Federal Court Cour fédérale

Date: 20220301

Docket: IMM-844-21

Citation: 2022 FC 283

Ottawa, Ontario, March 1, 2022

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

SIAVASH MAHMOUDIAN BIDGOLY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] Mr. Bidgoly [Applicant] seeks a writ of *mandamus* to compel the Minister of Citizenship and Immigration [Minister] to render a decision on his permanent resident [PR] application under the Express Entry program. The Applicant submitted his PR application over three and a half years ago, on July 22, 2018. Immigration, Refugees and Citizenship Canada [IRCC] claims

that the delay in processing his application is due to a security screening that is still in progress and the COVID-19 pandemic [Pandemic].

[2] The application for judicial review is allowed.

II. Background

[3] The timeline of events and the basic facts are uncontroverted. The evidence comes in the form of an affidavit from the Applicant and from Ms. Jerrott-Burns on behalf of the Respondent.

[4] The Applicant is a citizen of Iran. On July 11, 2018, he immigrated to Canada from the United States with a work permit. His spouse followed one month later. The Applicant is an IT entrepreneur who founded a company in September 2018. He is now CEO of the company. The company employs Canadian residents.

[5] On April 21, 2018, the Applicant submitted an application for the Express Entry pool. Four days later, he received the invitation to apply for PR.

[6] On July 22, 2018, the Applicant submitted his PR application. He included his spouse as an accompanying dependent.

[7] On August 14, 2018, an initial review of the application was made and the application was determined complete under section 10 of the *Immigration and Refugee Protection*

Regulations, SOR/2002-227. A further review on August 31, 2018 completed a criminality assessment and recommended the Applicant for the Federal Skilled Worker [FSW] Class.

[8] In June 2019, the Applicant's medicals expired and their validity was extended. On August 15, 2019, it was determined the Applicant met minimum eligibility requirements for a FSW, but a referral to partners was required to complete an admissibility assessment. The admissibility assessment cannot proceed until the security screening is completed.

[9] The Applicant made inquiries about the status of his application, starting with an Access to Information and Privacy Request in April 2019. He also submitted an online inquiry to IRCC in July 2019. He received a response indicating that his request was forwarded to the appropriate office.

[10] Since August 2019, the Applicant has contacted several Members of Parliament [MPs]. In December 2019, he discovered that his spouse's security check was completed, but his was still in process.

[11] Throughout 2020, the Applicant was informed after each follow-up request (both to MPs and to the IRCC), that his security check and application were still in process. On December 13, 2020, the Applicant made a final follow-up to the IRCC. He mentioned that he thought the Express Entry process would only take six months. The Applicant states that IRCC responded by indicating that his application was still in process. The Applicant made more follow-up inquiries to MPs in January 2021.

III. Issue

[12] The only issue is whether the Applicant has met the test for the granting of a writ of *mandamus*.

IV. Test for *Mandamus* and Reasonable Delay

[13] Prior to outlining the parties' positions, it is necessary to review the applicable test for granting the writ of *mandamus*. The parties agree on the applicable test but disagree on whether the test has been satisfied in the circumstances.

[14] *Mandamus* compels the performance of a public legal duty that a public authority refuses or neglects to perform (*Dragan v Canada (Citizenship and Immigration)*, 2003 FCT 211 at para 38 [*Dragan*]). At pages 19-21 of *Apotex Inc v Canada (Attorney General)*, [1994] 1 FC 742, 44 ACWS (3d) 349 [*Apotex*], the Federal Court of Appeal held that the following requirements must be met before *mandamus* will be issued:

1. There must be a public legal duty to act.
2. The duty must be owed to the applicant.
3. There is a clear right to the performance of that duty, in particular:
    a. the applicant has satisfied all conditions precedent giving rise to the duty;
    b. there was:
        i. a prior demand for performance of the duty;
        ii. a reasonable time to comply with the demand unless refused outright; and

iii. a subsequent refusal which can be either expressed or implied, e.g. unreasonable delay.

