Federal Court Cour fédérale

Date: 20241008

Dockets: IMM-1407-22
IMM-8585-22

Citation: 2024 FC 1593

Ottawa, Ontario, October 8, 2024

PRESENT: Mr. Justice Norris

BETWEEN:

Docket: IMM-1407-22

KHALIL MAMUT
AMINIGULI AIZEZI

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

AND BETWEEN:

Docket: IMM-8585-22

SALAHIDIN ABDULAHAD
ZULIPIYE YAHEFU

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] Salahidin Abdulahad and Khalil Mamut are Chinese citizens of Uyghur ethnicity. They were both captured in Pakistan and turned over to the United States military after coalition forces invaded Afghanistan in response to the terrorist attacks in the United States on September 11, 2001. In early 2002, Mr. Abdulahad and Mr. Mamut were transferred to the Guantanamo Bay detention facility. They were held there until 2009, when they were released to be resettled in Bermuda.

[2] Mr. Abdulahad's spouse, Zulipiye Yahefu, was granted refugee protection by Canada. When she applied for permanent residence in Canada in December 2013, Ms. Yahefu included Mr. Abdulahad on her application. Ms. Yahefu became a permanent resident in July 2014 but Mr. Abdulahad's application remains outstanding. Ms. Yahefu is now a Canadian citizen.

[3] Mr. Mamut's spouse, Aminiguli Aizezi, was also granted refugee protection in Canada. When she applied for permanent residence in Canada in June 2015, she included her then only child (a son) as well as Mr. Mamut on her application. Ms. Aizezi and her son became permanent residents in March 2017 but Mr. Mamut's application remains outstanding. Ms. Aizezi and her son are now Canadian citizens.

[4] On February 14, 2022, Mr. Mamut and Ms. Aizezi commenced an application for judicial review (IMM-1407-22). On August 31, 2022, Mr. Abdulahad and Ms. Yahefu commenced a

similar application (IMM-8585-22). The applicants contend that they are entitled to a legal remedy because of the failure of the Minister to make a decision on the outstanding applications for permanent residence in a reasonable time. Because the applications for judicial review share a number of issues in common, they have been joined and are being determined together.

[5] Previous Orders and Judgments dealt with the respondent's objections to disclosure of information in the Certified Tribunal Records (CTRs) on grounds of common law deliberative secrecy (2023 FC 1108), section 37 of the *Canada Evidence Act*, RSC 1985, c C-5 (2024 FC 370), and section 87 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*) (2024 FC 536). An earlier Order also dealt with the applicants' requests for anonymity or confidentiality orders (2024 FC 243).

[6] There is no issue that the delay in processing the applications for permanent residence has been largely, if not entirely, due to concerns that Mr. Abdulahad and Mr. Mamut may be inadmissible to Canada for security reasons under section 34 of the *IRPA.* Specifically, after they applied for permanent residence, concerns were raised that Mr. Abdulahad and Mr. Mamut may be inadmissible to Canada due to their alleged association with the East Turkistan Islamic Movement (ETIM). US authorities had also relied on this alleged association to justify the men's detention at Guantanamo Bay. The issue of inadmissibility on security grounds has still not been resolved by decision makers acting on behalf of the Minister of Citizenship and Immigration.

[7] Mr. Abdulahad and Mr. Mamut contend that there has been inordinate delay in the processing of their applications for permanent residence. Indeed, they submit that the Minister's delay in resolving the issue of their inadmissibility on security grounds is so excessive, oppressive, and unfair as to constitute an abuse of process. As a remedy, they seek an order staying the security inadmissibility proceedings and directing the Minister to proceed with the processing of their applications for permanent residence. In the alternative, they seek an order directing the Minister to find that they are not inadmissible on security grounds or, conversely, prohibiting the Minister from finding them inadmissible on this basis. Further, and in any event, they submit that the test for *mandamus* is met and the Minister should be ordered to render a decision on their applications for permanent residence without additional undue delay.

