Federal Court Cour fédérale

**Date: 20220527**

**Docket: T-64-19**

**Citation: 2022 FC 768**

**Ottawa, Ontario, May 27, 2022**

**PRESENT: Mr. Justice Norris**

**BETWEEN:**

**MAHMOUD SHARAFALDIN**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

# JUDGMENT AND REASONS

## I. OVERVIEW

[1] Mahmoud Sharafaldin is a citizen of Iran. In 1995, the Convention Refugee Determination Division of the Immigration and Refugee Board of Canada ("IRB") accepted his claim for refugee protection. He became a permanent resident of Canada in 1996.

[2] On December 23, 1999, Mr. Sharafaldin submitted an application for Canadian citizenship. Over twenty years later, this application is still pending.

[3] Mr. Sharafaldin has applied for judicial review under section 22.1 of the *Citizenship Act*, RSC 1985, c C-29. He seeks an order of *mandamus* requiring the Minister of Citizenship and Immigration ("the Minister") to make a decision on his application for Canadian citizenship. He contends that the Minister has taken unreasonably long to do so and, as a remedy for the undue delay, the Court should order the Minister to decide the matter within a strict timeframe and subject to substantive constraints imposed by the Court.

[4] For the reasons that follow, I have concluded that this application for judicial review must be allowed. I am satisfied that the Minister has a duty to render a decision on Mr. Sharafaldin's application for Canadian citizenship, that he has taken unreasonably long to do so, and that a decision must be made without further undue delay. Furthermore, I am satisfied that, in the exceptional circumstances of this case, the Minister's consideration of the application should be subject to the substantive constraints that are set out in detail below.

## II. BACKGROUND

[5] The background and procedural history of this matter are described in part in *Canada (Attorney General) v Sharafaldin*, 2021 FC 22. That decision dealt with claims by the Attorney General of Canada under section 38 of the *Canada Evidence Act*, RSC 1985, c C-5, for the non-disclosure of sensitive or potentially injurious information in the Certified Tribunal Record ("CTR") produced for this application for judicial review.

[6] Mr. Sharafaldin was born in Iran in October 1961. He left Iran for Romania in 1991. He remained in Romania until February 1995, when he travelled to Canada on a visitor's visa. Mr. Sharafaldin was accompanied to Canada by his spouse, Elisabeta Tudor, a Romanian citizen. Mr. Sharafaldin has three sons. The eldest was born in Iran and (as of 2019) is a permanent resident of Canada. The other two were born in Canada.

[7] On March 16, 1995, Mr. Sharafaldin made a claim for refugee protection in Canada on the basis of his fear of persecution in Iran and Romania. By a decision dated July 19, 1995, the Convention Refugee Determination Division of the IRB found him to be a Convention refugee.

[8] Mr. Sharafaldin became a permanent resident of Canada on November 13, 1996.

[9] On December 23, 1999, he submitted an application for Canadian citizenship under section 5 of the *Citizenship Act*. The application was received by Citizenship and Immigration Canada ("CIC") on January 6, 2000.

[10] I pause here to note that Ms. Tudor submitted an application for Canadian citizenship at the same time. Her application also remains outstanding, apparently because CIC has linked it to Mr. Sharafaldin's. Ms. Tudor is not a party to the present litigation.

[11] While the eligibility requirements under section 5 of the *Citizenship Act* have changed over the years since Mr. Sharafaldin submitted his application, in general terms they have included that an applicant for Canadian citizenship must be a permanent resident of Canada, that

the applicant has been physically present in Canada for the requisite number of days over a specified period of time, that the applicant not be under a removal order, and that the applicant not be subject to a declaration that there are reasonable grounds to believe that they have engaged, are engaging or may engage in activity that constitutes a threat to the security of Canada or that constitutes organized criminality.

[12] The history of the processing of Mr. Sharafaldin's citizenship application over the years – indeed, decades – since it was submitted is charted in the documents found in the CTR as well as in affidavits filed in this matter by Mr. Sharafaldin and on behalf of the Minister. Significant amounts of time were spent waiting for criminal, security and (especially) immigration clearances.

[13] For present purposes, three circumstances in the history of this matter are of particular importance.

[14] First, by March 2004 CIC was satisfied that Mr. Sharafaldin had passed the criminal and security clearances. In the preceding years, certain security concerns had been identified and investigated – including through an interview with Mr. Sharafaldin by the Canadian Security Intelligence Service in September 2002 – but by the end of March 2004, these concerns had been resolved to the satisfaction of CIC. (While the criminal and security clearances have had to be revisited subsequently because they are time-limited, no new concerns in either of these specific respects have arisen.) As of March 2004, the sole outstanding issue holding up the progress of the citizenship application was the immigration clearance.

[15] In the citizenship context, an immigration clearance considers such matters as whether the applicant has actually obtained permanent resident status or may have lost it and whether they are subject to a pending process under the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*") that may implicate their permanent resident status and, as a result, their eligibility for Canadian citizenship. See *Affidavit of Margaux Kaczor affirmed February 19, 2021*, at paras 11-13. As will be discussed below, over the following years the immigration clearance for Mr. Sharafaldin has encompassed an evolving set of concerns.

[16] Second, while waiting for a decision on his citizenship application, Mr. Sharafaldin returned to Iran from Canada three times. Between March and May 2006, he was in Iran for a total of 48 days. Between March and April 2007, he was in Iran for a total of 33 days (this stay was interrupted by a brief trip to the United Arab Emirates). And between June 2007 and February 2009, he was in Iran for a total of almost 18 months (this stay was interrupted by several brief trips to Turkey).

