Federal Court Cour fédérale

Date: 20230616

Docket: IMM-2836-22

Citation: 2023 FC 854

Ottawa, Ontario, June 16, 2023

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

ZULMEI SAMIDEH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant seeks a writ of *mandamus* to compel the Respondent to render a final decision on his pending application for permanent residence under the Family Class, which was submitted on November 28, 2018.

[2] For the reasons that follow, I find an order of *mandamus* is warranted. The Respondent has not provided an adequate justification for the unreasonable delay in rendering a final decision on the Applicant's permanent residence application. I will therefore grant this application for judicial review.

II. **Background Facts**

[3] The timeline of events leading to this application are undisputed.

[4] The Applicant is a 36-year old citizen of Afghanistan who has been residing in Vienna, Austria with permanent resident status since 2003.

[5] On November 28, 2018, the Applicant submitted an application for permanent residence to Immigration, Refugees and Citizenship Canada (IRCC) under the Family Class-Spousal Sponsorship category.

[6] On January 15, 2019, IRCC acknowledged receipt of the application.

[7] On March 8, 2019, IRCC informed the Applicant's spouse that she met the eligibility requirements as a sponsor.

[8] On March 25, 2019, the Applicant received notice that the application was being transferred to Vienna, Austria for further processing.

[9] On January 14, 2020, IRCC requested a copy of the Applicant's CV containing a detailed description of education, qualifications, and experience for the prior ten years.

[10] On January 20, 2020, the Applicant provided IRCC with the requested information.

[11] On February 19, 2020, IRCC notified the Applicant of an interview that took place, as scheduled, on March 11, 2020.

[12] Since the completion of the interview more than three years ago, the Applicant has repeatedly requested updates on the status of his application.

[13] The source of the delay has been the required security background checks.

[14] On December 14, 2021, the Respondent followed up with "partner agencies" regarding the outstanding security screening, and requested that prioritization be given to this file.

[15] On January 14, 2022, the Respondent followed up a second time with "partner agencies" regarding the outstanding security screening.

[16] On January 17, 2022, it was confirmed that the Applicant's file would be given priority status.

[17] The processing time posted on IRCC's website for this class of permanent residence applications at the time of submission is 12 months.

[18] To date the Application has been in process for 51 months.

[19] The Applicant has a spouse and two young children in Canada. He has never met his youngest daughter, Haniya, who is now four years old.

[20] After this application for judicial review was commenced, in January 2023, the Respondent indicates that the required security background checks returned a "non favourable result" with no further information as to why or next steps in the process.

III. **Issues and Standard of Review**

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

[22] An application for a writ of *mandamus* does not require a determination of the applicable standard of review: *Callaghan v Canada (Chief Electoral Officer),* 2010 FC 43 at para 64.

IV. **Analysis**

[23] The legal test to be applied when determining whether to grant an order for mandamus is set out in *Kalachnikov v Canada (Minister of Citizenship and Immigration),*2003 FCT 777,

citing *Apotex Inc. v Canada (Attorney General)*, 1993 CanLII 3004 (FCA), [1994] 1 FC 742 (CA), affirmed by the Supreme Court of Canada in [1994] 3 SCR 1110:

1. There is a public duty to the applicant 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 a prior demand for performance of the duty, a reasonable time to comply with the demand, and a subsequent refusal, which can be either expressed or implied;
4. There is no other adequate remedy.
5. The "balance of convenience" favours the applicant (*Apotex Inc. v. Canada (A.G.)*, 1993 CanLII 3004 (FCA), [1994] 1 F.C. 742 (C.A.), aff'd 1994 CanLII 47 (SCC), [1994] 3 S.C.R. 1100, *Conille v. Canada (Minister of Citizenship and Immigration)*, [1992] 2 F.C. 33 (T.D.) [*Conille*].

[24] In *Conille,* at paragraph 23, Madame Justice Tremblay-Lamer set out three requirements that must be met for a 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 satisfactory justification.

[25] The Applicant submits that he provided the Respondent with all required information in a timely manner, that he is not responsible for the delay at issue, and that no satisfactory explanation has been provided by the Respondent. On this basis, the Applicant contends that he meets all the requirements for an order of *mandamus* to be issued as set out in *Apotex.*

[26] The Respondent does not dispute that the Applicant is owed a duty to act, that there is no other adequate remedy available, and that there is no equitable bar to relief.

[27] The Respondent only disputes the Applicant's assertion that the delay is unreasonable.

[28] In my view, the first two prongs of the *Conille* test are clearly met.

[29] With respect to the first prong, this Court has found that the respondent's initial time estimate can be used to gauge what reasonable amount of time should be required: *Mersad v Canada (Citizenship and Immigration)*, 2014 FC 543 at para 17. According to the Applicant, the average processing time for this class of applications is 12 months. The Respondent has not argued otherwise. At the time of the hearing of this application, the Applicant will have been waiting 54 months, which is nearly four times the average. Therefore, I find the delay in question is *prima facie* longer than the nature of the process required.

[30] With respect to the second prong of the *Conille* test, there is no indication that the Applicant is in any way responsible for the delay. He has satisfied the procedural requirements under the *IRPA* and the *IRPR* by providing the necessary supporting documentation and paying

the required processing fees. He has also promptly responded to IRCC at each stage of the process, providing all requested information and documentation within the allotted timeframe.