[8] For the reasons that follow, this application will be allowed in part. I am satisfied that there has been inordinate delay in the processing of the applications for permanent residence and that this entitles the applicants to a remedy. While I agree that the delay in both cases is excessive, it would not assist the applicants to characterize it as amounting to an abuse of process. This is because the remedy they seek on this basis – a stay of the inadmissibility assessments – is self-defeating. Unless a Court grants a constitutional remedy, which is not the case here (the applicants have not advanced any claims under the *Charter*), its remedial powers do not extend to ordering the Minister to disregard the requirements of the *IRPA.* Under that Act, before Mr. Abdulahad and Mr. Mamut can become permanent residents, an officer must be satisfied that they are not inadmissible. As a result, if the Minister were ordered not to consider their inadmissibility on security grounds, this would stymie their applications for permanent residence; an officer acting on behalf of the Minister would have no choice but to reject the

applications. In any event, the remedy of a stay is not warranted because it is not meaningfully responsive to the prejudice the applicants have suffered as a result of the inordinate delay. Furthermore, I am not satisfied that the preconditions for an order directing the Minister to find that the applicants are not inadmissible on security grounds or, conversely, prohibiting the Minister from finding them inadmissible on these grounds, have been met.

[9] Nevertheless, the delay in these cases is clearly excessive, the Minister has fallen far short of demonstrating that the time that has been taken is justified, and the Minister has not shown why any additional time to make decisions on the applications for permanent residence is warranted. Accordingly, but subject to any further Order of the Court, the Minister must render decisions on the applications for permanent residence no later than 30 days from the date of this Judgment. Finally, in my view, this is an appropriate case for an award of costs.

II. BACKGROUND

[10] Mr. Abdulahad's application for permanent residence has now been outstanding for almost 11 years; Mr. Mamut's for over 9 years. The present applications for judicial review were commenced in 2022 but they could not be heard on their merits until contested objections to the disclosure of information in the CTRs were dealt with. Leave to proceed with the applications was granted on February 13, 2024. The public hearing of the applications took place on April 16, 2024. An *ex parte*, *in camera* hearing took place on May 7, 2024. The Court reserved its decision.

[11] It is not necessary to describe the history of the applications for permanent residence in great detail. It will suffice to highlight the principal periods of time that have been taken up with the issue of the applicants' potential inadmissibility on security grounds. To the extent that they are disclosed in the CTRs or set out in the applicants' affidavits, the relevant events in the processing of the applications are not in dispute. While there is significant overlap between the two cases, each application followed its own path so their respective histories will be set out separately below.

[12] Since the security inadmissibility concerns relate to the applicants' alleged association with or membership in the ETIM, it is helpful to review this background first before turning to the processing of the applications for permanent residence.

A. *The applicants' detention and release by US authorities*

[13] Mr. Abdulahad was born in 1977 in Kashgar, People's Republic of China. In June 2001, after witnessing the ongoing persecution of Uyghurs (sometimes spelled Uighurs or Uighers) and the harassment of his family, Mr. Abdulahad left China for Pakistan, hoping to continue his education there. When his legal status in Pakistan expired (it was valid for only one month), he feared returning to China so he decided to seek out a Uyghur community he had heard about in a village outside Jalalabad, Afghanistan. He arrived there in August 2001.

[14] Mr. Abdulahad describes his experiences of persecution in China, his decision to leave for Pakistan, and his experiences in Pakistan and Afghanistan in detail in a statutory declaration sworn on April 6, 2020, in connection with his application for permanent residence. He also

swore an affidavit in support of the present application on November 15, 2022, that covers much of the same ground. He swore a further affidavit on February 27, 2024. He was not cross-examined in connection with this application.

[15] Mr. Mamut was born in Kashgar in 1978. Due to Chinese oppression and persecution of Uyghurs, in 1998, he left China to study in Pakistan. He studied in Lahore for three years. In 2001, his Chinese passport was expiring so, being afraid to return to China, Mr. Mamut sought out a group of Uyghurs in Afghanistan he believed could help him with the renewal of his passport so that he could return to Pakistan. He ended up in the same village in Afghanistan as Mr. Abdulahad.

