Federal Court Cour fédérale

Date: 20230712

Docket: IMM-6881-22

Citation: 2023 FC 946

Montreal, Quebec, July 12, 2023

PRESENT: Mr. Justice Gascon

BETWEEN:

TALA GHADDAR
MOHAMAD SAAD
AYA SAAD
LILAS SAAD

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The principal applicant, Ms. Tala Ghaddar, her husband, Mr. Mohamad Saad, and their three children, Aya Saad, Lilas Saad, and Mirabelle Saad [together, the Saad family], are citizens of Lebanon. They ask the Court to issue a writ of *mandamus* to compel Immigration, Refugees

and Citizenship Canada [IRCC] to process their application for permanent residence [Application], which was filed more than six years ago, in 2016.

[2] The Saad family submits that IRCC has unreasonably delayed their Application. They seek the following reliefs:

1. A declaratory order finding that IRCC refused to process their Application in a timely manner and has unreasonably delayed the processing of their Application;

2. An order for a writ of *mandamus* directing IRCC to complete the processing of their Application in accordance with the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] and the *Immigration and Refugee Protection Regulations*, SOR/2002-227;

3. A declaratory order requiring IRCC to complete the processing of their Application within 90 days of IRCC's receipt of the requested documentation pertaining to the addition of Mirabelle Saad to their Application;

4. A declaratory order stating that the High Commission of Canada – United Kingdom office has

    a) inordinately delayed the conclusion of this case; and

    b) acted unfairly in failing to disclose the reasons for the delay in concluding the processing of this case.

5. Their costs for this proceeding; and

6. Such further and other relief as may be advised and this Honourable Court considers appropriate in the circumstances.

[3] For the reasons that follow, the Saad family's application for judicial review will be granted in part. Having considered the evidence and the applicable law, I am satisfied that the Saad family meets the requirements of the test for an order of *mandamus*. The delay incurred for the treatment of their Application is clearly unacceptable and unreasonable in the circumstances,

as IRCC has been unable to provide any explanation or justification for it. This situation warrants the Court's intervention and the issuance of an order requiring IRCC to complete the processing of the Saad family's Application within 90 days. However, the Court does not need to grant the other declaratory remedies requested by the Saad family, since an order of *mandamus* will suffice to correct the unfortunate situation created by the failure to process their permanent residency Application in a timely manner.

II. Background

A. *The factual context*

[4] In 2016, Ms. Ghaddar applied for permanent residence in Canada through the economic immigration class, under the Provincial Nominee Program [PNP]. She listed Mr. Saad and her then only daughter, Aya Saad, as accompanying dependants.

[5] On December 31, 2016, after submitting her information into the "Express entry pool", Ms. Ghaddar received a letter from the Ontario Ministry of Citizenship and Immigration — as it then was, confirming that she had been nominated under the PNP.

[6] On January 4, 2017, Ms. Ghaddar received an invitation to apply for permanent residence under the PNP, through the Express Entry System.

[7] After Ms. Ghaddar, Mr. Saad, and their first daughter Aya completed the medical examinations required by IRCC, Ms. Ghaddar received a letter on February 22, 2017, confirming that the Application had been received.

[8] On May 13, 2017 and on August 22, 2017, respectively, IRCC requested Saudi Arabian police certificates for Ms. Ghaddar and her husband, and copies of passport biodata pages along with information regarding their height and eye colour. The requested documents and information were submitted to IRCC on September 27, 2017.

[9] In November 2017, Ms. Ghaddar and her husband submitted an updated "Schedule A form" to provide missing information, as requested by IRCC. From that moment, IRCC had all the relevant information to process the Saad family's Application.

[10] On August 2, 2019, Ms. Ghaddar gave birth to her second daughter, Lilas Saad. On November 4, 2019, Ms. Ghaddar requested that Lilas be added to the Application. After submitting the required information, Ms. Ghaddar received a confirmation on January 10, 2020 that Lilas had been added to the Application.

[11] On April 21, 2022, Ms. Ghaddar gave birth to her third daughter, Mirabelle Saad. Similarly, Ms. Ghaddar requested that Mirabelle be added to the Application. Ms. Ghaddar requested an extension of time in order to provide the required documents to IRCC because of delays in obtaining Mirabelle's passport. As of October 2022, Mirabelle's documents were still unavailable.

[12] Since May 2018, Ms. Ghaddar requested updates from IRCC on numerous occasions. The only replies she ever received from the Canadian immigration authorities were that background checks were still ongoing, or that further delays were to be expected due to the COVID-19 pandemic.

