Federal Court Cour fédérale

Date: 20240509

Docket: IMM-4268-23

Citation: 2024 FC 720

Toronto, Ontario, May 9, 2024

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

SAMINA FIDA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS AND JUDGMENT

[1] Ms. Samina Fida (the "Applicant") is a citizen of Pakistan. She brings an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act"). She seeks an order of *mandamus* to compel the Minister of Citizenship and Immigration (the "Respondent") to process her application for permanent residence under the "Express Entry" program.

[2] The following details are taken from the affidavits filed by the parties and from the Certified Tribunal Record (the "CTR").

[3] The Applicant filed two affidavits. The first was sworn on April 26, 2023 and the second was sworn on November 11, 2023.

[4] The Respondent filed the affidavit of Ms. Keri Bishop, sworn on November 14, 2023.

[5] Ms. Bishop is the Deputy Migration Program Manager with the Canadian High Commission in London, England. She deposed about her review of the Global Case Management System ("GCMS") notes on file which recorded concerns as to the genuineness of the Applicant's second marriage and the sending of a procedural fairness letter in that regard to the Applicant.

[6] Ms. Bishop also deposed about the need to conduct security screening of the Applicant's husband. That screening is undertaken by the National Security Screening Division (the "NSSD") of the Canada Border Services Agency (the "CBSA").

[7] Ms. Bishop also deposed about reliance upon "partner agencies" in conducting the security screening. She further deposed that there is no time limit in the Act for concluding such screening and that COVID-19 impacted the completion of security screenings.

[8] On April 25, 2017, the Respondent received the application.

[9] On February 17, 2018, the Applicant married her husband.

[10] On March 21, 2018, an officer interviewed the Applicant. Among other things, the interviewing officer advised the Applicant that she needed to add her husband to her application for permanent residence and requested documentation of the marriage.

[11] On September 27, 2018, the application was sent to the National Security Screening Division ("NSSD") for security screening.

[12] On February 6, 2020, the Respondent requested further documents, which were received on February 11, 2020.

[13] On February 20, 2020, the Respondent issued a procedural fairness letter expressing concern regarding the validity of the Applicant's marriage. The Applicant provided additional information on March 10, 2020.

[14] On March 16, 2020, the Respondent sent a follow-up to the NSSD about the security screening. On April 22, 2020, the NSSD advised the Respondent that the screening was ongoing and that there was no timeframe for its conclusion.

[15] On June 17, 2021, the Applicant advised the Respondent that she gave birth to a child on May 1, 2021.

[16] On March 21, 2022, the Respondent requested additional documents from the Applicant. The requested documents were provided in March 2022.

[17] On July 1, 2022, the Respondent sent another follow-up inquiry to the NSSD regarding the status of the security screening. On July 5, 2022, the NSSD advised the Respondent that the screening was still in progress, again with no timeframe for its conclusion.

[18] On November 23, 2022, the Applicant requested that the Respondent process the application. On December 7, 2022, the Respondent advised that the application was still in progress.

[19] On February 23, 2023, the Applicant again requested that the Respondent process the Application. On February 27, 2023, the Respondent advised that routine background checks remained ongoing.

[20] The Applicant filed her application for leave and judicial review on March 30, 2023.

[21] The issue in this matter is whether the Applicant is entitled to an order of *mandamus*.

[22] That issue falls to be determined according to the test set out in *Apotex Inc. v. Canada (Attorney General)* (1993), 162 N.R. 177 (C.A.), aff'd [1994] 3 S.C.R. 1100. At pages 192 to 194, the Court set out the following test:

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 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;

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

    a. in exercising 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.

5. No other adequate remedy is available to the applicant;

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

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

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

[23] The disagreement between the parties is at the third step of the *Apotex*, *supra* test, particularly whether the delay in processing the application has been unreasonable.

[24] In *Conille v. Canada (Minister of Citizenship and Immigration) (T.D.)*, [1999] 2 F.C. 33, Justice Tremblay-Lamer outlined the requirements for an unreasonable delay in the context of processing a citizenship application:

> (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 argues that the delay in question is *prima facie* longer than the nature of the process requires and that she is not responsible for the delay. She further submits that the Respondent has not provided a satisfactory justification for the delay.