[16] Mr. Mamut describes his experiences of persecution in China, his decision to leave for Pakistan, and his experiences in Pakistan and Afghanistan in detail in a statutory declaration sworn on April 6, 2020, in connection with his application for permanent residence. He also swore an affidavit in support of the present application on March 26, 2022, that covers much of the same ground. He swore a further affidavit on February 27, 2024. He was not cross-examined in connection with this application.

[17] Mr. Abdulahad and Mr. Mamut had to flee the village in Afghanistan at the end of October 2001, when it came under aerial bombardment by US forces. Together with a group of 16 other Uyghurs, they hid in nearby mountains and then made their way to Pakistan. At first, some local individuals assisted the group but they soon turned them over to the Pakistani military, reportedly in exchange for bounties. Mr. Abdulahad, Mr. Mamut, and the others were

then turned over to the US military. Subsequently, they were all transferred to the detention facility that had just been constructed at the US Naval Base at Guantanamo Bay, Cuba. In total, 22 Uyghurs captured in Afghanistan or Pakistan were sent to Guantanamo Bay.

[18] For the next two years, Mr. Abdulahad and Mr. Mamut were held without any sort of hearing to determine the lawfulness of their detention. In July 2004, following decisions of the Supreme Court of the United States holding that Guantanamo Bay detainees were entitled to challenge the lawfulness of their detention through a federal writ of *habeas corpus* (*Rasul v Bush*, 542 U.S. 466 (2004) and *Hamdi v Rumsfeld*, 542 U.S. 507 (2004)), the US Department of Defense established the Combatant Status Review Tribunal (CSRT) to review whether detainees were being rightfully held. Guantanamo Bay detainees, including Uyghur detainees, nevertheless continued to pursue relief in US courts through *habeas corpus* filings (although there was some uncertainty about the availability of this remedy until this was finally resolved in the detainees' favour by the Supreme Court in *Boumediene v Bush*, 533 US 723 (2008)).

[19] One of the central allegations against Mr. Abdulahad and Mr. Mamut was that they were members of the ETIM. The United States had designated the ETIM as a terrorist organization in August 2002. In September 2002, the ETIM was added to the United Nations Security Council sanctions list.

[20] For detainees like Mr. Abdulahad and Mr. Mamut, who were not alleged to be members of al-Qaida or the Taliban, the Department of Defense had stipulated that, to establish that their detention as enemy combatants was warranted, it had to prove by a preponderance of evidence

that they were part of or supporting forces, that those forces were associated with al-Qaida or the Taliban, and that they are engaged in hostilities against the United States or its coalition partners: see *Parhat v Gates*, 532 F.3d 834 (D.C. Cir.) at 16-17. In the cases of Mr. Abdulahad and Mr. Mamut, the forces in question were the ETIM.

[21] In determining whether a detainee was an enemy combatant, the CSRT could consider both unclassified and classified evidence and information. Proceedings would be conducted in the presence of the detainee but the tribunal could also proceed *ex parte*. Detainees could be assisted by a member of the US armed forces but they were not entitled to any form of legal representation.

[22] The allegation that Mr. Abdulahad and Mr. Mamut were members of the ETIM appears to have rested largely, if not entirely, on the characterization of the village near Jalalabad, where they had admittedly stayed for a few months, as an ETIM training camp. While Mr. Abdulahad and Mr. Mamut were informed of the unclassified gist of the allegations against them in connection with the CSRT process, no information or evidence supporting the allegation that the village was an ETIM training camp, that the ETIM was affiliated with al-Qaida or the Taliban, or that the "camp" had anything to do with fighting the United States was disclosed to them (or has been made available to them since then, for that matter). Mr. Abdulahad and Mr. Mamut maintained that they had gone to the village solely because they believed they would be safe there and they had nowhere else to go. They denied being members of the ETIM. Indeed, they maintained that the first time they ever heard about the group was when they were questioned about it by US officials. They maintained that they bore no enmity towards the United States

and had never engaged in hostilities against it. US authorities did not produce any evidence to contradict these latter assertions. Nevertheless, the CSRT continued the detentions of Mr. Abdulahad and Mr. Mamut as enemy combatants.