[13] On July 19, 2022, the Saad family filed this application for judicial review.

B. ***Pending security clearance***

[14] In an affidavit dated May 17, 2023 [Bishop affidavit], Keri Bishop, the Unit Manager of the Economic Class Unit in the London Migration Office, mentioned that she had knowledge of the Saad family's file being in their team's inventory of files in process.

[15] The Bishop affidavit indicated that as of May 2023, the security screening of Mr. Saad remained pending, but that IRCC did not have control over the duration or timelines of the security screening process, as it is coordinated by IRCC's institutional partners.

[16] Keri Bishop also stated that in her experience, "security screenings take on average 12 months," but that on some occasions they might be of different lengths due to the complexity of the case and of the individuals involved.

[17] Finally, Keri Bishop declared that the processing of the Application might have been affected by the lockdowns and other restrictions as a result of the COVID-19 pandemic.

III. Analysis

A. *Order of* mandamus

[18] An order of *mandamus* is an extraordinary remedy pursuant to which the Court "can compel the performance of a clear affirmative legal duty by a public authority" (*Ahousaht First Nation v Canada (Fisheries, Oceans and Coast Guard)*, 2019 FC 1116 [*Ahousaht*] at para 73). 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" (*Wasylynuk v Canada (Royal Mounted Police)*, 2020 FC 962 [*Wasylynuk*] at para 76). As summarized by Justice Little in *Wasylynuk*, 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* at para 76).

[19] In *Apotex Inc v Canada (Attorney General)*, 1993 CanLII 3004 (FCA), [1994] 1 FC 742 [Apotex], aff'd [1994] 3 SCR 110, the Federal Court of Appeal stated that the following cumulative conditions must be satisfied before a court can issue a writ of *mandamus*:

> 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;

1. Where the duty sought to be enforced is discretionary, the following rules apply:

    a. in exercising a discretion, the decision-maker must not act in a manner which can be characterized as "unfair", "oppressive" or demonstrate "flagrant impropriety" or "bad faith";

    b. mandamus is unavailable if the decision-maker's discretion is characterized as being "unqualified", "absolute", "permissive" or "unfettered";

    c. in the exercise of a "fettered" discretion, the decision-maker must act upon "relevant", as opposed to "irrelevant", considerations;

    d. mandamus is unavailable to compel the exercise of a "fettered discretion" in a particular way; and

    e. mandamus is only available when the decision-maker's discretion is "spent"; i.e., the applicant has a vested right to the performance of the duty.

1. No other adequate remedy is available to the applicant.

2. The order sought will be of some practical value or effect.

3. The Court in the exercise of its discretion finds no equitable bar to the relief sought;

4. On a "balance of convenience" an order in the nature of *mandamus* should (or should not) issue.

[Citations omitted.]

(*Ahousaht* at para 72, citing *Apotex* at pp 766–769)

[20] These criteria have been confirmed by the Federal Court of Appeal in *Hong v Canada (Attorney General)*, 2019 FCA 241 at paragraph 10, in *Canada (Health) v The Winning Combination Inc*, 2017 FCA 101 at paragraph 60, and in *Lukacs v Canada (Transportation Agency)*, 2016 FCA 202 at paragraph 29.

[21] The Minister of Citizenship and Immigration [Minister] submits that the Saad family has not established that IRCC has failed to discharge its public duty, that the delay in the processing of their Application is unreasonable, or that the balance of convenience favours the issuance of an order of *mandamus*. The Minister does not dispute the remainder of the conditions set out in *Apotex*, and I am satisfied that the Saad family meets them. Therefore, I will only examine the three conditions at issue below.

(1) Failure to discharge a public duty

[22] The Saad family claims that they have a clear right to the performance of the public duty that IRCC owes them, since they performed all the conditions precedent for the consideration of their permanent residency Application.

[23] For his part, the Minister submits that the Saad family has not demonstrated that IRCC failed to discharge its public duty to act on the Application because IRCC has been active in processing it. According to the Minister, the Global Case Management System [GCMS] notes demonstrate that since receiving the Application, “IRCC conducted numerous assessments and verifications, including criminality, medical, education, employment, eligibility for the program and security” (Respondents’ Memorandum of fact and law at para 11).

[24] I am not persuaded by the Minister's arguments.

