

Federal Court



Cour fédérale

**Date: 20240209**

**Docket: IMM-11408-22**

**Citation: 2024 FC 224**

**Toronto, Ontario, February 9, 2024**

**PRESENT: Mr. Justice Gascon**

**BETWEEN:**

**FAHED SOWANE  
FAYEIZ SOWANE**

**Applicants**

**and**

**MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

I. Overview

[1] The applicants, Mr. Fahed Sowane and his adult son Fayeiz Sowane, are both citizens of Lebanon and Belgium. They have submitted an application for leave and judicial review to seek a writ of *mandamus* compelling the respondent, the Minister of Citizenship and Immigration

[Minister], to process and finalize their pending application for permanent residence [Application], which was filed almost five years ago.

[2] Mr. Sowane submits that there is nothing he is aware of that can explain the unreasonable delay in the treatment of his Application. Mr. Sowane highlights that the lengthy processing time has caused him and his son unnecessary hardship in that they cannot move forward with their future life in Canada without having certainty as to their status in Canada. Mr. Sowane seeks relief in the form of a writ of *mandamus* compelling the Minister to render a decision on the Application forthwith.

[3] For the reasons that follow, this application for judicial review will be granted. Having considered the evidence and the applicable law, I am satisfied that Mr. Sowane and his son meet the requirements of the test for an order of *mandamus*. The Minister has a public duty to act and the delay incurred for the treatment of their Application is clearly unacceptable and unreasonable in the circumstances, as Immigration, Refugees and Citizenship Canada [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 Mr. Sowane and his son's Application within 90 days.

## II. Factual context

[4] Mr. Sowane has been residing in Canada since 2016 on various work permits. He is currently employed as a wholesale trade manager in the used car industry. Mr. Sowane's son resides in Lebanon but he is currently visiting his father in Canada on a visitor visa.

[5] On January 21, 2019, Mr. Sowane was nominated for immigration by the province of Ontario. In respect of this nomination, Mr. Sowane submitted his Application to IRCC's Sydney, Nova Scotia office for processing on March 26, 2019. Within his Application, Mr. Sowane included his son as a dependant.

[6] Following the submission of Mr. Sowane's application forms and various supporting documents on March 26, 2019, his Application went through various processing steps. Mr. Sowane's son was requested to complete biometrics on May 13, 2019, which he promptly did. On September 10, 2019, both Mr. Sowane and his son were requested to complete medical examinations, which they promptly did. It appears from the record that the eligibility and criminality verifications were completed in 2020. In April 2021, Mr. Sowane's Application was submitted for security concerns.

[7] In 2021, Mr. Sowane's file was transferred to the IRCC's Etobicoke office. After the transfer to the Etobicoke office, the Minister's officials requested that Mr. Sowane's son provide an updated Lebanese police certificate and complete a new medical examination because the old ones had expired. These were promptly provided on August 6, 2021. Mr. Sowane was exempted from having to complete an additional medical examination.

[8] On December 6, 2021, the Minister requested updated application forms from Mr. Sowane and his son because the previous ones were out-of-date due to the passage of time. These updated application forms were quickly provided on December 10, 2021.

[9] According to IRCC's website, which lists processing time estimates for immigration applications, the current processing time for provincial nominee applications such as Mr. Sowane

is 22 months. As of the date of filing this application for judicial review, the processing time for Mr. Sowane's file was at over 45 months. As of today, it has been almost 59 months since Mr. Sowane submitted his Application to the Minister.

[10] In an affidavit affirmed on June 29, 2023 [Somal Affidavit], Sareena Somal, an Acting Case Processing Officer for IRCC at the Etobicoke office, indicated that the delays in processing Mr. Sowane and his son's Application relate to "an outstanding request for information from partners as part of an ongoing security screening assessment", over which IRCC says it has no control.

[11] Ms. Somal added that, in her experience, "once background checks are submitted, they can take anywhere from a few weeks to a few years, depending on the complexity of the file and nature of the potential inadmissibility". I pause to observe that the Somal Affidavit contains no mention of any complexity or potential concerns for inadmissibility to Canada in Mr. Sowane's file.

[12] Ms. Somal further indicates that the processing of Mr. Somane and his son's Application is ongoing pending the final results of the security screening.

### III. Analysis

[13] The Minister submits that Mr. Sowane has failed to satisfy the test for *mandamus*. Specifically, the Minister argues that Mr. Sowane has not demonstrated that the Minister has failed to discharge a public duty to act on his Application, nor has he established any unreasonable delay in the processing of his Application. The Minister further asserts that the processing delays in this case are justified by necessary security screening assessments, and that

the Minister has actively processed Mr. Sowane's Application with appropriate diligence. Consequently, the Minister submits that the interests of justice and the balance of convenience do not favour the issuance of an order of *mandamus*.