[17] Third, on October 24, 2014, Mr. Sharafaldin's citizenship application was suspended under section 13.1 of the *Citizenship Act* on the basis that he was a subject of interest in a Canada Border Services Agency ("CBSA") investigation. Section 13.1 had come into force a short time earlier, on August 1, 2014. As will be discussed further below, when the suspension was authorized, the specific concern on the part of the CBSA was whether, by returning to and remaining in Iran, Mr. Sharafaldin had reavailed himself of the protection of that country. If this were the case, the Refugee Protection Division ("RPD") of the IRB could, upon application by the Minister of Public Safety and Emergency Preparedness, find that his refugee protection had

ceased: see subsection 108(2) of the *IRPA*. If this were to happen, it would have significant implications for Mr. Sharafaldin and his application for Canadian citizenship.

[18] As a result of amendments to the *IRPA* that had come into force on December 15, 2012, if an application for cessation of his Convention refugee status were to be granted on the basis of reavailment, Mr. Sharafaldin would lose not only his status as a Convention refugee but also his status as a permanent resident of Canada: see sections 40.1 and 46(1)(c.1) of the *IRPA*; see also *Canada (Citizenship and Immigration) v Nilam*, 2017 FCA 44 at para 25. He would also become inadmissible to Canada and subject to removal. If Mr. Sharafaldin were to lose his permanent resident status, he would no longer be eligible for Canadian citizenship. However, at the time he returned to Iran, if he were found to have reavailed himself of the protection of that country, Mr. Sharafaldin would only have been at risk of losing his Convention refugee status; his status as a permanent resident of Canada – and therefore his right to seek Canadian citizenship, something for which he had applied several years earlier – would have been unaffected.

[19] Mr. Sharafaldin was interviewed by the CBSA when he returned to Canada from Iran on February 1, 2009, and his Iranian passport was seized. Despite the CBSA knowing of this trip since it took place, it was not until over six years later – on June 24, 2015 – that the Minister of Public Safety and Emergency Preparedness filed an application with the RPD seeking cessation of Mr. Sharafaldin's refugee protection.

[20] The documentary evidence in the CTR shows that, since March 2004 – that is, well before the issue of cessation arose – CBSA analysts had raised concerns that, notwithstanding

the security and criminal clearances, Mr. Sharafaldin may be ineligible for Canadian citizenship because he was inadmissible to Canada under the *IRPA* on security or organized criminality grounds. As a result, on several occasions over the following years, analysts requested that the citizenship application not proceed pending further inquiries into these matters. However, it was not until the cessation application was commenced in 2015 that any concrete step was taken to seek a determination that, if granted, would render Mr. Sharafaldin ineligible for Canadian citizenship. Even then, the application was not served on Mr. Sharafaldin until nearly three years later, on April 23, 2018.

[21] While from time to time between 2004 and 2015 there were requests by CBSA analysts to place Mr. Sharafaldin's citizenship application "on hold" pending further investigations, there is no evidence that section 17 of the *Citizenship Act* was ever invoked to formally suspend the processing of the application. This provision, which was repealed on July 31, 2014, (see SC 2014, c 22, s 13) had permitted the Minister to suspend the processing of a citizenship application for a period not exceeding six months to obtain the necessary information when the Minister "is of the opinion that there is insufficient information to ascertain whether [the applicant] meets the requirements of this Act and the regulations with respect to the application." Section 17 has now been superseded by section 13.1 of the *Citizenship Act*, which was enacted at the same time as section 17 was repealed (see SC 2014, c 22, s 11).

[22] On July 25, 2018, the RPD adjourned the cessation application at Mr. Sharafaldin's request.

[23] On January 9, 2019, Mr. Sharafaldin filed the present application for leave and judicial review under section 22.1 of the *Citizenship Act*.

[24] In the originating Notice of Application, Mr. Sharafaldin framed his request for relief as follows:

> The Applicant seeks leave of the Court to commence an application for judicial review of the decision not to decide the Applicant's citizenship application – an application filed more than 18 years ago. The Applicant also seeks a writ of *mandamus* or an order to compel the Minister of Citizenship and Immigration, as represented by any Citizenship Official or Citizenship Judge, to resume processing forthwith of the Applicant's application for citizenship; and, if the requirements for a grant of citizenship have been met, or were previously met but have lapsed solely due to an improper decision to not decide the application, for an order that the citizenship application be promptly processed to conclusion.

[25] On January 30, 2019, the RPD adjourned the cessation application again at Mr. Sharafaldin's request so that he could pursue this judicial review application. The Minister of Public Safety and Emergency Preparedness brought an application for leave and judicial review challenging the RPD's second decision to adjourn the cessation proceeding but that application was dismissed by Justice Grammond on September 11, 2019: see *Canada (Public Safety and Emergency Preparedness) v Sharafaldin*, 2019 FC 1168.

[26] Mr. Sharafaldin was granted leave to proceed with the present application for judicial review on April 18, 2019.

[27] When he commenced this application in January 2019, Mr. Sharafaldin was unaware that, over four years earlier, the processing of his citizenship application had been suspended under

section 13.1 of the *Citizenship Act*. He learned this only after he received an affidavit (affirmed on March 25, 2019) filed by the Minister in response to this application.

[28] In light of this and other additional information disclosed to Mr. Sharafaldin in connection with the judicial review application (including information disclosed in the course of the *Canada Evidence Act* section 38 proceeding), his request for relief has evolved since January 2019. The full articulation of the relief he now seeks is found in his Second Further Memorandum of Argument (dated March 26, 2021).