[26] The Respondent argues that the delay in processing the Application is not unreasonable. He submits that he has a statutory duty to ensure that the Applicant's husband is not inadmissible for security reasons and that necessary security screenings may justify lengthy delays in processing permanent residence applications; see the decision in *Chong v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1335 at paragraphs 14-15.

[27] Further, information provided on the Respondent's website advises that complex files may take longer than the estimated processing time. The Respondent argues that the Application is complex and is being processed in a timely fashion.

[28] The Applicant also seeks costs.

[29] In my opinion, an application for permanent residence should not, in the ordinary course of events, take nearly 7 years. The Applicant sought permanent residence for her husband in 2017. There is nothing in the CTR to show that the Applicant or her Counsel contributed to the delay.

[30] Finally, I move to the remaining element set out in *Conille*, *supra*, that is whether the authority responsible for the delay has failed to give a satisfactory explanation for that delay.

[31] The Respondent principally relies on the facts that security screening requires time and that COVID-19 caused understandable delays.

[32] The parties accepted the opportunity to address the recent decision in *Jaballah v. Canada (Citizenship and Immigration)*, 2024 FC 163. The Respondent submits that that case is distinguishable of its facts, specifically on the issue of completing the security clearances.

[33] I agree that in the case of *Jaballah*, *supra*, the government of Canada was privy to that applicant's background, including security concerns. The same cannot be said of the Applicant's husband, at this time.

[34] The Applicant's application for permanent residence has been outstanding since 2017. While I agree that security clearance is an important part of the processing of such an application, I am not persuaded that the slow processing times occasioned by the COVID-19 pandemic remain a reasonable excuse for the delay in processing the Applicant's application for permanent residence. The Respondent has offered no other explanation for the delay in obtaining the necessary security clearance.

[35] In the result, the application for an order of *mandamus* will be granted and the Respondent will process the Applicant's application for permanent residence within one hundred and twenty (120) days of the date of the Judgment below.

[36] Further to a Direction issued on January 12, 2024, the parties were given the opportunity to submit a question for certification. Counsel for the Applicant submitted the following:

> If there is a delay in the processing of an immigration application due to the lack of response from the other partner agencies a decision-maker relies on, can the decision-maker—who has a public legal duty to act and owes the duty to the applicant—refuse to provide a timeline for the processing of the application or refuse to provide a reason (which will enable the applicant to make an informed decision on the next step) for the delay when the applicant has satisfied all conditions precedent giving rise to the duty?

[37] Counsel for the Respondent opposed the certification of any question.

[38] Subsection 74(d) of the Act sets out the test for certifying a question, that is a question that raises a serious question of general importance that is dispositive of the case, as discussed in *Zazai v. Canada (Minister of Citizenship and Immigration)* (2004), 318 N.R. 365 (F.C.A.).

[39] I agree with the position advanced by the Respondent and no question will be certified.

JUDGMENT IN IMM-4268-23

THIS COURT'S JUDGMENT is that the application for judicial review is granted and an order of *mandamus* will issue, the Respondent will process the Applicant's application for permanent residence within one hundred and twenty (120) days of this judgment. No question will be certified. No costs are awarded.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4268-23
STYLE OF CAUSE:	SAMINA FIDA v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	CALGARY, ALBERTA
DATE OF HEARING:	JANUARY 11, 2024
	FURTHER WRITTEN SUBMISSIONS ON JANUARY 18, 25 & 29, 2024, FEBRUARY 26, 2024 AND MARCH 4, 2024
REASONS AND JUDGMENT:	HENEGHAN J.
DATED:	MAY 9, 2024

APPEARANCES:

Thomas Kannanayakal	FOR THE APPLICANT
Maria Green	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Merchant Law Group LLP Calgary, Alberta	FOR THE APPLICANT
Attorney General of Canada Edmonton, Alberta	FOR THE RESPONDENT