultimate remedy" that should be granted in the "clearest of cases."

[92] The Respondent argues that a "remedy ordered to cure an abuse of process cannot serve to usurp, ignore or re-write the statute that the administrative decision maker is meant to apply." The Respondent argues that *Sharafaldin* should not be relied upon because it relies on its own

facts and that it "improperly used a writ of prohibition to restrain IRCC from considering the statutorily mandated residence pre-requisite for citizenship."

[93] The Respondent also argues that the Court cannot direct IRCC to consider a timeframe for residency other than the relevant residency period of 2010-2014. Indeed, the Act now requires that any residency requirement be met in the five-year period leading up to the application. In this case, the Court could not order a decision maker to consider periods that are after the date of the application.

[94] Rather, the Respondent argues that an adequate remedy that would respond to the Applicant's circumstances is to simply quash the Decision, and direct that the Applicant may withdraw his 2014 application. Therefore, the Applicant is not barred and may apply at any time when he will meet the residency requirement and, because he will apply knowing that he meets the residency requirement, there will be no issue with a misrepresentation investigation.

[95] In my view, the most appropriate remedy is to set aside the Decision without remitting it for re-determination, and direct that IRCC permit the Applicant to withdraw his application. The Applicant may then apply anew at a date of his choosing.

[96] The proposed remedy is responsive to the Applicant's circumstances, but also consistent with the Act. While *Sharafaldin* may be relied upon to craft special remedies, *Sharafaldin* is an exceptional case in which it was a foregone conclusion that the applicant otherwise met the

citizenship requirements. By comparison, the facts of the present case do not lead me to the same conclusion.

[97] For example, while it is known that the Applicant did not meet the residency requirement in 2014, there is no evidence suggesting that the Applicant meets the requirement now. There is evidence suggesting that there was a period between 2015 and 2021 when the Applicant may have met the requirement, but that evidence is not compelling. The evidence also suggests that the Applicant frequently leaves Canada for extended periods of time for work.

[98] I also agree with the Respondent that it is not properly the role of the Court to grant remedies that serve to re-write the statute that the administrative decision maker is meant to apply. In these circumstances, I agree that paragraph 5(1)(c) of the Act unambiguously requires the officer to now consider the five-year period "immediately before the date of" the Applicant's citizenship application. While *Sharafaldin* did provide a remedy tailored to the particular facts in that case, there was uncontested evidence that the applicant met the residency requirement in the periods since his application as he had not left Canada in the last 13 years. That is not the case here.

[99] In this case, an appropriate remedy must therefore allow the Applicant to file a new application. This will be responsive to the two issues that he faces: a) he will be able to demonstrate that he meets the residency requirement (and therefore any issue as to a misrepresentation investigation is not applicable); b) he will be able to file his application before November 2026.

[100] An order quashing the Decision and directing that the Applicant may withdraw his application is responsive to those two issues. First, under such a remedy, the Applicant is not subject to the five-year re-application ban. In my view, this prevents the double punishment that would otherwise arise if the Decision was upheld. Indeed, had the investigation and Decision been handled in due course, it is fair to assume that the Applicant's five-year ban would have expired by now.

[101] Second, such a remedy allows the Applicant to re-apply when he meets the residency requirement and, at the same time, it allows IRCC to comply with the statutory requirement to consider the period "immediately before" the application.

IX. Costs

[102] The Applicant claims substantial indemnity pursuant to section 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 [*FCCIRPR*]. In support for his claim, the Applicant cites the "unreasonable and unjustifiable delay," that the Respondent "conceal[ed] the reason of the delay," lacked diligence, and failed to cooperate until the filing of the *mandamus* application. Notably, the Applicant submits that this negligent processing caused him to make "numerous enquiries and requests as well as bringing three judicial review applications," thereby incurring unnecessary legal fees.

[103] The Respondent argues that there is little to no basis for the Applicant's claims. First, barring "special reasons," no costs are available in immigration and citizenship matters. Second, the Respondent argues that substantial indemnity cost are awarded only where there has been

"reprehensible, scandalous or outrageous conduct" — a rare occurrence. In that sense, a delay, even if unreasonable, does not automatically result in a finding of reprehensible, scandalous, or outrageous behaviour. Considering the absence of evidence to that effect, an award of costs would not be justified, "let alone costs on a substantial indemnity basis."

[104] Upon consideration, in my view, no costs are warranted in this case. While there was an inordinate and unexplained delay, and a delay may in some circumstances allow special costs (*Ndungu v Canada (Citizenship and Immigration)*, 2011 FCA 208 [*Ndungu*] at paras 6-7), such costs are not warranted in this case.

[105] First, the threshold for costs under Rule 22 is high. Second, even when a delay occurred in the processing of an application, "special reasons to award costs will not often exist" (*Bankole v Canada (Citizenship and Immigration)*, 2011 FC 372 at para 9; see also *Uppal v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1133 at para 5). Finally, the evidence in this case does not demonstrate that the Respondent's conduct was "unfair, oppressive, improper or actuated by bad faith," nor was it reprehensible, scandalous, or outrageous (*Kanthasamyiyar v Canada (Citizenship and Immigration)*, 2015 FC 1248 at para 61; *Singh v Canada (Citizenship and Immigration)*, 2010 FC 1306 at para 45; *Ukaobasi v Canada (Citizenship and Immigration)*, 2015 FC 561 at paras 25-26).

[106] In this particular case, and unlike the cases cited in *Ndungu* (*Nalbandian v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1128; *John Doe v Canada (Citizenship and Immigration)*, 2006 FC 535; *Jaballah v Canada (Citizenship and Immigration)*, 2003 FC 1182),

the Applicant bears some responsibility for his situation. The evidence clearly establishes that he applied for citizenship when he knew, or ought to have known, that he was not eligible. Had he waited until he was eligible to apply, the circumstances of this case, including the institutional costs related to any investigation, would not have occurred.

[107] The request for substantial indemnity costs is therefore dismissed.

X. Certifiable question

[108] At the hearing, the parties argued that no question of general importance existed and that no question should be certified.

[109] After the Court directed the parties to produce additional submissions in relation to *Sharafaldin*, the Respondent sent a letter identifying questions of general importance, should the Court decide to follow *Sharafaldin* and order a remedy that precluded IRCC from considering a residency requirement or otherwise prohibited IRCC from discharging its duties under the Act.

[110] As I have ultimately refused to follow *Sharafaldin*, no such question of general importance arises.

XI. Conclusion

[111] For the foregoing reasons, the delay in the Applicant’s file was inordinate, caused significant prejudice, and amounted to an abuse of process.

[112] The applications for judicial review are granted.

[113] The Decision is set-aside without remitting it for re-determination.

[114] The Applicant shall be allowed to withdraw his 2014 application, and to submit a new application for citizenship at a time of his choosing.

[115] As a last comment, I would like to thank both counsel for their courteous and helpful submissions.

JUDGMENT in T-1074-21 and T-1863-21

THIS COURT'S JUDGMENT is that:

1. The applications for judicial review are granted.

2. The Decision is set aside.

3. The Applicant shall be allowed to withdraw his 2014 citizenship application.

4. The Applicant shall be allowed to submit a new application for citizenship at a time of his choosing.

5. No questions for certification were argued, and I agree none arise.

6. No costs are awarded.

"Guy Régimbald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-1074-21, T-1863-21
STYLE OF CAUSE:	HUSEIN GIUMA ABOUDLAL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY WAY OF VIDEOCONFERENCE
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