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 be of some practical value or effect.

7. The Court in the exercise of discretion finds no equitable bar to the relief sought.

8. On a balance of convenience, an order in the nature of *mandamus* should issue.

[15] The issue of reasonable delay is assessed within the third factor, the clear right to the performance of that duty. Unreasonable delay in performing the public duty may be deemed an implied refusal to perform (*Dragan* at para 45). A delay in performing this duty may be unreasonable if the following three requirements are met (*Conille v Canada (Citizenship and Immigration)* (1998), [1999] 2 FC 33 at para 23, 87 ACWS (3d) 24 [*Conille*]):

1. The delay in question is *prima facie* longer than the nature of the process required;

2. The applicant and his counsel are not responsible for the delay; and

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

V. Parties' Positions

A. *Applicant's Position*

[16] The Applicant submits that he has satisfied each element of the test for *mandamus*. In sum, his application has already been selected for Express Entry: he has a right to be issued PR

under subsection 21(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] because he has met the statutory requirements; he submitted his application in July 2018 and has made numerous follow-up inquiries; and there is no reasonable explanation for the delay.

[17] The Minister has a public legal duty to process the application and owes this duty to the Applicant. This is confirmed by the case law and statute, including section 11 and paragraph 3(1)(*f*) of *IRPA* (*Liang v Canada (Citizenship and Immigration)*, 2012 FC 758 at para 25; *Dragan* at para 43).

[18] The Applicant has a clear right to performance. He has done all that is required of him, and has complied with everything requested of him in a timely fashion. He has received a positive selection decision but he has been waiting for an excessive amount of time with no reasonable explanation from the Minister.

[19] If the Applicant's PR application is not processed, there is no other appropriate remedy available. A granting of *mandamus* would have a practical effect as well.

[20] When determining whether there is an equitable bar to the relief sought, the Court is to consider the conduct of the parties. The presence of an unreasonable delay is therefore a major consideration in this case.

[21] The delay is longer than the nature of the process required, which the IRCC website outlines as six months. The Respondent has failed to provide any justification for the delay. The

Respondent also does not explain why, when his application was submitted in July 2018, the security screening was not commenced until August 2019. The Respondent also provides no detail explaining the delay since August 2019. The affidavit of Ms. Jerrott-Burns acknowledges the facts set out by the Applicant and does not provide any explanation of the processing delays nor does the affidavit explain the impacts of the Pandemic on the application. Therefore, the test for reasonable delay is met.

[22] The present matter is analogous to *Almuhtadi v Canada (Citizenship and Immigration*), 2021 FC 712 [*Almuhtadi*] where this Court granted an order of *mandamus* for a similar delay in processing a PR application for persons found to be convention refugees.

[23] Finally, the balance of convenience favours the Applicant. There are no countervailing concerns in favour of the Minister. The Applicant has been waiting for an excessive amount of time and, though prejudice is not required, he has nevertheless demonstrated prejudice. Namely, the delay has caused the Applicant stress and has affected his Canadian business.

B. *Respondent's Position*

[24] The writ of *mandamus* is an extraordinary remedy and a delay in processing an application must be assessed on the facts. The Applicant has not established there has been unreasonable delay or that the balance of convenience weighs in his favour.

[25] While a public duty to process the application exists in the circumstances, there is a satisfactory justification for the delay: a very important part of the process, the security

screening, still needs to be completed. The application is being assessed for admissibility, and it is important not to abbreviate such investigations. Delays due to security concerns are normal and inquiries to satisfy security concerns is a satisfactory explanation (*Kang v Canada (Citizenship and Immigration)*, 2001 FCT 1118 at para 21). In oral submissions, the Respondent stated that there were issues in the security screening caused by the lack of a working relationship with the Applicant's home country, Iran.