[25] First, it should be noted that the Saad family completed all conditions precedent giving rise to IRCC's public duty, in that they filed relevant information and documents and paid the applicable processing fees in a timely manner. They also repeatedly demanded that the duty be performed (*Dragan v Canada (Minister of Citizenship and Immigration) (TD)*, [2003] 4 FC 189 [*Dragan*] at para 45). Thus, the Minister owes them the performance of a public duty according to subsection 11(1) of the IRPA (*Bidgoly v Canada (Citizenship and Immigration)*, 2022 FC 283 [*Bidgoly*] at para 30; *Singh v Canada (Minister of Citizenship and Immigration)*, 2010 FC 757 at paras 50, 54; *Dragan* at para 43).

[26] Second, despite the initial steps that IRCC took to advance the Application, IRCC still has not processed it. The public duty is not to issue permanent residence applications, but rather to process them and provide a final result to the applicants, whether positive or negative (*Bidgoly* at para 30). This has not happened yet for the Saad family's Application, and the jurisprudence has established that "[n]eglect to perform the duty or unreasonable delay in performing it may be deemed an implied refusal to perform [the public duty]" (*Dragan* at para 45).

[27] Therefore, I am satisfied that the Saad family is still owed a clear public duty that the Minister impliedly refused to perform.

(2) Unreasonable delay

[28] To determine whether a delay in performing a public duty is unreasonable, the Court must look at the following three criteria:

> 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.
>
> (*Almuhtadi v Canada (Citizenship and Immigration)*, 2021 FC 712 [*Almuhtadi*] at para 32; *Thomas v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 164 at para 19; *Conille v Canada (Minister of Citizenship and Immigration)*, [1999] 2 FC 33 (FC) at para 23).

[29] As mentioned above, the Minister's affiant, Keri Bishop, mentioned in her affidavit that the average timeframe for processing security screenings is 12 months, but that it varies depending on the complexity of each case. This delay has clearly been exceeded in the case of the Saad family, by a material margin. Moreover, nothing in the evidence nor in the Minister's submissions points to any complex or particular features of the Saad family's Application that could shed light on the unusual delay they have been facing. There is simply nothing to explain the notable gap in the delay imposed on the Saad family compared to the average delay.

[30] Further, I cannot accept the Minister's submissions that the delay caused by the COVID-19 pandemic accounts for a significant part of what was imposed on the Saad family. In *Almuhtadi* at paragraph 47, Justice Ahmed held the following:

> [47] Finally, I find the COVID-19 pandemic does not fully explain IRCC's delay. As noted by the Applicants, this reasoning is not applicable for the period leading up to March 2020, approximately 3.5 years after the Applicants submitted their application for

> permanent residency. In the absence of evidence to the contrary, COVID-19 also does not negate the Respondents' decision-making capacity for the entirety of time subsequent to March 2020. The pandemic was undoubtedly disruptive, but governmental processes have slowly resumed and decisions are being made.

[31] Similarly, in the present case, the Saad family had been waiting nearly 28 months before the COVID-19 pandemic hit in March 2020. The circumstances of the pandemic only account for a short part of the total delay incurred, especially considering that "[a]ll institutions throughout Canada have […] adapted to addressing backlogs and delays" (*Bidgoly* at para 41), although to various degrees of success. Therefore, I am satisfied that the delay in the Saad family's case is *prima facie* much longer than the nature of the process required, despite the slowed IRCC processing times incurred by the COVID-19 pandemic (*Almuhtadi* at para 34).

[32] Furthermore, nothing indicates or suggests that the Saad family is responsible for the delay. On the contrary, the affidavit of Ms. Ghaddar eloquently illustrates how diligent they have been in following up on the status of their Application for permanent residence. As she pointed out, the addition of their children to the Application was merely the result of the initial delays resulting from the IRCC process. The Saad family had already been waiting almost two years when Ms. Ghaddar added her second daughter Lilas to the Application. Thus, the delay in the processing of their Application had already exceeded the average processing time, which was of 15 months as of October 2022. In any event, the addition of Ms. Ghaddar's second and third daughters was rapidly processed and completed by IRCC.

[33] Finally, the Minister provided no satisfactory justification for the delay. I do not dispute the Minister's contention that background checks are a prime tool to alleviate security concerns.

Of course, this is a process that IRCC has to conduct with caution and rigour. However, "blanket statements" that delays are incurred because of pending security assessments are inadequate, as this Court determined in multiple instances (*Bidgoly* at paras 37–38; *Almuhtadi* at para 40; *Kanthasamyiyar v Canada (Citizenship and Immigration)*, 2015 FC 1248 at paras 49–50; *Abdolkhaleghi v Canada (Minister of Citizenship and Immigration)*, 2005 FC 729 at para 26). Even if I accept that IRCC's processing timeframe depends on the complexity of each case, no evidence whatsoever has been provided by the Minister showing that the Saad family's Application raises any particular complexity.