[31] The determinative issue then, is whether the Respondent has provided a satisfactory justification for the delay in processing the Applicant's permanent residency application. For the reasons that follow, I am not persuaded that they have.

[32] The Respondent's position is that background checks and security concerns are a necessary and important requirement under the *IRPA* and justify lengthy processing delays in permanent residence applications, citing *Carrero v Canada* (*Citizenship and Immigration*), 2021 FC 891 at paras 14 & 15 [*Carrero*] and *Jaber v Canada (MCI),* 2013 FC 1185 [*Jaber*] at para 26.

[33] While it is true that the need to conduct security enquiries can potentially be a satisfactory explanation for long processing delays, I am not satisfied that is the case here.

[34] The cases cited by the Respondent are distinguishable on the facts. In *Carrero* for example, the delays were attributed to concerns about the Applicant's military service in Venezuela and potential involvement in a political coup that took place in 1992. There is no evidence to suggest that the Applicant in the case at bar is suspected of involvement in war crimes or criminality.

[35] In *Jaber,* the Respondent argued that the number of documents and complexity of the file, as well as the applicant's own conduct contributed to the delay. No such suggestion has been

made here. Indeed, the Respondent has provided no details whatsoever in their affidavits as to what security concerns or issues justify the delay, if any.

[36] The Respondent relies on the blanket statement that security clearance is still pending, and can take months to years to process. This Court has repeatedly held that such an explanation alone is inadequate: *Kanthasamyiyar v Canada (Citizenship and Immigration)*, 2015 FC 1248 at paras 49-50, citing *Abdolkhaleghi v Canada (Minister of Citizenship and Immigration)*, 2005 FC 729 at para 26 [*Abdolkhaleghi]*.

[37] Specifically, in *Abdolkhaleghi,* Justice Tremblay-Lamer cautioned that a blanket statement that security checks are pending does not in itself constitute an adequate explanation, and that "[w]hat will constitute an adequate explanation will of course depend on the relative complexity of the security considerations in each case".

[38] The Respondent has not explained what, if anything, renders the Applicant's case relatively more complex or what security considerations have contributed to the delay. To the contrary, the Respondent's submissions suggest that the source of the delay is even unknown to them. I note that the Respondent twice followed up with its partner agencies for information on December 14, 2021 and January 14, 2022. While priority status was confirmed in January 2022, a "timeframe could not be given" with no information as to what was causing the delay in processing or what security concerns exist, if any.

[39] The Respondent submits that the "non favourable result" returned in January 2023 warrants further delays as it will require "additional steps to assess whether the applicant is admissible to Canada".

[40] Without further information as to what concerns resulted in the return of a "non-favourable" result, or whether the Applicant is inadmissible, this does not materially change the Applicant's circumstances. He remains in limbo, with no understanding as to what has caused many years of delay in the processing of his permanent residence application. He continues to be separated from his wife and children in total uncertainty as to the next steps in the process.

[41] For the foregoing reasons, I am not convinced that the Respondent has provided a satisfactory justification for the delay. As a result, the balance of convenience unquestionably favours the Applicant.

V. Order Sought

[42] The Applicant requests that IRCC process his permanent residency application within 30 days of the date of this decision.

[43] The Respondent has not made any submissions concerning how the Court ought to address the Order. I do recognize that the Respondent followed up three times during the security checks and was able to get the Applicant's application "prioritized" on January 17, 2022.

[44] I also acknowledge that post-hearing the Applicant was to be interviewed on May 9, 2023 and the Respondent stated that, “contingent on no additional potential inadmissibility arising from the Applicant’s interview, a reasonable timeframe for rendering a decision on the Applicant’s outstanding permanent resident application would be 60 to 90 days from the date of his interview.”

[45] No determination has yet been made and the Court has not received any update following the interview of the Applicant, assuming it occurred as scheduled. It appears a Court Order with a firm deadline to determine the Applicant’s permanent residency application is now required.

VI. **Conclusion**

[46] For the foregoing reasons, I find IRCC’s delay in processing the Applicant’s permanent residency application is unreasonable. I therefore grant this application for judicial review and will order IRCC to determine the Applicant’s permanent residency application within 90 days of May 9, 2023.

[47] Post-hearing, the Applicant asked for costs of $6500 based on the amount of delay. The Respondent objects as no reference to costs was previously made and no submissions were provided to the Court orally or in writing at the time of the hearing. The Respondent also points out that they independently followed up three times during the security check and succeeded in having the application prioritized on January 17, 2022. As I have noted however, the prioritization has failed to produce an outcome for the Applicant.

[48] Having considered the matter, I will order costs of $2500, all in, to the Applicant, payable within 30 days of the date of this Judgment and Reasons.

JUDGMENT IN IMM-2836-22

THIS COURT'S JUDGMENT is that:

1. This application is granted.
2. The Respondent is ordered to determine the Applicant's permanent residency application within 90 days of May 9, 2023.
3. Costs of $2500, all-inclusive, are payable to the Applicant within 30 days of the date of this Judgment and Reasons.

"E. Susan Elliott"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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