[26] The delay may seem long to the Applicant but the delay is less than three years. Considering the intervening impact of the Pandemic, the delay has not been longer than what is required of the process**.**

[27] The Court must also consider the full context of the immigration scheme (*Vaziri v Canada (Citizenship and Immigration)*, 2006 FC 1159 at paras 53-55 [*Vaziri*]) which, in this case, includes the consideration of the impact of the Pandemic on immigration processing timelines. With the shutdown of government offices, the handling of security matters has become more complicated and limited. *Almuhtadi* is distinguishable because the Pandemic did not explain the delay in that case. Here, the security assessment began in August 2019 and the Pandemic is contributing to the delay. The Court has recognized this in cases like *Gentile v Canada (Citizenship and Immigration)*, 2020 FC 452 [*Gentile*]. In oral submissions, the Respondent asked this Court to take judicial notice of the impacts the Pandemic has on processing times.

[28] The Applicant has not demonstrated significant prejudice due to the delay. The Applicant has no vested right to PR, and his application must still be assessed for satisfaction of *IRPA* criteria.

VI. Analysis

A. *Has the Applicant met the test for a grant of mandamus?*

[29] The Applicant has satisfied the test for the granting of the writ of *mandamus*. Below, I analyze each of the factors set forth in *Apotex*.

(1) The Minister has a legal duty to act and that duty is owed to the Applicant

[30] There is no doubt that the Respondent has a legal duty to process the Applicant's PR application pursuant to subsection 11(1) of the *IRPA* (*Dragan* at para 43). However, the Respondent's duty is to process the PR application, not to issue the PR.

(2) There is a clear right to performance of that duty

[31] I find that there is nothing more for the Applicant to do. He has submitted the application, paid the fees, and responded to all requests in a timely manner. He has also made numerous inquiries as to the status of his application.

[32] Under this step of the *Apotex* test, it is appropriate to consider the reasonableness of the delay by assessing the factors set out in *Conille*. For the following reasons, I find that the *Conille* factors are satisfied.

(a) *The delay in question is* prima facie *longer than the nature of the process required*

[33] There is no uniform standard for what constitutes a reasonable length of time. Each case turns on its facts, especially in light of the relevant immigration scheme (*Vaziri* at para 55).

[34] The Applicant, relying on information from IRCC's website, states that the processing time for Express Entry is six months. I agree with the Applicant that this is *prima facie* longer than the nature of the process.

[35] The Respondent submits that delays in processing PR applications are not unusual when there are security concerns. There is no evidence in the record indicating the average processing times for security assessments, nor is there evidence of how the security assessments have been impacted by the Pandemic. Therefore, while I accept that these factors may have contributed to delay beyond the normal six-month period, it is impossible for this Court to determine whether that delay is reasonable in the circumstances. If the Respondent wished to rely on these justifications for delay, it was the Respondent's responsibility to provide the Court with sufficient evidence.

(b) *The applicants are not responsible for the delay*

[36] The parties agree that the Applicant is not responsible for the delay.

(c) *The authority responsible for the delay has not provided satisfactory justification*

[37] The Respondent submits two justifications for the delay: the importance of not aborting security-related processes and the Pandemic's effect on the government's ability to make prompt security assessments.

(i) Security

[38] I do not find this to be satisfactory justification. I agree with the Applicant that this case is similar to *Almuhtadi*: the Respondents are using the blanket statement that issuing an order of *mandamus* "would have the effect of aborting an important security investigation" (at para 40). As in *Almuhtadi*, the Respondent has provided no details of the security concerns in the material filed in this application. The cases submitted by the Respondent detailed the nature of the security concerns on the record. Here, like in *Almuhtadi*, no such information is in the record. At paragraph 26 of *Abdolkhaleghi v Canada (Citizenship and Immigration)*, 2005 FC 729, former Justice Tremblay-Lamer provided some guidance on this point:

> What will constitute an adequate explanation will of course depend on the relative complexity of the security considerations in each case. <u>A blanket statement to the effect that a security check investigation is pending, which is all that was given here, prevents an analysis of the adequacy of the explanation altogether. And security concerns instead appear to be lacking as a result</u>.
>
> [Emphasis added.]