[14] With respect, I am not persuaded by the Minister's arguments.

A. *The requirements for an order of mandamus*

[15] An order of *mandamus* is an extraordinary remedy under 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 at para 73 [*Ahousaht*]). 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 at para 76 [*Wasylynuk*]). 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).

[16] The test for determining whether the Court should exercise its discretion to issue a writ of *mandamus* is set out in *Apotex Inc v Canada (Attorney General)*, [1994] 1 FC 742 (FCA) [*Apotex*], aff'd [1994] 3 SCR 110 (*Hong v Canada (Attorney General)*, 2019 FCA 241 at para 10; *Canada (Health) v The Winning Combination Inc*, 2017 FCA 101 at para 60; *Lukacs v Canada (Transportation Agency)*, 2016 FCA 202 at para 29). The test requires that the following

conditions be met: 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 the duty; 4) no other adequate remedy must be available; 5) the order must have some practical value or effect; 6) there shall be no equitable bar to relief; and 7) the balance of convenience must favour issuing the order (*Ahousaht* at para 72; *Apotex* at pp 766–769).

B. *Failure to discharge a public legal duty to act*

[17] The Minister does not dispute that IRCC has a public legal duty to process Mr. Sowane and his son's Application. Mr. Sowane and his son have a 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.

[18] The Minister however notes that IRCC also has an explicit statutory duty to ensure that applicants for permanent residence are not inadmissible to Canada. There is no absolute duty to land an applicant for permanent residence, or to land them within a specific amount of time. In that sense, any applicant for permanent residence must satisfy the statutory criteria of not being inadmissible. On that front, the assessment of Mr. Sowane and his son's Application are still underway and, says the Minister, there is no evidence of an intention not to proceed with the Application. In fact, the Somal Affidavit indicates that the Application is progressing.

[19] With respect, I am not convinced by the Minister's argument and I instead agree with Mr. Sowane that, in the circumstances, IRCC has failed to discharge its public duty.

[20] First, I note that Mr. Sowane and his son 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 at para 45 [*Dragan*]). 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 at para 30 [*Bidgoly*]; *Singh v Canada (Minister of Citizenship and Immigration)*, 2010 FC 757 at paras 50, 54; *Dragan* at para 43).

[21] Second, despite the initial steps that IRCC took to advance the Application, IRCC still has not processed it — though some progress has been made. 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 Mr. Sowane and his son’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).

[22] Therefore, I am satisfied that Mr. Sowane and his son are still owed a clear public duty that IRCC impliedly refused to perform.

### C. *Unreasonable delay*

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

1. the delay in question is *prima facie* longer than the nature of the process required;
2. the applicant and their 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).

[24] With respect to the test for unreasonable delay, the Minister maintains that Mr. Sowane's reliance on IRCC's online processing time estimates does not raise an arguable issue warranting this Court's intervention, nor do his assertions that once he and his son submit requested documents, officials "do nothing and time passes". Indeed, this Court has noted that there is no uniform length of time for the limit of what is reasonable when there are delays in assessing an application (*Almuhtadi* at para 37). This Court has also noted that IRCC's estimated processing time is not a guarantee and that IRCC is committed to processing most applications within the estimated timeframe — but that it cannot apply to all cases, as such an approach would ignore the complexity of some situations (*Jaballah v Canada (Citizenship and Immigration)*, 2019 FC 1051 at para 94 [*Jaballah*]). Delays in the processing of an application must therefore be assessed in terms of the particular facts of the case (*Tapie v Canada (Citizenship and Immigration)*, 2007 FC 1048 at para 7).

[25] In the case of Mr. Sowane and his son's Application, the delays have been attributed to security screenings and the standard background checks that accompany such a screening. These delays have now reached over 58 months and exceed by three years (36 months) the average processing time of 22 months. I accept, as mentioned in the Somal Affidavit, that delays can and do vary depending on the complexity of each case. But, here, nothing in the evidence nor in the Minister's submissions points to any complex or particular features of Mr. Sowane's Application



that could shed light on the unusual delay he and his son have been facing. There is nothing to explain the notable gap in the delay imposed on Mr. Sowane and his son, compared to the average delay.

[26] Furthermore, nothing indicates or suggests that Mr. Sowane and his son bear any responsibility for the delay. On the contrary, the record eloquently illustrates how diligent they have been in following up on the status of their Application for permanent residence.

[27] In sum, there is no satisfactory explanation for the delay.