[29] In summary, Mr. Sharafaldin's position is that the Minister has unreasonably delayed making a decision on his citizenship application and he has been prejudiced by this delay. As a remedy, Mr. Sharafaldin seeks an order vacating the October 24, 2014, suspension of his 1999 citizenship application and an order directing the Minister to promptly conclude the processing of that application. He also asks the Court to impose substantive constraints on the Minister's consideration of the application. He seeks an order to prevent the Minister from refusing the application because he falls short of the residency requirement. He also seeks an order that would prevent the Minister from suspending the processing of the application again or refusing it on security or criminality grounds unless this is based on new information. (What constitutes new information will be considered below.) Although he does not expressly request that the Minister also be constrained from denying him an immigration clearance except on the basis of new information, in my view this is implicit in the overall purpose of this application.

[30] For its part, the respondent has focused on the validity of the section 13.1 suspension as a complete answer to this application. The respondent had little to say about the specific forms of mandatory relief Mr. Sharafaldin seeks.

## III. ANALYSIS

### A. *Introduction*

[31] Mr. Sharafaldin rests this application on two jurisprudential foundations. One is the power of the Court to grant an order of *mandamus*. The other is the power of the Court to grant a remedy for abuse of process. I am satisfied that Mr. Sharafaldin is entitled to the relief he seeks under the well-established test for *mandamus* and related principles. Consequently, it is not necessary to consider the doctrine of abuse of process.

### B. *The Test for* Mandamus

[32] Paragraph 18.1(3)(a) of the *Federal Courts Act*, RSC 1985, c F-7 provides that, on an application for judicial review, the Federal Court may "order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing." Pursuant to subsection 18.1(4) of the *Federal Courts Act*, such relief may be granted if, among other grounds, the reviewing Court is satisfied that the federal board, commission or other tribunal "refused to exercise its jurisdiction." While the term is not used here, there is no question that this power encompasses the common law prerogative writ of *mandamus*. See also paragraph 18(1)(a) of the *Federal Courts Act*, which expressly grants this Court the power to issue a writ of *mandamus.* As well, when a reviewing court refers a matter

back to an administrative decision maker, this may be subject to "such directions as it considers to be appropriate" (*Federal Courts Act*, paragraph 18.1(b)).

[33] Justice Little recently offered the following concise description of the remedy of *mandamus*:

> *Mandamus* is an order that compels the performance of a public legal duty. The duty is typically set out in a statute or regulation. An order of *mandamus* is the Court's response to a public decision-maker that fails to carry out a duty, on successful application by an applicant to whom the duty is owed and who is currently entitled to the performance of it. The test for *mandamus* thus requires careful consideration of the statutory, regulatory or other public obligation at issue, to determine whether the decision-maker has an obligation to act in a particular manner as proposed by an applicant and whether the factual circumstances have triggered performance of the obligation in favour of the applicant.
>
> (*Wasylynuk v Canada (Royal Mounted Police)*, 2020 FC 962 at para 76)

[34] *Apotex v Canada (Attorney General)*, [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 as follows:

(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 *Lukacs v Canada (Transportation Agency)*, 2016 FCA 202 at para 29.

[35] In cases like the present one, where the alleged public legal duty is the duty to make a decision on a matter, a key issue is whether the third *Apotex* requirement is met. The right to the performance of the duty to make a decision 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: see *Apotex* at 767.

[36] In *Conille v Canada (Minister of Citizenship and Immigration)*, [1999] 2 FC 33, which also 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.

[37] Where unreasonable delay in making a decision is established and the other requirements for *mandamus* are also satisfied, the decision maker will typically be required to make a decision within a timeframe set by the Court: see, for example, *Conille*, *Abdolkhaleghi v Canada (Minister of Citizenship and Immigration)*, 2005 FC 729, *Thomas v Canada (Public Safety and*

*Emergency Preparedness)*, 2020 FC 164, and *Almuhtadi v Canada (Citizenship and Immigration)*, 2021 FC 712.

[38] Mr. Sharafaldin's request for mandatory relief raises two fundamental issues. The first concerns the implications of the *Citizenship Act* section 13.1 suspension for the *Apotex* test. In particular, does the suspension defeat Mr. Sharafaldin's contention that, because the decision has been unduly delayed, the Minister is under a duty to render a decision in his case without further undue delay or, conversely, that he has the right to a decision from the Minister without further undue delay? This will be examined further below.

[39] The second fundamental issue concerns whether, if Mr. Sharafaldin is entitled to a decision from the Minister without further undue delay, he is also entitled to have substantive constraints placed on the Minister's consideration of his citizenship application. This is an exceptional remedy but the basis for imposing such constraints is well-established in the jurisprudence.

[40] In some cases, an applicant for judicial review may maintain that, separate and apart from any question of unreasonable delay, they are entitled not only to a decision but to a particular outcome. *Mandamus* in this form is available "only where the facts and law are such that the administrative decision-maker has no choice and must determine the matter in a particular way" (*Sexsmith v Canada (Attorney General)*, 2021 FCA 111 at para 40). This is consistent with the general proposition that, in exceptional circumstances, a reviewing court may render the decision that should have been rendered by the administrative decision maker when that decision maker

"could not reasonably come to any other decision on the facts and the law" (*Canada (Attorney General) v Philps*, 2019 FCA 240 at para 41). This is warranted because "no practical end" would be served by returning the matter to the decision maker: see *Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 at paras 52-53. As well, prolonging the matter by referring it back to the administrative decision maker could cause prejudice to the affected party and undermine confidence in the administration of justice: see *Philps* at para 42; see also *LeBon v Canada (Attorney General)*, 2013 FCA 55 at para 14, and *Canada (Citizenship and Immigration) v Tennant*, 2019 FCA 206 at paras 72-74 ("*Tennant FCA*"). The reviewing court will therefore make an exception to the usual rule and decide the underlying matter on its merits.