[39] Further, I reject the Respondent’s submission that part of the delay is attributable to the lack of a working relationship with Iran. If the Respondent wished to rely on this argument, it should have provided evidence of this in Ms. Jerrott-Burns’ affidavit.

(ii) The Pandemic

[40] Without more information, I do not find the Pandemic to be a satisfactory justification. In *Almuhtadi*, Justice Ahmed did not find that the Pandemic fully explained the delay, as a delay of three and a half years already existed before the Pandemic began in March 2020 (at para 47). In this case, there was already a delay of 19 months by March 2020. The delay was already unreasonable by the time the Pandemic began in March 2020.

[41] I recognize that, in a proper factual context, the Pandemic may explain a further delay from March 2020 to date. However, the impact of the Pandemic is not a satisfactory justification without more detail on how it has affected Express Entry applications. I am unable to take judicial notice of the impact that the Pandemic has taken on the delay in these particular circumstances because there are both pre-Pandemic and post-Pandemic delays at play. Furthermore, the Pandemic has been a gradual part of life since March 2020, and processes have slowly resumed (*Almuhtadi* at para 47). All institutions throughout Canada have also adapted to addressing backlogs and delays to varying degrees of success.

(3) No adequate alternative remedy is available to the Applicant and the order sought will have some practical value or effect

[42] I am persuaded that the Applicant has no other available remedy. If *mandamus* is not granted, he will have to continue waiting for his application to be processed. *Mandamus* undoubtedly yields a practical effect of lessening the already long delay in the Applicant's file.

(4) The Court finds no equitable bar to the relief sought

[43] I am also satisfied that there is no equitable bar to the relief sought. In case law cited by the Respondent, this Court found it inequitable to grant *mandamus* for similar requests, as *mandamus* would allow the applicants to "leap-frog" over other similar applicants or "jump the queue" (*Jia v Canada (Citizenship and Immigration)*, 2014 FC 596 at para 103 [*Jia*]; *Mazarei v Canada (Citizenship and Immigration)*, 2014 FC 322 at paras 31-33 [*Mazarei*]). However, the circumstances of these cases are not similar to the present matter. *Jia* involved a large number of applications from other would-be investor class immigrants and changes in the manner in which those applications were processed. In *Mazarei*, there was evidence of where the applicant's application stood in relation to other applications. Here, there is no such evidence in the record.

[44] In this case, if the Court orders *mandamus*, the Applicant would be able to have his application processed on an expedited basis, which may appear to be a leapfrog over other Express Entry applicants. However, without a satisfactory explanation from the Respondent, it is difficult to see how the Applicant is jumping the queue when he has been waiting since July 2018 for his application to be processed.

(5) On a balance of convenience, an order of *mandamus* should be issued

[45] I agree with the Applicant that the unreasonable and unexplained delay tilts the balance in favour of the Applicant. I am cognisant of the Respondent's submissions of the effects of the Pandemic on many administrative processes generally (*Gentille* at para 36). I am also cognisant that, with a security assessment, the Court must also balance the protection of the public and those of the applicant (*Dhahbi v Canada (Citizenship and Immigration)*, 2004 FC 1702 at paras 40-41). The Applicant does not dispute the importance of security assessments.

[46] However, there is no clear evidence from the Respondent about these matters. To rely on either the Pandemic or the difficulties associated with security assessments, the Respondent had to provide evidence. Simple statements to the effect that a security check is in progress or that the Pandemic is responsible for the delay are insufficient.

VII. Conclusion

[47] The application for judicial review is granted. There is no question for certification.

JUDGMENT in IMM-844-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted. A writ of *mandamus* is ordered compelling the Minister or IRCC to process the Applicant's application within 90 days of this Order.
2. There is no question for certification.
3. There is no order for costs.

"Paul Favel"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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