[28] The Minister rightly highlights that screening regarding security and inadmissibility is a necessary and important requirement under the Canadian immigration law framework. Indeed, paragraphs 3(1)(h) and (i) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] explicitly state that maintaining the security of Canadian society and promoting international justice and security are among the objectives of the IRPA. This point has been reaffirmed by the Supreme Court and the Federal Court of Appeal (*Medovarski v Canada (Minister of Citizenship and Immigration)*); *Esteban v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51 at para 10; *Canada (Citizenship and Immigration) v Solmaz*, 2020 FCA 126 at para 53).

[29] 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 (*Ghaddar v Canada (Citizenship and Immigration)*, 2023 FC 946 at para 33; *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 or potential concerns of inadmissibility in any given case, no evidence whatsoever has been provided by the Minister showing that Mr. Sowane and his son's Application raises any particular complexity or inadmissibility concerns. This could have been inserted in the Somal Affidavit if that was the case, but there is no such evidence.

[30] I pause to underline that this suffices to distinguish the present case from *Jaballah*, where the importance of security screenings was discussed. In *Jaballah*, the Court observed 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. There are no similar security or inadmissibility concerns with respect to Mr. Sowane or his son.

[31] I accept that the Somal Affidavit demonstrates that IRCC has been processing the Application, and that Mr. Sowane and his son's files are progressing towards finalization. Since receiving the Application, IRCC has conducted numerous assessments and verifications. Indeed, the record before this Court contradicts Mr. Sowane's assertions that officials do nothing, as it indicates that updated documents were being requested and assessed in August 2021, even while security screenings were ongoing. The Somal Affidavit further demonstrates that eligibility and criminality assessments were completed for both Mr. Sowane and his son, and that security screening assessments were requested in April 2021 and December 2021 for Mr. Sowane and his son, respectively.

[32] However, the record has been virtually silent since then. It may be that IRCC's processing office has no control over the timeframes and delays associated with security

screening assessments conducted by other federal agencies. But this is not sufficient to render the delay at the IRCC reasonable.

[33] Each request for *mandamus* turns on its own particular facts, and I am not persuaded that the delay in processing Mr. Sowane and his son's Application in this case can be qualified as reasonable. I find that no satisfactory justification for the 59-month delay has been provided.

D. *Balance of convenience*

[34] In his affidavit, Mr. Sowane affirms that the unreasonable delay in the processing of his Application has caused unnecessary hardship to him and his son in that they cannot move forward with their future life in Canada without having certainty as to their status in Canada. I recognize that more details could have been provided regarding the difficulties endured because of the delay in the processing of their Application. I am also mindful of the fact that a long and arduous administrative process does not necessarily mean that an applicant is automatically entitled to a writ of *mandamus*. Indeed, as this Court noted in *Jia v Canada (Citizenship and Immigration)*, 2014 FC 596 [*Jia*], "many of the applicants are disappointed by the length of time it has taken to process their applications and may well have experienced hardship due to the time their applications have been pending. However, these very real concerns do not translate into an entitlement to an order in the nature of *mandamus*" (*Jia* at para 91).

[35] However, I am satisfied that the balance of convenience tilts in Mr. Sowane and his son's favour.

[36] The Minister argues that his statutory duty to ensure the integrity of the immigration system justifies the delays in processing applications for permanent residence. In fact, the Somal

Affidavit goes as far as saying that delays could fall within a window of a few weeks to a few years, suggesting that virtually any form of delay should be deemed reasonable. With respect, I cannot agree. 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.

[37] The Minister also indicates that Mr. Sowane and his son'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 complexity or inadmissibility concerns regarding Mr. Sowane and his son, 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. In fact, no update to the Somal Affidavit was provided at the hearing before the Court, despite the fact that more than seven months have gone by since Ms. Somal signed her affidavit. I further observe that Mr. Sowane agreed to put this application for judicial review in abeyance for several months in early 2023, but that still has not allowed IRCC to make material progress in the treatment of Mr. Sowane's file.

[38] In the same vein, there was also no evidence regarding any particular issues associated with security assessments in the IRCC process.

[39] In light of those findings, I find that the hardship faced by Mr. Sowane and his son tilts the balance of convenience in favour of the issuance of an order of *mandamus*.

[40] 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).

IV. Conclusion

[41] For the above-mentioned reasons, this application for judicial review is granted. An order of *mandamus* will be issued, requiring IRCC to determine Mr. Sowane and his son’s permanent residency application within 90 days from the date of this decision.

[42] The parties proposed no question of general importance for certification and I agree that none arises in this case.

**JUDGMENT in IMM-11408-22**

**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.
3. There is no question of general importance to be certified.

“Denis Gascon”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-11408-22

**STYLE OF CAUSE:** FAHED SOWANE ET AL. v. MINISTER OF  
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**PLACE OF HEARING:** HELD BY VIDEOCONFERENCE

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