[23] Since its inception, the CSRT process was the subject of intense legal debate and, separate and apart from the larger question of the lawfulness of the detention of "enemy combatants" at the Guantanamo Bay facility, the process was widely condemned as fundamentally unfair. As well, whether there was ever a sound basis to designate the ETIM as a terrorist organization has also been the subject of significant debate. The US designation was revoked in October 2020; however, the ETIM still appears on the United Nations Security Council sanctions list. The organization has never been designated by Canada as a terrorist entity.

[24] After Mr. Abdulahad and Mr. Mamut were released from Guantanamo Bay, some US information concerning them found its way into the public record, notably through a leak of hundreds of classified military documents relating to Guantanamo Bay detainees. The documents were published by the *New York Times* in April 2011.

[25] Included in these documents was a classified memorandum concerning Mr. Abdulahad dated February 21, 2004, prepared by the Department of Defense, Joint Task Force Guantanamo. A copy of this memo was subsequently disclosed to Mr. Abdulahad (on July 1, 2020) by the Consulate General of Canada in New York in connection with his application for permanent residence. The purpose of the memo was to recommend Mr. Abdulahad's transfer to the control

of another country for continued detention. (The memo pre-dates the creation of the CSRT process. It appears that Mr. Abdulahad had been cleared for transfer from Guantanamo Bay to another country as early as 2003, as long as he continued to be detained after the transfer.) The memo set out the US assessment of Mr. Abdulahad as follows:

> - Detainee sought out and received training in an ETIM training camp in Afghanistan.
>
> - Detainee is a probable member of the East Turkistan Islamic Movement (ETIM), which is a Uigher separatist organization dedicated to the creation of a Uigher Islamic homeland in China, through armed insurrection and terrorism.
>
> - Sensitive reporting indicates that ETIM and the Islamic Movement of Uzbekistan (IMU) have unified their efforts to form a larger and more capable terrorist organization, which is now directly affiliated and supported by Al-Qaida and other terrorist groups.
>
> - Reporting has also noted that both ETIM and the IMU have expanded and focused their efforts on the United States and have made attacking Americans their main priority.
>
> - Both organizations have extensive Al-Qaida ties and numerous affiliations have existed for several years with other Islamic extremist groups.
>
> - Detainee has admitted to affiliations with the Islamic Movement of Uzbekistan (IMU).
>
> - Detainee was captured in Pakistan along with other Uigher fighters and Al-Qaida members in 2001.

[26] The memo summarized the US assessment of Mr. Abdulahad as follows:

> Based on information collected and available to Joint Task Force Guantanamo as of 15 January 2004, detainee [. . .] is assessed as being a probable member of the East Turkistan Islamic Movement. Detainee has had some level of terrorist training, as confirmed by associations with known terrorist group(s) and is highly vulnerable to future recruitment by terrorist groups targeting the US and its allies. It has been determined that the detainee poses a medium risk

> as he may possibly pose a threat to the U.S., its interests or its allies.

[27] Also included in the leak was a similar classified memorandum concerning Mr. Mamut, dated June 17, 2005. A copy of this memo was subsequently disclosed to Mr. Mamut (on July 1, 2020) by the Consulate General of Canada in New York in connection with his application for permanent residence. Like Mr. Abdulahad, Mr. Mamut had also been cleared for transfer to another country, as long as he continued to be detained after the transfer.

[28] The memo summarized the US assessment of Mr. Mamut as follows:

> For this updated recommendation, detainee is assessed to be a trained member of the Eastern Turkistan Islamic Movement (ETIM) (also known as the Eastern Turkistan Islamic Party or organization, ETIP or ETIO). The ETIM is affiliated with Al-Qaida and its global terrorist network. ETIM individuals have reportedly fought alongside the Taliban against coalition forces in Afghanistan. Additionally, ETIM is reportedly a member of the "League of Islamic Mujahidin" (LEVO). Their primary objective is creating an Islamic caliphate (rule of Islam) that will encompass the entire Central Asian region, starting with Afghanistan. It is assessed detainee made a commitment to jihad. He advocates Islamic extremism/militancy by his involvement with the ETIM. He likely will regroup with ETIM if released. It is assessed this detainee is a MEDIUM risk, as he may pose a threat to the US, its interests and allies.