[41] I do not understand Mr. Sharafaldin to go quite this far in his request for relief. That is to say, I do not understand him to be asking the Court to declare that he is a Canadian citizen (as occurred in *Fisher-Tennant v Canada (Citizenship and Immigration)*, 2018 FC 151 [appeal by the Minister quashed: see *Tennant FCA*]). Nor does he ask the Court to order the Minister to grant him citizenship (as occurred in *Murad v Canada (Citizenship and Immigration)*, 2013 FC 1089, and *Stanizai v Canada (Citizenship and Immigration)*, 2014 FC 74, for example). Rather, he argues that the Minister's consideration of his citizenship application should be constrained in certain material respects both as a remedy for the prejudice he has suffered because of the long delay in the processing of his citizenship application and to forestall any additional undue delay. Specifically, he argues that the Court should deem him to have met the residency requirement attaching to his 1999 application (even if in fact he falls short of having the requisite number of days of physical presence in Canada). He also argues that the Minister should be prevented from suspending his citizenship application again and from denying security, criminal or immigration

clearances unless these steps are based on new information. According to Mr. Sharafaldin, he is entitled to these additional mandatory orders because of the maladministration or administrative misconduct committed in connection with his citizenship application. He contends that the substantial delay in this case and the prejudice he has suffered because of it warrant placing these constraints on the Minister: see *D'Erico v Canada (Attorney General)*, 2014 FCA 95 at paras 16-21.

[42] Mr. Sharafaldin also contends that he is entitled to these orders as a remedy for the abuse of process committed in connection with the 1999 citizenship application. However, as I have already stated, it is not necessary to draw on this distinct source of remedial authority to find that he is entitled to the relief he seeks.

C. *The Section 13.1 Suspension*

[43] Mr. Sharafaldin submitted his application for citizenship over 14 years before section 13.1 of the *Citizenship Act* was enacted. There is no question that a citizenship application made before the enactment of section 13.1 can be suspended under that provision: see *GPP v Canada (Citizenship and Immigration)*, 2019 FCA 71 at para 1. The respondent contends that Mr. Sharafaldin's application for *mandamus* must fail because, with the section 13.1 suspension now in place, the Minister does not have a public legal duty to continue processing his citizenship application: see *Nilam* at para 27. I agree that, if the section 13.1 suspension is valid, the test for *mandamus* cannot be met. The determinative issue is whether the suspension is valid.

[44] The exercise of the power to suspend a citizenship application under section 13.1 is subject to judicial review: see *Niu v Canada (Citizenship and Immigration)*, 2018 FC 520 at para 14. If, for example, a suspension is for the purpose of an investigation into a matter that has nothing to do with an applicant's eligibility for citizenship, it could be found to be substantively unreasonable and would be set aside on judicial review. Likewise, a suspension to permit an investigation into a relevant matter under paragraphs 13.1(a) or (b) could be found to be substantively unreasonable if it lasted longer than is reasonably necessary to conduct the investigation in question: see *Niu* at para 14. In the latter circumstance, the material question is whether the investigation was conducted "within reasonable bounds": see *Zhang v Canada (Citizenship and Immigration)*, 2019 FC 938 at para 38; and *Gentile v Canada (Citizenship and Immigration)*, 2020 FC 452 at para 20.

[45] Since Mr. Sharafaldin did not know about the section 13.1 suspension when he commenced this application for judicial review, it was not challenged in his original application. Once he learned of the suspension, he incorporated a challenge to the validity of the decision to authorize it into the present application. In effect, a subsidiary application for *certiorari* has been added to the application for *mandamus.* No issue has been taken with Mr. Sharafaldin's right to challenge the reasonableness of the suspension in arguing for an order of *mandamus.* Indeed, it could not be otherwise given the respondent's reliance on the suspension as a complete answer to the *mandamus* application, a circumstance Mr. Sharafaldin only learned of years after it was authorized.

[46] As Justice McHaffie noted in *Gentile*, "the assessment of whether a suspension is reasonable or not will be highly fact-specific" (at para 21). In my view, among the relevant facts are: whether the suspension is for the purpose of an investigation that was already underway when the suspension was authorized; if so, how long that existing investigation had been going on; and whether there are sufficient reasons for why it had not yet been concluded. If there was such an investigation and it was already unreasonably delayed when the suspension was authorized, then any further delay pursuant to the suspension would *per se* not be within reasonable bounds (unless, for example, there had been a material change in circumstances such as the discovery of new information).

[47] I find that this is the case here.

[48] The document authorizing the suspension under section 13.1 notes that as of October 24, 2014, Mr. Sharafaldin "is a subject of interest in an active CBSA investigation." Considering the evidence before me on this application, I find that the only active CBSA investigation at the time the suspension under section 13.1 was authorized was the investigation into whether Mr. Sharafaldin had reavailed himself of the protection of Iran by returning there several times between March 2006 and February 2009. This finding is based on, among other things, a CBSA Case Review note concerning Mr. Sharafaldin dated June 17, 2014, stating: "The investigation into the possible cessation of his refugee status is ongoing." No other investigations are mentioned. See *Affidavit of Mahmoud Sharafaldin sworn October 8, 2019*, Exhibit B, pp. 228-29. (This exhibit consists of the results of an access to information request for Mr. Sharafaldin's CBSA records.) While there is information suggesting that the CBSA may

have been looking into other things as well, there is no evidence that it was these other concerns, as opposed to or in addition to the concern about potential cessation, that prompted the suspension of the processing of the citizenship application in October 2014.

