

Federal Court



Cour fédérale

Date: 20231024

Docket: IMM-7522-22

Citation: 2023 FC 1408

Ottawa, Ontario, October 24, 2023

PRESENT: Mr. Justice Norris

BETWEEN:

ESHAGH GHALIBAF

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION AND
THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS**

Respondents

JUDGMENT AND REASONS

[1] The applicant is a 36-year-old citizen Iran. In December 2018, he was invited to apply for admission to Canada as a permanent resident under the Express Entry federal skilled worker program (the applicant is a civil engineer). He completed his application in February 2019. Over four-and-a-half years later, the application is still pending. The applicant has been told that the delay is due to the need for security screening.

[2] In September 2022, the applicant applied for an order in the nature of *mandamus* to compel the Minister of Citizenship and Immigration to render a decision on his application for permanent residence. Out of an abundance of caution, the applicant also named the Minister of Public Safety and Emergency Preparedness as a respondent because agencies under the authority of that Minister are responsible for security screening.

[3] The respondents oppose the application on the basis that the delay in rendering a decision is reasonably explained by the need to conduct security screening and because the balance of convenience does not favour the applicant.

[4] For the reasons that follow, I am satisfied that this application should be granted.

[5] The test for *mandamus* is well-established. *Apotex v Canada (Attorney General)* (1993), [1994] 1 FC 742 (CA) (aff'd [1994] 3 SCR 1100) identified eight preconditions that must be met for an applicant to be entitled to an order of *mandamus*. In summary, these requirements are: (1) there must be a public legal duty to act; (2) the duty must be owed to the applicant; (3) there must be a clear right to performance of that duty; (4) where the duty sought to be enforced is discretionary, certain additional principles apply; (5) no other adequate remedy is available to the applicant; (6) the order sought will have some practical value or effect; (7) there is no equitable bar to the relief sought; and (8) on a balance of convenience an order of *mandamus* should be issued. See also *Lukács v Canada (Transportation Agency)*, 2016 FCA 202 at para 29.

[6] As noted above, only the third and eighth *Apotex* requirements are in issue here.

[7] Under the third requirement, the question is whether the applicant has a clear right to performance of the duty on the part of the Minister of Citizenship and Immigration to render a decision on his application for permanent residence. Generally speaking, this right is engaged only if the party seeking *mandamus* has satisfied all the requirements for a decision to be made, they have requested that a decision be made, and the tribunal has either expressly refused to make a decision or it has taken unreasonably long to do so (*Apotex* at 767). In the present case, the only live issue is whether the Minister has taken unreasonably long to make a decision.

[8] In *Conille v Canada (Minister of Citizenship and Immigration)* (1998), [1999] 2 FC 33, which concerned a long-delayed decision on a citizenship application, Justice Tremblay-Lamer held (at 43) that three requirements must be met for delay to be considered unreasonable: (1) the delay in question has been longer than the nature of the process required, *prima facie*; (2) the applicant and his counsel are not responsible for the delay; and (3) the authority responsible for the delay has not provided a satisfactory justification.

[9] In support of his submission that it has taken longer to make a decision on his application than the process required, *prima facie*, the applicant relies on evidence that, as of September 2022 (when he commenced this *mandamus* application), Immigration, Refugees and Citizenship Canada's published processing time for Express Entry applications by skilled workers was 26 months. While not necessarily conceding that this should be the benchmark for the time the nature of the process usually requires, I do not understand counsel for the respondents to seriously dispute that the first *Conille* requirement is met given the wide disparity between the published processing time (as of September 2022) and the amount of time that has

passed since the applicant completed his application for permanent residence. Nor is there any question that the second *Conille* requirement is met. The record demonstrates that the applicant has always responded promptly when additional information was requested from him. None of the delay is attributable to the applicant.

[10] The determinative issue is whether the respondents have provided a satisfactory justification for the delay. The respondents submit that “the delay in processing has not been longer than the nature of the process required under all the circumstances, and given the complex nature of this application, where security screening is required” (Respondents’ Memorandum of Argument, para 11).

[11] I am unable to agree.

[12] I would underscore at the outset that the respondents filed their Memorandum of Argument on October 5, 2022. As a result, the delay they sought to justify on this basis was only that which had accrued up to that point. The respondents did not file a Further Memorandum of Argument after leave was granted. Thus, strictly speaking, they have not made any argument to justify the additional delay over the last year. Nevertheless, the hearing of this application proceeded on the understanding that the respondents’ position is that all the delay to date is explained by the need for security screening.

[13] There is no question that background checks and security screening are important requirements under the *Immigration and Refugee Protection Act, SC 2001, c 27 (IRPA)*. Nor is

there any question that, depending on the circumstances, the need to take such steps can justify even lengthy processing delays (*Jaber v Canada (Citizenship and Immigration)*, 2013 FC 1185 at para 26; *Carrero v Canada (Citizenship and Immigration)*, 2021 FC 891 at paras 14-15).