[29] While these memos (and other contemporaneous documents) provide some insight into the US assessments of Mr. Abdulahad and Mr. Mamut when they were being held at Guantanamo Bay, they reveal nothing about the information or evidence that supported the key allegations: that the ETIM was a terrorist organization aligned with al-Qaida, that it had shifted

its attention from China to attacking Americans and American interests, and that the village where Mr. Abdulahad and Mr. Mamut had stayed for a few months was an ETIM training camp.

[30] Meanwhile, in *Parhat v Gates*, which was released on June 20, 2008 (just over a week after the Supreme Court released its decision in *Boumediene v Bush*), the United States Court of Appeals for the District of Columbia granted judicial review of the decision of the CSRT that Huzaifa Parhat, another Uyghur detainee, is an enemy combatant. It appears that Parhat was at the same "training camp" as Mr. Abdulahad and Mr. Mamut and that they were all part of the same group that fled to Pakistan and then were captured and turned over to the US military. The court concluded that the evidence before the CSRT (including classified information) was insufficient to sustain its determination that Parhat is an enemy combatant under the Department of Defense's own definition of that term (see paragraph 20, above).

[31] The court noted that the CSRT's determination that Parhat is an enemy combatant was based on its finding that he is "affiliated" with a Uyghur independence group (the ETIM) and a further finding that the group was "associated" with al-Qaida and the Taliban. The court's decision to allow the application for judicial review turned on the latter finding. The court observed: "The Tribunal's findings regarding the Uighur group rest, in key respects, on statements in classified State and Defense Department documents that provide no information regarding the sources of the reporting upon which the statements are based, and otherwise lack sufficient indicia of the statements' reliability" (at 2). To survive judicial review, the CSRT's determination of a detainee's status "must be based on evidence that both the Tribunal and the court can assess for reliability" (at 3). In the absence of such evidence (either classified or

unclassified) supporting the necessary findings concerning the ETIM, the finding that Parhat is an enemy combatant had to be set aside.

[32] Subsequently, the US government notified the US District Court for the District of Columbia (the court with *habeas corpus* jurisdiction in respect of Guantanamo Bay detainees) that it would no longer consider 17 Uyghur detainees, including Mr. Abdulahad, Mr. Mamut, and Mr. Parhat, as enemy combatants. It conceded that there were no material factual differences between Parhat and the others, including the applicants, and that the court's holding in *Parhat v Gates* applied to them all equally. (Earlier, in May 2006, five other Uyghur detainees had been released and resettled in Albania.) On October 8, 2008, the District Court concluded that the continued detention of all these individuals was unlawful. The men remained at Guantanamo Bay, however, pending successful efforts to resettle them in a foreign country.

[33] Following negotiations with Bermuda, in June 2009, Mr. Abdulahad, Mr. Mamut, and two other Uyghur detainees were released from Guantanamo Bay and resettled there. Other Uyghur detainees were resettled elsewhere. None could be repatriated to China because of the risks they would face there.

B. *Mr. Abdulahad's application for permanent residence*

[34] Mr. Abdulahad and Ms. Yahefu were married in a religious ceremony in Bermuda in February 2012. Ms. Yahefu is also a Chinese citizen of Uyghur ethnicity. In December 2013, after she was granted refugee protection by Canada, Ms. Yahefu applied for permanent residence in Canada. She included Mr. Abdulahad on her application. In July 2014, Ms. Yahefu was

informed that she met the requirements to apply for permanent resident status. She was also informed that Mr. Abdulahad's application would be processed by the office of the Consulate General of Canada in New York (CGNY). Over the next several months, the Immigration Section at the CGNY requested various documents and other background information from Ms. Yahefu and Mr. Abdulahad, all of which they provided promptly.

[35] On February 24, 2015, the Canada Border Services Agency (CBSA) requested security advice from the Canadian Security Intelligence Service (CSIS) concerning Mr. Abdulahad's application for permanent residence.