[49] I also find that the investigation into the issue of cessation was already unreasonably delayed when the section 13.1 suspension was authorized. The CBSA had known of the circumstances potentially giving rise to a cessation of Mr. Sharafaldin's Convention refugee status at least since he returned to Canada from Iran on February 1, 2009. Mr. Sharafaldin was interviewed by the CBSA at that time about what he had been doing in Iran and why he had returned to Canada. His Iranian passport, laptop, cell phone, boarding pass, and other documents were seized "for investigative purposes." A report of the interview with Mr. Sharafaldin was written up at the time.

[50] On the record before me, when the section 13.1 suspension was authorized over five years later, the only meaningful step the CBSA had taken to inquire into the issue of whether Mr. Sharafaldin's Convention refugee status had ceased was to interview him again on January 10, 2014. There is no evidence of what, if anything, the CBSA had been doing until then to move the investigation forward. Nor is there any suggestion that the CBSA learned anything new from the 2014 interview that was relevant to the issue of cessation. Even after having conducted that interview, there is no evidence of any further progress in this investigation by the time the section 13.1 suspension was authorized nine months later. Nor is there any evidence that those responsible for investigating this matter were unable to deal with it in a timely way because of other responsibilities.

[51] Applying the *Conille* factors to the investigation into the issue of cessation, I find that the period of delay from February 1, 2009, until October 24, 2014, was longer than the process required, *prima facie*; that Mr. Sharafaldin bears no responsibility for the delay; and that no justification for the delay has been provided. This delay is, therefore, unreasonable.

[52] Consequently, I also find that the section 13.1 suspension is unreasonable because it purports to extend the time available for this investigation beyond the bounds of what is reasonable. The Minister has the responsibility – indeed, the duty – to investigate matters bearing on an applicant's eligibility for Canadian citizenship. However, since the investigation into the issue of cessation had already been unreasonably delayed as of October 24, 2014 (the date the suspension was authorized), no further delay can reasonably be considered "necessary" for the investigation, as section 13.1 requires. Furthermore, had I not been satisfied that the delay was already unreasonable as of October 24, 2014, I would still have found that the investigation fell outside reasonable bounds given that there is no explanation for why it took until June 24, 2015, for the Minister of Public Safety and Emergency Preparedness to file an application with the RPD seeking cessation of Mr. Sharafaldin's refugee protection or why that application was not served on Mr. Sharafaldin until April 23, 2018. Considering all the circumstances, the section 13.1 suspension must be set aside.

[53] In view of this conclusion, it is unnecessary to consider whether it was an abuse of process to invoke section 13.1 in this case.

D. *The Apotex Requirements*

[54] Setting aside the section 13.1 suspension only resolves the first of the *Apotex* requirements in Mr. Sharafaldin's favour. To be entitled to an order of *mandamus*, he must establish that he meets the remaining requirements as well. As I will explain, I find that he does.

[55] In my view, apart from the first requirement, the only point seriously in issue is whether Mr. Sharafaldin has a clear right to the performance of the duty to process and render a decision on his citizenship application (the third requirement).

[56] Mr. Sharafaldin has done everything required of him for a decision to be made. Before filing this application, he requested that a decision be made. The determinative question is whether the Minister has taken unreasonably long to make that decision. Answering this question requires another application of the *Conille* factors. In doing so, I am prepared to view the matter in the light that is most favourable to the Minister and assume that the section 13.1 suspension stopped the clock as of October 24, 2014 (even though, as set out above, I have concluded that the suspension is unreasonable). Thus, the relevant time period for this part of the analysis is from January 6, 2000 (when CIC received Mr. Sharafaldin's citizenship application) until October 24, 2014 (when the suspension was authorized).

[57] Nearly 15 years for the processing of a citizenship application is manifestly longer than the nature of the process required, *prima facie*. I am satisfied that Mr. Sharafaldin did not contribute to the delay in any way. On the contrary, the record demonstrates that he always

responded promptly to any request for information or action on his part. As for whether the Minister has justified the delay, with the exception of the period up until March 2004, I find that the matter was not pursued with reasonable diligence by the Minister and partner agencies and that no satisfactory justification for the delay after March 2004 has been provided.

[58] More particularly, given information available to the Minister and partner agencies, a determination had to be made as to whether Mr. Sharafaldin may be subject to paragraph 19(2)(a) of the *Citizenship Act*. Under this provision, a process may be engaged for a determination as to whether he should not be granted citizenship or administered the oath of citizenship because there are reasonable grounds to believe that he has engaged, is engaging or may engage in activity that constitutes a threat to the security of Canada. By the end of March 2004, CIC had determined that Mr. Sharafaldin would not be subject to this process and, accordingly, the security clearance was recorded as "cleared". (There was never any suggestion that Mr. Sharafaldin had a Canadian criminal record or outstanding charges that would preclude a criminal clearance so this had been easily confirmed.) I am satisfied that, while the processing of the citizenship application to this point had been lengthy, a satisfactory justification of the time it took *up to this point* has been provided.

[59] However, despite the determination that Mr. Sharafaldin had passed the criminal and security clearances, his citizenship application did not move forward. Instead, after March 2004, there were repeated requests by CBSA analysts to keep the application on hold while further inquiries were made. Notwithstanding the security and criminal clearances, concerns continued to be raised by CBSA analysts that Mr. Sharafaldin may be inadmissible to Canada under the

*IRPA* on grounds of security or organized criminality (see *IRPA*, paragraph 34(1)(d) and section 37).

[60] Under *Conille*, the Minister must provide a "satisfactory justification" for the delay in processing Mr. Sharafaldin's citizenship application after March 2004. I find that he has failed to do so.