[34] I pause to underline that this suffices to distinguish the present case from *Jaballah v Canada (Citizenship and Immigration)*, 2019 FC 1051 [*Jaballah*], on which the Minister relies to support his argument that the importance of security screenings renders the delays reasonable. In *Jaballah*, the delay was nowhere near the same magnitude as in the present case. Furthermore, in that case, Justice Elliott highlighted that the security concerns at play were due to the applicant's inadmissibility on security grounds described in paragraphs 34(1)(b), (c), (d) and (f) of the IRPA, which created a certain level of complexity and concern that allowed the Minister to justify the above-average delay incurred in that case. There are no similar security or inadmissibility concerns with respect to the Saad family.

[35] The Saad family's Application has now reached a total processing time of nearly 68 months since its completion in November 2017. Neither the addition of the children to the Application, the security screening process nor the COVID-19 pandemic can explain or justify

such a sizable delay. As a result, I am satisfied that the Saad family has established the unreasonableness of the delay.

(3) Balance of convenience

[36] In her affidavit, Ms. Ghaddar describes in detail the hardship that she and her family have endured because of the delay in the processing of their Application. Aside from the additional fees they incurred, they had to pursue their higher education and will have to deal with the disadvantages of a foreign education on the Canadian labour market if their Application is ever approved. Further, Ms. Ghaddar describes the disruption her older daughter will have to face if they move to Canada since she had to begin school and will have to adapt to a new education system. Ms. Ghaddar also mentions the disadvantages suffered by her two youngest daughters, who could have obtained Canadian citizenship at birth had the delay not been so great. Overall, Ms. Ghaddar describes the uncertainty her family had to endure because of the delay in the processing of their Application, which has forced them to put their lives on hold for several years while waiting for a response from IRCC.

[37] The Minister argues that his statutory duty to ensure the integrity of the immigration system justifies the delays in processing applications for permanent residence. With respect, I disagree. If this were true in all cases, applicants would not be able to enforce their right to the performance of the Minister's public duty to process applications for permanent residence.

[38] The Minister also indicates that the Saad family's Application is processing toward finalization, which should tilt the balance of convenience in the Minister's favour. Respectfully,

just as much as no evidence was provided to support any security concerns regarding the Saad family, the Minister has failed to adduce any clear and compelling evidence or to identify any element in the record suggesting that the Application will be finalized shortly with no further unreasonable delays.

[39] Just as in *Bidgoly*, there is also no evidence on the difficulties associated with security assessments or on the effects of the COVID-19 pandemic on the IRCC process (*Bidgoly* at para 46). Accordingly, I am unable to determine the real impact of these factors on the IRCC process, or to assess whether the situation will improve in the near future for the Saad family.

[40] In light of those findings, I find that the hardship faced by the Saad family clearly tilts the balance of convenience in favour of the issuance of an order of *mandamus*.

[41] In any event, the objectives of the IRPA with respect to maintaining the security of Canadians can still be pursued by the Minister despite the order that the Court will grant in this case. Since the delay to act will be 90 days, the Minister will have ample time to complete the on-going security assessments, especially since the Minister claims that the processing of the Application is already "toward finalization" (*Almuhtadi* at para 53).

[42] I would also add that, as Mr. Saad confirmed at the hearing before the Court, the *mandamus* order sought will clearly be of some practical value or effect since obtaining permanent resident status in Canada remains the primary objective and plan of the Saad family.

B. *Other remedies*

[43] However, I fail to see how the declaratory orders requested by the Saad family would have a practical value similar to a *mandamus*, or why they should be granted by the Court. The issuance of declaratory orders requires the Court to have jurisdiction to hear the issue, a real dispute, a genuine interest in the resolution of the issue by the moving party, and an interest by the respondents to oppose the declaration (*Ewert v Canada*, 2018 SCC 30 at para 81). In the present case, declaratory orders would go farther than the Court needs to. In the circumstances, I am of the opinion that, similarly to what the Court did in *Bidgoly* and *Almuhtadi*, an order of *mandamus* requiring IRCC to determine the Saad family's Application within a delay of 90 days will suffice.