[36] On July 17, 2015, the CGNY convoked Mr. Abdulahad for an interview in relation to his application for permanent residence. The interview was to take place in Bermuda on August 19, 2015. However, on August 12, 2015, the CGNY cancelled the interview due to the unavailability of a Uyghur interpreter.

[37] On August 18, 2015, CSIS provided its security advice to the CBSA. In providing this advice, CSIS considered Mr. Abdulahad's purported support of Uyghur nationalism as it may relate to Uyghur separatist movements. The validity period of this assessment has now elapsed.

[38] On November 20, 2015, the National Security Screening Division (NSSD) of the CBSA provided an inadmissibility assessment concerning Mr. Abdulahad to Immigration, Refugees and Citizenship Canada (IRCC). The assessment concluded that there were reasonable grounds to believe that Mr. Abdulahad is inadmissible to Canada under paragraph 34(1)(c) of the *IRPA* for

engaging in terrorism and under paragraph 34(1)(d) of that Act for being a danger to the security of Canada. Information concerning Mr. Abdulahad's apprehension in Pakistan, his detention at Guantanamo Bay, and his purported support of Uyghur nationalism as it may relate to Uyghur separatist movements was considered in this assessment.

[39] On May 10, 2016, Ms. Yahefu was granted permanent residence in Canada.

[40] On November 25, 2016, an immigration officer at the CGNY sent Mr. Abdulahad a procedural fairness letter setting out potential concerns that he may be inadmissible to Canada on security grounds. After quoting section 34 of the *IRPA* in full, the letter states: "Specifically, records indicate you were arrested by the American authorities and transferred to Guantanamo Bay in 2002. You were involved in military activity, assisted in the building and received military training at a Uighur training camp." The letter states that, before a final decision is made on his application for permanent residence, Mr. Abdulahad "may submit additional information relating to this issue" within 60 days.

[41] Mr. Abdulahad responded to the procedural fairness letter by letter dated January 4, 2017. He addressed each provision of section 34 of the *IRPA*, denying that any of them applied to him. He also enclosed a memorandum from Susan Baker Manning, one of his American *habeas corpus* lawyers, setting out the history of his case, including his detention at and ultimate release from Guantanamo Bay.

[42] A year later, on January 16, 2018, the CGNY convoked Mr. Abdulahad for another interview in Bermuda. This time, it proceeded as scheduled on January 30, 2018. The interview was conducted without the assistance of a Uyghur interpreter. Among the topics covered was Mr. Abdulahad's potential inadmissibility for security reasons, including his activities in Afghanistan prior to his capture. Mr. Abdulahad heard nothing further from the CGNY.

[43] In April 2019, Mr. Abdulahad retained Downtown Legal Services (DLS) to represent him in his application for permanent residence and related legal proceedings. From the outset, DLS raised concerns about the length of time the application for permanent residence had been outstanding. An application for *mandamus* was filed on November 1, 2019 (IMM-6616-19) but it was eventually discontinued on March 5, 2020, because it appeared that the application for permanent residence was finally moving forward.

[44] Shortly after the *mandamus* application was filed, the Migration Section of the CGNY requested additional information from Mr. Abdulahad, which he provided. Then, on February 7, 2020, a migration officer with the CGNY sent Mr. Abdulahad a second procedural fairness letter. In the letter, the officer stated:

> After careful review of the details of your application, due to your membership in the ETIM, an organization that has engaged in terrorism, I am concerned that you are a member of the inadmissible class of persons described in section 34(1)(f) [of the *IRPA*] in reference to paragraph 34(1)(c).
>
> Pursuant to paragraph 34(1)(f) in reference to paragraph 34(1)(c), a foreign national is inadmissible for being a member of an organization that there are reasonable grounds to believe engages, has engaged or will in engage in terrorism.

[45] The letter goes on to explain that the concerns arose from Mr. Abdulahad having stayed at a Uyghur training camp in Afghanistan for approximately three months where he received "military training in the form of physical and small-arms training (AK-47/Kalashnikov) and engaged in security duties for this camp and participated in building the camp." The letter states that this indicates his role as a member of the ETIM, which ran the training camp. The letter then notes that the ETIM had been listed as a terrorist organization by the United Nations Security Council on the basis of its terrorist activities in China as early as May 1998. Mr. Abdulahad was given 60 days to address these concerns.