[61] I recognize that the CBSA has a distinct mandate to inquire into potential issues of inadmissibility (including on security or criminality grounds) and to advise the Minister accordingly. This is a necessary step for the Minister to determine whether to grant an immigration clearance or not. There is, however, little explanation for the concerns that had arisen on the part of the CBSA and there is nothing to demonstrate what was being done to address them apart from references to inquiries that were being made. By December 2004, the CBSA was satisfied that no concerns relating to organized criminality could be substantiated so the only remaining issues related to security. While there continued to be vague references to concerns about organized criminality in subsequent years along with ongoing security concerns, there is little to show that the continuing delay was justified on either basis. To the contrary, there are long stretches of time when it appears that nothing at all was being done to resolve these concerns, one way or the other. In short, the delay after March 2004 (or, to be generous, after December 2004) is left largely if not entirely unexplained. Considering the length of the delay at issue, the mere fact that there were concerns about inadmissibility is insufficient to justify the delay given the absence of evidence that they were being investigated in a timely way and given the absence of evidence even today to substantiate them. Even assuming the concerns

on the part of the CBSA at the time were *bona fide*, on the evidence before me, they fall well short of justifying the years of delay that ensued.

[62] It is also significant that in April and May 2004, the CIC analyst responsible for overseeing Mr. Sharafaldin's citizenship application had noted in communications with CBSA analysts "the importance of this case" and the possibility of a *mandamus* application. Despite this, nothing was done to see that the matter was brought to a timely conclusion, one way or the other. Simply checking in for status updates (as was done over the following months and years) is insufficient to discharge the Minister's responsibility to ensure that the processing of the citizenship application is not delayed unduly.

[63] This unreasonable delay is only compounded by the unreasonable delay associated with the potential cessation of Mr. Sharafaldin's Convention refugee status, discussed above.

[64] Consequently, I find that the time taken to process Mr. Sharafaldin's citizenship application between March 2004 and October 2014 is unreasonable.

[65] I underscore that, as requested by counsel for Mr. Sharafaldin, in making this determination I have considered the entirety of the record, including information that has been withheld from Mr. Sharafaldin under section 38 of the *Canada Evidence Act.*

[66] Finally, the respondent submits that Mr. Sharafaldin is not entitled to an order directing the Minister to conclude the consideration of his citizenship application because he waived the

right to a timely decision by not objecting to the delay earlier or seeking a legal remedy with due diligence. I do not agree.

[67] At least in theory, there is no reason why an applicant for Canadian citizenship could not waive the right to a timely decision (either entirely or with respect to a discrete period of time). However, the waiver of a procedural right cannot be inferred simply from silence, inaction or lack of objection: see *Korponay v Attorney General of Canada*, [1982] 1 SCR 41 at 48-49; see also *Park v The Queen*, [1981] 1 SCR 64 at 74. Moreover, to be valid, the waiver of a right must be clear and unequivocal. It must be done "with full knowledge of the rights the procedure was enacted to protect and of the effect the waiver will have on those rights in the process" (*Korponay* at 49, original emphasis removed). Waiver can be explicit or implicit but in either case it must comply with this stringent test to be valid. The burden is on the party alleging waiver to establish it.

[68] These well-established principles apply to, among other things, a right to have something occur within a reasonable time, such as a criminal trial: see *R v Askov*, [1990] 2 SCR 1199 at 1228-29; *R v Morin*, [1992] 1 SCR 771 at 790; *R v Jordan*, 2016 SCC 27 at para 61; and *R v JF*, 2022 SCC 17 at paras 43-49. Of course, all these cases concern a right guaranteed by the *Charter*; however, the understanding of waiver on which they draw is not limited to *Charter* rights. While the right to a decision on his citizenship application within a reasonable time is obviously not a *Charter* right, the test for the waiver of a right in both *Charter* and non-*Charter* contexts is instructive when it comes to determining whether at any point Mr. Sharafaldin waived the right at issue here.

[69] In the present case, there is no evidence whatsoever that Mr. Sharafaldin clearly, unequivocally and with knowledge of the consequences waived his right to a timely decision on his citizenship application. Between 2001 and 2004 he had retained counsel to look into the matter but he decided not to bring an application for *mandamus* at that time (at least in part because he could not afford to). While it is true that he did not take any further affirmative steps to obtain a decision from the Minister until mid-2018 (steps that eventually led to the filing of this application in January 2019), this does not absolve the Minister of the public legal duty to render a timely decision.

[70] For these reasons, I find that Mr. Sharafaldin has satisfied all of the *Apotex* requirements and, therefore, is entitled to an order of *mandamus.*

E. *The Terms of the Order of* Mandamus

[71] In light of the jurisprudence discussed above, at a minimum Mr. Sharafaldin is entitled to a decision from the Minister without further undue delay. This can be achieved by placing time limits on the Minister's further consideration of this matter. The more difficult remedial question is whether he is also entitled to have substantive constraints placed on the Minister's decision-making.

[72] Mr. Sharafaldin seeks three such constraints: (1) that he be deemed to have met the applicable residency requirement; (2) that the Minister be precluded from suspending his citizenship application again except on the basis of new information; and (3) that the Minister be precluded from refusing him citizenship on security or criminality grounds except on the basis of

new information. As noted above, while he does not expressly ask for this, I think it is implicit in Mr. Sharafaldin's request for *mandamus* that he also asks that the Minister be precluded from refusing him citizenship because he has not received an immigration clearance unless this is based on new information.

[73] As also noted above, the respondent provided little in the way of submissions regarding the specific relief Mr. Sharafaldin is requesting in the event that the Court were persuaded that an order of *mandamus* should issue.

[74] As I will explain, I am satisfied that Mr. Sharafaldin has established that, in the exceptional circumstances of his case, the substantive constraints he seeks on the Minister's consideration of the citizenship application are warranted.

