Federal Court  Cour fédérale

Date: 20210628

Docket: IMM-1048-20

Citation: 2021 FC 678

Ottawa, Ontario, June 28, 2021

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

GALDINO SANCHEZ AGUIRRE

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application by Galdino Sanchez Aguirre, the applicant, for *mandamus* requiring the respondent, the Minister of Citizenship and Immigration (the Minister), to make a decision on the applicant's June 27, 2019 application for an electronic Travel Authorization (eTA). A secondary issue pertains to a letter requesting supplemental documents from the applicant that the applicant and his counsel claim was never received.

[2] For the reasons that follow, this application is granted.

II. **Background**

[3] The applicant is a citizen of Mexico who applied for an eTA on June 27, 2019.

[4] On June 29, 2019, immigration officials requested further information regarding the applicant's criminal conviction for driving while under the influence of alcohol in Illinois in 2000. The applicant supplied the requested information on July 8, 2019.

[5] On July 24, 2019, the applicant's eTA application was referred to the Consulate of Canada in New York for assessment. He was deemed inadmissible to Canada on the basis of s.36(2)(b) of the *Immigration and Refugee Protection Act,* SC 2001, c 27 [*IRPA*].

[6] The eTA application was then referred to the Embassy of Canada in Mexico (the Embassy) for further review. On October 17, 2019, the Operations Support Centre determined that the applicant was inadmissible for misrepresentation, but was not criminally inadmissible.

[7] The applicant, through his counsel, inquired about his pending eTA application on a regular basis between August 2019 and January 2020.

[8] On February 11, 2020, the applicant filed this application, seeking an order compelling the respondent to make a final determination on the eTA application.

[9] On September 2, 2020, an officer at the Embassy assessed the applicant's eTA application. The officer deemed the applicant rehabilitated pursuant to s.18 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 as more than 10 years had elapsed since the completion of his sentence.

[10] On September 7, 2020, the Embassy sent the applicant a letter requesting further documentation. The applicant states he only became aware of the letter upon receiving the Certified Tribunal Record (CTR) for this matter on April 21, 2021.

[11] The applicant relocated to his hometown when the Covid-19 pandemic began and his landlord, who took care of the mail for his mailing address, had not informed him that he had received a letter from the Embassy. The applicant says he spoke with his landlord to inquire about the letter and was informed that the landlord had also left the residence due to the pandemic and had not returned.

[12] Previously, the Embassy had been communicating with the applicant through his GCKey account and to his counsel via email.

[13] No final decision had been made regarding the applicant's eTA application as of the date of the hearing.

III. **Preliminary Issue**

[14] The Respondent is improperly named in the Application therefore effective immediately the name will be changed to “Minister of Citizenship and Immigration”.

IV. **Issues and Standard of Review**

[15] The parties identify a single issue:

1. Should the applicant be granted a writ of *mandamus* requiring the Minister to render a decision on his eTA application?

[16] 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.

V. **Analysis**

A. *Mandamus*

[17] In order for the Court to grant an order of *mandamus,* a legal public duty to act must exist; the duty must be owed to the applicant; the Court must be satisfied that the applicant has a clear right to the performance of that duty; there must be no other adequate remedy available; the order must be of some practical value or effect; there must be no equitable bar to the relief sought; and, the balance of convenience must warrant the issuance of the order: *Gagnon v Canada (Attorney General),* 2019 FC 1661 at para 37; *Apotex Inc v Canada (Attorney General),* [1994] 1 FC 742 (CA), aff’d [1994] 3 SCR 110.

[18] The respondent agrees, as do I, that the applicant is owed a duty to act. A public legal duty to process an applicant's permanent residence application has been recognized under s.11(1) of the *IRPA* which requires a foreign national to apply for a visa or other document required by the regulations: *Singh v Canada (Citizenship and Immigration),* 2010 FC 757 at para 50. I find that the respondent has a similar public legal duty to process the applicant's eTA application pursuant to s.11(1.01) of the *IRPA* which requires foreign nationals to apply for an eTA before entering Canada. The two provisions are similarly worded and are analogous.

[19] The respondent does not dispute that there is no other adequate remedy available, and that there is no equitable bar to relief.

[20] There is no indication of when a final determination on the applicant's eTA application will be made and an eTA is required in order to enter Canada as a foreign national.

[21] I see no equitable bar to an order of *mandamus.*

[22] The respondent disputes whether there is a clear right to performance, arguing that the delay in processing the applicant's eTA application is reasonable due to the applicant's criminal history, and further submits that the balance of convenience favours the respondent.