[46] In response, on February 13, 2020, DLS requested disclosure of certain documents in order to be able to respond properly to the concerns raised in the procedural fairness letter. Specifically, DLS requested disclosure of any notes arising from Mr. Abdulahad's interview with IRCC on January 30, 2018; the letter from CSIS to the CBSA dated August 18, 2015, providing its security advice concerning Mr. Abdulahad (see paragraph 37, above); and the letter from the CBSA to IRCC dated November 20, 2015, providing an inadmissibility assessment (see paragraph 38, above). (Mr. Abdulahad had learned of the latter two documents through a request under the *Access to Information Act*, RSC 1985, c A-1).

[47] Despite the lack of a response to the disclosure request, on April 7, 2020, DLS provided a comprehensive response to the February 7, 2020, procedural fairness letter. DLS also requested a decision on Mr. Abdulahad's application for permanent residence within 60 days.

[48] Eventually, in response to the earlier disclosure request, on July 1, 2020, the Migration Section of the CGNY provided Mr. Abdulahad with a copy of notes from his interview in Bermuda on January 30, 2018. It also provided him with a copy of the February 21, 2004, Memorandum from the Department of Defense, Joint Task Force Guantanamo (see paragraph 25, above). The covering letter does not address the requests for the August 18 and November 20, 2015, security assessments. (These letters were eventually disclosed to Mr. Abdulahad as part of the CTR prepared in connection with the present application. Both were subject to redactions under section 87 of the *IRPA* that were confirmed by the Court, although a non-injurious summary of redacted information in the letters was ordered released.)

[49] On August 27, 2020, DLS provided a detailed response to the information disclosed on July 1, 2020. DLS also requested a decision on Mr. Abdulahad's application for permanent residence within 30 days. In a follow-up letter dated October 2, 2020, DLS reiterated its request that a decision be made as soon as possible.

[50] On November 17, 2020, DLS requested that the processing of Mr. Abdulahad's application for permanent residence be held in abeyance temporarily so that further submissions could be provided on the implications of the recent decision by the United States to de-list the ETIM as a terrorist organization. These further submissions were provided on February 12, 2021. Once again, DLS requested a decision within 60 days.

[51] On May 26, 2021, the migration officer at the CGNY assigned to Mr. Abdulahad's case wrote a detailed email to the NSSD. The email was sent in accordance with a "contrary outcome" process that had been adopted by IRCC and the CBSA.

[52] Briefly, security screening of applicants for permanent residence is a joint undertaking involving the IRCC decision maker and the CBSA. IRCC and the CBSA developed a process to ensure that IRCC decision makers undertake a final consultation with its screening partners before making a decision that is contrary to the security recommendation provided by the CBSA. The contrary outcome process applies in two circumstances: (1) when IRCC has received a non-favourable inadmissibility recommendation from the CBSA and the IRCC decision maker wishes to issue a visa with no finding of inadmissibility; or (2) when IRCC has received a favourable recommendation from the CBSA and the IRCC decision maker wishes to refuse the visa on a ground of inadmissibility under sections 34, 35 or 37 of the *IRPA*.

[53] As set out above, the NSSD had provided IRCC with a non-favourable inadmissibility recommendation on November 20, 2015. Evidently, the IRCC migration officer initiated the contrary outcome process because he was considering approving the application for permanent residence despite the NSSD's recommendation.

[54] I pause here to note that, when the IRCC officer's email was first included in the CTR prepared by the Minister in connection with this application for judicial review, it was redacted in its entirety, including the date it was sent. The respondent sought orders upholding the redactions under common law deliberative secrecy and, when this was rejected, under section 37

of the *CEA*. The latter claim was allowed in part. (See, respectively, 2023 FC 1108 and 2024 FC 370.) It was in connection with the litigation of these privilege claims that the respondent provided evidence concerning the contrary outcome process and confirmed that the IRCC officer disagreed with CBSA's adverse assessment. There appears to be no issue that this evidence should also be considered in connection with the merits of the present applications as all the parties have relied on it in advancing their respective positions.