[75] Looking first at the residency requirement, as a result of the Minister's delay, the relevant period for determining eligibility has been frozen in amber for decades. This has prejudiced Mr. Sharafaldin because his residency appears to fall slightly short of what is required (apparently by 79 days of the required 1,095 days) and he therefore would require a discretionary exemption from the usual residency requirement. However, the evidence demonstrates with respect to multiple qualifying periods in subsequent years that he could easily have met the residency requirement. Indeed, it appears that Mr. Sharafaldin has not left Canada again since he returned in February 2009. Had the Minister denied the 1999 citizenship application in a timely way, Mr. Sharafaldin could have reapplied and locked in a different qualifying period that would not have required any exercise of discretion in his favour. Even if that application were to run

into other difficulties, the residency requirement would not be an issue. In these circumstances, it would be unfair for the Minister to refuse the application now on the basis that, in relation to the qualifying period for the 1999 application, Mr. Sharafaldin falls short of what is required.

[76] That being said, I am not persuaded that the appropriate remedy is to "deem" Mr. Sharafaldin to have met the residency requirement, as he suggests. Rather, the Minister should be precluded from refusing the application on the basis that Mr. Sharafaldin does not meet the residency requirement.

[77] Second, the Minister's delay in processing the citizenship application has caused actual prejudice to Mr. Sharafaldin in relation to the application in another way as well. Because the processing of the application was not completed within a reasonable time (which, in my view, having regard to all the circumstances, would have been by shortly after March 2004), Mr. Sharafaldin now faces serious adverse legal consequences for having returned to Iran between 2006 and 2009. Those potential consequences only came to adhere to his actions retrospectively because of amendments to the *IRPA* in 2012, years after he travelled to Iran and well over a decade after he first applied for Canadian citizenship. Specifically, as set out above, because of these amendments, if Mr. Sharafaldin's Convention refugee status is found to have ceased, he will lose not only that status but also his status as a permanent resident. And if he loses his status as a permanent resident, he will be ineligible for Canadian citizenship. This would not have been the case had his citizenship application been processed within a reasonable time. The only effective remedy for this prejudice is to constrain the Minister from delaying the

citizenship application or the administration of the oath of citizenship on the basis that there is now a proceeding before the RPD dealing with the issue of cessation.

[78] In reaching this conclusion, I have given significant weight to the fact that Mr. Sharafaldin likely could not obtain a remedy for this particular form of prejudice from the RPD. The RPD would likely consider its jurisdiction to be limited to the conduct of the proceeding before it and, as a result, it would not consider the critical period of delay that is in issue here – namely, the delay that accrued before the cessation proceeding commenced: see *Seid v Canada (Citizenship and Immigration)*, 2018 FC 1167 at paras 28-31; and *Lezama Cerna v Canada (Citizenship and Immigration)*, 2021 FC 973 at para 43.

[79] Looking at the issue more broadly, for similar reasons, I am satisfied that the Minister should be precluded from suspending the application for any other reason except one relating to new information.

[80] The line for determining whether information is new or not could be drawn at any number of different points in the history of this matter. One possibility is October 24, 2014, the date the section 13.1 suspension was authorized. This, however, would undermine the effectiveness of the *mandamus* order in the particular circumstances of this case. While the fact that Mr. Sharafaldin *could* be subject to a cessation application was known to the Minister in October 2014, the fact that a cessation application had actually been brought could not have been known until later (because of the delay in moving forward with that application).

[81] Mr. Sharafaldin has suggested that the line should be drawn as of January 9, 2019, the date he filed this *mandamus* application. In the particular circumstances of this case, I agree that this is the appropriate place to draw the line. Doing so balances, on the one hand, Mr. Sharafaldin's right to an effective remedy for the unreasonable delay and, on the other hand, the public interest in ensuring that the Minister can respond appropriately to information that is unrelated to that delay. Drawing the line at this point prevents the unfairness of the citizenship application being suspended again for any reason relating to the potential cessation of Mr. Sharafaldin's refugee status arising from his trips to Iran between 2006 and 2009 while also leaving it open to the Minister to authorize another suspension on reasons unrelated to this (provided this is based on new information). Accordingly, the Minister will not be permitted to suspend the processing of the citizenship application or the administration of the citizenship oath unless the reason for doing so relates to information that post-dates the filing of the *mandamus* application or, if the information pre-dates the filing of the *mandamus* application, it was not known to the Minister or partner agencies before then and could not have been known to them through the exercise of reasonable diligence.

[82] Finally, I am satisfied that the Minister and partner agencies have had more than ample time to investigate all of the concerns disclosed in the record before me in relation to security or criminality (whether organized or otherwise) that have held up the immigration clearance. No further delay of the processing of the citizenship application on this basis is warranted. Thus, I agree with Mr. Sharafaldin that the Minister's consideration of this matter must be constrained in this respect as well. This is a necessary and appropriate remedy for the maladministration of the citizenship application (in particular, in relation to the immigration clearance) since March 2004.

As well, given the passage of time, it is likely that the security and criminal clearances have lapsed and will need to be revisited. However, since they have been granted previously, it would be unfair and unreasonable for the Minister to withhold them now except on the basis of new information. Accordingly, the Minister will also be precluded from withholding security, criminal or immigration clearances unless this is based on new information (as defined in paragraph 81, above).

[83] The precise terms of the Court's order are set out below.