[14] In the present case, however, the respondents simply make the bald assertion that the need for background and security checks increased the complexity of the application and, as a result, the amount of time required to process it. This Court has held repeatedly that blanket statements like this are insufficient to justify delay: see *Abdolkhaleghi v Canada (Minister of Citizenship and Immigration)*, 2005 FC 729 at para 26; *Kanthasamyiyar v Canada (Citizenship and Immigration)*, 2015 FC 1248 at paras 49-50; *Samideh v Canada (Citizenship and Immigration)*, 2023 FC 854 at paras 36-37; and *Jahantigh v Canada (Citizenship and Immigration)*, 2023 FC 1253 at para 19. As Justice McHaffie held in *Jahantigh*, “For the Court to assess whether the length of a security review is reasonable, it must have some information about the review and the reasons for its length” (at para 20). Likewise, Justice Tremblay-Lamer held in *Abdolkhaleghi* that what will constitute an adequate explanation for delay will depend “on the relative complexity of the security considerations in each case” (at para 26).

[15] The record before me falls well short of providing any justification for the delay in this case. Beyond the fact that security screening is required, the record sheds no light whatsoever on the nature of the review or the reasons for its length. The respondents did not file any affidavits at the leave stage. The Certified Tribunal Record (CTR) was produced on January 11, 2023. It confirms that in July 2019, an analyst recommended that the application be approved and that, as of October 2019, it was determined that a “comprehensive check” was required. As of

May 2021, security verifications were “not started.” As of November 2021 and then July 2022, “additional verifications” were in progress. The CTR reveals nothing about the nature of these verifications or why they have taken as long as they have.

[16] In sum, from the information in the CTR, it appears that very little has happened in the processing of the application since July 2019. This is despite repeated inquiries about the matter from the office of a Member of Parliament, Pierre Poilievre.

[17] The most recent entry in the Global Case Management System notes in the CTR is dated December 1, 2022. It states (rather optimistically) that the due date had been pushed back by another 30 days because verifications were still in progress. The respondents did not file any affidavits after leave was granted (despite having until August 24, 2023, to do so). As a result, what, if anything, has happened since last December is a complete mystery.

[18] The respondents submit that processing of the application has also been delayed by the COVID-19 pandemic. According to the respondents, I should take judicial notice that the pandemic adversely affected processing times for applications for permanent residence. I do not doubt that this is something of which I can take judicial notice. What I cannot take judicial notice of is how, exactly, the pandemic affected the processing of this application and whether this (alone or together with other factors) justifies the delay that has accrued in this case. This must be established by evidence, and there is none.

[19] Perhaps to state the obvious, the complete absence of evidence to explain the lengthy delay in processing the applicant's application for permanent residence gave counsel for the respondents little to work with in defending the delay as reasonable.

[20] Turning to the balance of convenience, the applicant provided affidavit evidence explaining how the delay in processing his application has left his life in limbo and led him to delay making important decisions. I accept that the applicant has been prejudiced by the lengthy delay in processing his application for permanent residence in Canada. The respondents, on the other hand, did not provide any evidence to show that they would be inconvenienced by an order directing that a decision finally be made. As a result, I am satisfied that the balance of convenience favours the applicant.

[21] For these reasons, I am satisfied that the applicant meets all the preconditions for an order of *mandamus*.

[22] The applicant requested that the respondents be ordered to complete the processing of his application and to render a decision within sixty days of the Court's judgment. Counsel for the respondents confirmed that she did not have any instructions concerning this aspect of the request for relief.

[23] In the absence of any evidence or submissions suggesting that the applicant's proposed deadline is unreasonable or would be unfair to the respondents, I am satisfied that it is appropriate. If circumstances warranting an extension of the deadline were to arise, the

respondents may bring a motion to that effect. If the extension is not opposed, the request may be submitted informally. Otherwise, a motion record and supporting evidence will be required.

[24] Finally, the parties did not suggest any serious questions of general importance for certification under paragraph 74(d) of the *IRPA*. I agree that no question arises.

JUDGMENT IN IMM-7522-22

THIS COURT'S JUDGMENT is that

1. The application is granted.
2. A decision shall be rendered on the applicant's application for permanent residence within sixty (60) days of the date of this judgment.
3. The preceding term is without prejudice to the right of the respondents to seek an extension of the deadline set out therein.
4. I will remain seized with this matter.

"John Norris"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-7522-22

STYLE OF CAUSE: ESHAGH GHALIBAF v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION ET AL

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: OCTOBER 17, 2023

JUDGMENT AND REASONS: NORRIS J.

DATED: OCTOBER 24, 2023

APPEARANCES:

Ronald Poulton FOR THE APPLICANT

Neeta Logsetty FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Poulton Law Office Professional Corporation FOR THE APPLICANT
Toronto, Ontario

Attorney General of Canada FOR THE RESPONDENTS
Toronto, Ontario