[44] The Saad family also asks for an order of costs. In immigration matters, an award of costs is subject to Rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, which provides that no costs shall be awarded on applications for leave and judicial review but for "special reasons." The provision reads as follows:

Costs	**Dépens**
22 No costs shall be awarded to or payable by any party in respect of an application for leave, an application for judicial review or an appeal under these Rules unless the Court, for special reasons, so orders.	**22** Sauf ordonnance contraire rendue par un juge pour des raisons spéciales, la demande d'autorisation, la demande de contrôle judiciaire ou l'appel introduit en application des présentes règles ne donnent pas lieu à des dépens.

[45] The threshold for establishing the existence of "special reasons" is high (*Aleaf v Canada (Citizenship and Immigration)*, 2015 FC 445 at para 45). In *Almuhtadi* at paragraph 56, Justice Ahmed described the requirements for such order of costs as follows:

> [56] The threshold for establishing "special reasons" is high. It includes instances where one party has acted in a manner that may be characterized as unfair, oppressive, improper or actuated by bad faith (Taghiyeva v Canada (Citizenship and Immigration), 2019 FC 1262 at paras 17-23; Ndungu v Canada (Citizenship and Immigration), 2011 FCA 208 at para 7).

[46] "These 'special reasons' can pertain, among others, to the nature of the case, the behaviour of the applicant, the behaviour of the Minister or of an immigration official, or to the behaviour of counsel" (*Radiyeh v Canada (Citizenship and Immigration)*, 2022 FC 1234 at para 34, citing *Ndungu v Canada (Citizenship and Immigration)*, 2011 FCA 208 at para 7). It has also been held that issuing a decision only after an unreasonable or unjustified delay can be a valid reason for a cost award *(Monge Contreras v Canada (Public Safety and Emergency Preparedness)*, 2023 FC 282 at para 11; *Canada (Citizenship and Immigration) v Suleiman*, 2015 FC 891 at para 48).

[47] Here, I am satisfied that this matter warrants an award of costs to the Applicants. I accept that, based on the evidence, it cannot be said that the Minister acted in an unfair, oppressive or improper manner or that the Minister had a conduct actuated by bad faith. However, the Minister and IRCC can be the cause of unreasonable delays leading to "special reasons" within the meaning of Rule 22 without having acted in bad faith. In the case of the Saad family, they have waited far beyond the average processing time for a permanent residency application. At more than 68 months, their situation resides at the very high end of the spectrum. And yet, the Minister

could not utter any compelling explanation or justification for such an exceptional delay. Even the security concerns that the Minister keeps brandishing are not anchored in any form of evidence regarding the past behaviour of the Saad family.

[48] In the circumstances, keeping the Saad family in the dark for so long, and not being able to provide any explanation for the patently unreasonable delay they have faced — even after they filed an application for judicial review — rises to the level of "special reasons" warranting an award of costs against the Minister.

[49] Accordingly, I am of the view that the Saad family is entitled to receive costs in the all-inclusive, lump-sum amount of $1,000.

IV. Conclusion

[50] For the above-mentioned reasons, the Saad family's application for judicial review is granted in part. An order of *mandamus* will be issued, requiring IRCC to determine the Saad family's permanent residency application within 90 days from the date of this decision, or from the date of IRCC's receipt of the requested documentation pertaining to the addition of Mirabelle Saad to the Application, if such documentation has not been received yet.

[51] The parties proposed no question of general importance for certification and I agree that none arises in this case. The style of cause is modified to reflect the correct name of the Applicant Mohamad Saad.

JUDGMENT in IMM-6881-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. A writ of *mandamus* is ordered compelling IRCC to process and determine the Applicants' permanent residency application within 90 days of this Order, or within 90 days of IRCC's receipt of the requested documentation pertaining to the addition of Mirabelle Saad to the Application, if such documentation has not yet been received.

3. The Respondent shall forthwith pay to the Applicants costs fixed to an all-inclusive, lump-sum amount of $1,000.

4. The style of cause is modified to reflect the correct name of the Applicant Mohamad Saad.

5. There is no question of general importance to be certified.

"Denis Gascon"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6881-22
STYLE OF CAUSE:	TALA GHADDAR, MOHAMAD SAAD, AYA SAAD AND LILAS SAAD V MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	JULY 10, 2023
JUDGMENT AND REASONS:	GASCON J.
DATED:	JULY 12, 2023

APPEARANCES:

Tala Ghaddar Mohamad Saad	FOR THE APPLICANTS (ON THEIR OWN BEHALF)
Christopher Ezrin	FOR THE RESPONDENT

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