F. *Certified Question*

[84] Exceptionally, the Court agreed to give the parties an opportunity to review this decision before they would be asked for their position on whether a serious question of general importance should be stated under paragraph 22.2(d) of the *Citizenship Act.* The parties are therefore asked to confer and, if possible, communicate a joint position regarding whether any questions are proposed for certification and, if so, the wording of any such question(s). This communication shall be provided to the Court within 14 days of the date of this decision. In the event that the parties cannot agree, they shall each serve and file written submissions in support of their respective positions within 14 days of the date of this decision. These submissions may be in letter form and shall not exceed three single-spaced pages in length. Reply submissions in letter form not exceeding two single-spaced pages in length shall be served and filed within 7 days of the exchange of the parties' principal submissions. If additional time for any of these steps is required, the parties may submit an informal request to the Court.

G. *Costs*

[85] At the hearing of this application, counsel for Mr. Sharafaldin submitted not only that there are special reasons warranting an award of costs (as required by Rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22) but also that those costs should be on a solicitor/client scale. The respondent opposes costs on any scale and did not seek costs in the event that the application is dismissed.

[86] I urged the parties to confer to see whether they might be able to agree on an appropriate award of costs should the application be granted. In any event, I also advised the parties that I would reserve on the issue of costs pending receipt of further submissions from them. Accordingly, I would ask the parties to address the issue of costs in the same manner and on the same timetable set out in paragraph 84, above.

IV. CONCLUSION

[87] For these reasons, the application for judicial review is allowed. An Order will issue including the following terms:

a) the October 24, 2014, suspension of Mr. Sharafaldin's 1999 citizenship application under section 13.1 of the *Citizenship Act* is set aside;

b) the Minister shall promptly conclude Mr. Sharafaldin's application for Canadian citizenship;

c) the Minister's consideration of the application shall be subject to the following constraints:

(i) the Minister may not invoke section 13.1 or subsection 14(1.1) of the *Citizenship Act* except for reasons related to new information – i.e. information that post-dates January 9, 2019, or, if the information pre-dates this, it was not known to the Minister or partner agencies before then and could not have been known to them through the exercise of reasonable diligence;

(ii) the application shall not be refused on the basis that Mr. Sharafaldin does not meet the residency requirement;

(iii) security, criminal, and immigration clearances shall be completed within 60 days of the date of this Order;

(iv) the Minister shall not withhold a security, criminal or immigration clearance except on the basis of new information – i.e. information that post-dates January 9, 2019, or, if the information pre-dates this, it was not known to the Minister or partner agencies before then and could not have been known to them through the exercise of reasonable diligence;

(v) any further action or information required from Mr. Sharafaldin to complete the processing of his citizenship application shall be requested from him within 60 days of this Order;

(vi) Mr. Sharafaldin shall be given a reasonable opportunity to perform the requested actions and to provide the requested information;

(vii) a decision on the application shall be made within 30 days of the clearances being completed or Mr. Sharafaldin completing any actions and providing any information requested of him, whichever is later.

[88] Recognizing that circumstances could arise that may warrant a modification of this timeline for a decision, either party may move to vary the terms of the Court's Order. If the request is not opposed, it may be made informally. If the request is opposed, motion records will be required.

[89] The issues of costs and whether a question arises for certification will remain under reserve pending receipt of further submissions from the parties.

[90] Finally, Mr. Sharafaldin asks that I continue to case manage this matter in order to deal with any motions to vary the terms of the Court's Order and to monitor compliance with that Order. I agree that some form of continuing involvement by the Court would be appropriate. However, since there are matters that still remain under reserve, it is not necessary to include a term to this specific effect at this time. If so advised, Mr. Sharafaldin may renew this request at a later date.

**JUDGMENT IN T-64-19**

**THIS COURT'S JUDGMENT is that**

1. The application for judicial review is allowed.

2. The October 24, 2014, suspension of Mr. Sharafaldin's 1999 citizenship application under section 13.1 of the *Citizenship Act* is set aside.

3. The Minister shall promptly conclude Mr. Sharafaldin's application for Canadian citizenship.

4. The Minister's consideration of the application shall be subject to the following constraints:

    (a) the Minister shall not invoke section 13.1 or subsection 14(1.1) of the *Citizenship Act* except for reasons related to new information – i.e. information that post-dates January 9, 2019, or, if the information pre-dates this, it was not known to the Minister or partner agencies before then and could not have been known to them through the exercise of reasonable diligence;

    (b) the application shall not be refused on the basis that Mr. Sharafaldin does not meet the residency requirement;

    (c) security, criminal, and immigration clearances shall be completed within 60 days of the date of this Order;

(d) the Minister shall not withhold a security, criminal or immigration clearance except on the basis of new information – i.e. information that post-dates January 9, 2019, or, if the information pre-dates this, it was not known to the Minister or partner agencies before then and could not have been known to them through the exercise of reasonable diligence;

(e) any further action or information required from Mr. Sharafaldin to complete the processing of his citizenship application shall be requested from him within 60 days of this Order;

(f) Mr. Sharafaldin shall be given a reasonable opportunity to perform the requested actions and to provide the requested information; and

(g) a decision on the application shall be made within 30 days of the clearances being completed or Mr. Sharafaldin completing any actions and providing any information requested of him, whichever is later.

5. The issues of costs and whether a question for certification arises will remain under reserve pending receipt of further submissions from the parties.

"John Norris"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-64-19 |
| **STYLE OF CAUSE:** | MAHMOUD SHARAFALDIN v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | HELD BY VIDEOCONFERENCE |
| **DATE OF HEARING:** | JUNE 10, 2021 |
| **JUDGMENT AND REASONS:** | NORRIS J. |
| **DATED:** | MAY 27, 2022 |

**APPEARANCES:**

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|---|---|
| Douglas Cannon | FOR THE APPLICANT |
| Helen Park | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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| Attorney General of Canada<br>Vancouver, British Columbia | FOR THE RESPONDENT |