[23] A delay in performing a statutory obligation may be deemed unreasonable where the delay has been longer than the nature of the process required, *prima facie*; the applicant and his counsel are not responsible for the delay; and the authority responsible for the delay has not

provided satisfactory justification: *Thomas v Canada (Public Safety and Emergency Preparedness),* 2020 FC 164 at para 19.

[24] While I agree with the respondent that the 72 hour average processing time for an online eTA application is not to be expected given the applicant's criminal history, I am of the opinion that the delay, on its face, has been longer than the nature of the process required. The application at issue was submitted on June 27, 2019 and no decision had been rendered at the time of the hearing – nearly two years later.

[25] I also find there is no evidence that the applicant or his counsel is responsible for the delay. In fact, the applicant had regularly asked for updates regarding the status of his application.

[26] Finally, I am not convinced that the respondent has provided a satisfactory justification for the delay. The New York office deemed the applicant inadmissible on July 25, 2019. The Operations Support Centre subsequently deemed him rehabilitated on September 2, 2020. The 90 day period to submit further documentation in response to the September 7, 2020 letter, which the applicant states was not received by either the applicant or his counsel, had elapsed. The respondent has not shown that the delay is justified.

[27] The respondent submits that the delay is not the result of inaction or bad faith on the part of immigration officials and notes that the Covid-19 pandemic affected the operations of government departments, especially outside of Canada. While this may be the case, the eTA

application at issue was submitted months before the onset of the pandemic, and though I acknowledge processing times may be affected by the pandemic, I find the cumulative delay of nearly two years is unreasonable.

[28] Next, it is clear that the order sought would have some practical value regardless of what the final outcome of the eTA application may be. A final determination would allow the applicant to move forward from this state of procedural limbo.

[29] I will now turn to whether the balance of convenience favours granting *mandamus*.

[30] The respondent argues that the integrity of the Canadian immigration system requires that immigration officials thoroughly review applicants for entry, especially where the applicant has a criminal history. While this may be true, there is also a public interest in having a system which operates in an efficient, expeditious and fair manner: *Membreno-Garcia v Canada (Minister of Employment and Immigration)*, [1992] 3 FC 306 at para 18.

[31] The respondent has not indicated what other factors may favour the Minister in considering the balance of convenience. It appears a *mandamus* order would largely only affect the applicant's interests.

[32] It is unclear why the respondent has been unable to render a decision on this eTA application thus far. The respondent has stated that immigration officials have assessed the

applicant's criminal history in Illinois, his overstay in America, and his previous attempt to enter Canada on October 17, 2019.

[33] The applicant has now waited nearly two years for a decision on his eTA application. Without an order directing that a determination on this application be made, there is no telling how much longer the delay in processing his application might be.

[34] Given the lengthy wait, the absence of a decision on the applicant's eTA outweighs any inconvenience or prejudice to the respondent. The balance of convenience favours the applicant.

B. *The Embassy's request for further information*

[35] Where the respondent has no indication that communication has failed or been mis-delivered, the risk of non-delivery rests with the applicant: *Khan v Canada (Citizenship and Immigration)*, 2015 FC 503 at para 13. The applicant ought to have updated his mailing address when he moved at the onset of the Covid-19 pandemic to ensure he would receive any mailed communications from the respondent in regards to his application.

[36] However, previous communications between the respondent and the applicant and applicant's counsel were conducted by uploading correspondence to a GCKey account and via email to applicant's counsel. Thus, I believe the applicant reasonably had a legitimate expectation that the same procedures would be used to send future correspondence: *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 26.

[37] In the circumstances of this case, the applicant should be afforded an opportunity to respond to the Embassy's request for further documents. It was procedurally unfair of the respondent to change the established communication procedures. The application is therefore granted on the terms set out in the Judgment.

[38] The parties have made submissions regarding reasonable timelines to submit further documentation and render a decision on the applicant's eTA application. Those submissions are incorporated into the Judgment.

JUDGMENT in IMM-1048-20

THIS COURT'S JUDGMENT is that:

1. The name of the Respondent is changed to Minister of Citizenship and Immigration.
2. The application is granted on the following terms;
    a. The applicant shall respond to the respondent's request for supplemental documents within 30 days of this judgment.
    b. The respondent shall make and communicate a determination on the merits of the applicant's eTA application within 60 days of receiving the applicant's supplemental documents.
3. No costs are awarded.
4. There is no serious question of general importance for certification.

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1048-20
STYLE OF CAUSE:	GALDINO SANCHEZ AGUIRRE v CITIZENSHIP AND IMMIGRATION CANADA
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DATED:	JUNE 28 2021

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