[55] On August 31, 2022, Mr. Abdulahad and Ms. Yahefu commenced the present application for judicial review.

[56] The CTR was produced on June 14, 2023. As just noted, it included the May 26, 2021, email from the migration officer to the NSSD (albeit in redacted form). Even though it was produced two years after the officer sent the contrary outcome email, the CTR does not include any response from the NSSD. This is despite the fact that, according to the outline of the contrary outcome process in CBSA's Immigration Control Manual, the CBSA had committed to providing a final reply within five working days of being advised of a possible contrary outcome (although an extension of time could be requested). The respondent has not provided any evidence of when or even if the NSSD responded to the May 26, 2021, email from the IRCC officer. In the meantime, as already noted, the validity period of the 2015 CSIS security assessment has elapsed.

[57] It appears that, at some point, Mr. Abdulahad's application was assigned to a new IRCC officer.

[58] On October 23, 2023, Mr. Abdulahad was convoked for another interview. This interview took place on January 31, 2024, in the United Kingdom, where Mr. Abdulahad and his family were staying with temporary status. Mr. Abdulahad has heard nothing from IRCC since then.

C. *Mr. Mamut's application for permanent residence*

[59] Mr. Mamut and Ms. Aizezi were married in a religious ceremony in Bermuda in June 2012. Ms. Aizezi is also a Chinese citizen of Uyghur ethnicity. After she was granted refugee protection by Canada, Ms. Aizezi applied for permanent residence in Canada in June 2015. She included Mr. Mamut and her son on her application.

[60] Like Mr. Abdulahad's, Mr. Mamut's application for permanent residence was assigned to the Migration Section of the Consulate General of Canada in New York. For some time, at least, the same migration officer was assigned to both applications.

[61] On May 6, 2016, the CBSA requested security advice from CSIS concerning Mr. Mamut's application for permanent residence.

[62] On August 5, 2016, CSIS provided its security advice to the CBSA. In providing this advice, CSIS addressed Mr. Mamut's alleged support for and training with the ETIM. Information considered in connection with this advice included a document published by the *New York Times* purporting to be a summary of Mr. Mamut's unsworn statement to the CSRT that had considered his case in 2004. It also included the Joint Task Force Guantanamo Detainee

Assessment dated June 17, 2005, mentioned earlier (see paragraph 27, above). The validity period of CSIS's assessment has now elapsed.

[63] On January 25, 2018, the NSSD provided an inadmissibility assessment concerning Mr. Mamut to IRCC. The assessment recommended that there were reasonable grounds to believe that Mr. Mamut represents a danger to the security of Canada, and that he is a member of an organization (the ETIM) that has engaged in terrorism, rendering him inadmissible to Canada pursuant to paragraphs 34(1)(d) and (f) of the *IRPA*. This assessment was valid for 48 months.

[64] Meanwhile, Ms. Aizezi and her son were granted permanent resident status in March 2017.

[65] On January 17, 2018, the CGNY convoked Mr. Mamut for an interview in Bermuda on January 30, 2018. (As set out above, this was the same date Mr. Abdulahad was also to be interviewed.) The interview proceeded as scheduled, without the assistance of a Uygur interpreter. The interviewer informed Mr. Mamut that his application for permanent residence had given rise to security concerns but few particulars were provided. Mr. Mamut heard nothing further from IRCC after this.

[66] In April 2019, Mr. Mamut retained DLS to represent him in his application for permanent residence and related legal proceedings. From the outset, DLS raised concerns about the length of time the application for permanent residence had been outstanding. An application for *mandamus* was filed on November 1, 2019 (IMM-6617-19) but it was eventually discontinued

on March 5, 2020, because it appeared that the application for permanent residence was finally moving forward.

[67] Shortly after the *mandamus* application was filed, the Migration Section of the CGNY requested additional information from Mr. Mamut, which he provided. Then, on February 7, 2020, a migration officer with the CGNY sent Mr. Mamut a procedural fairness letter. The letter is in all material respects identical to the letter of the same date sent to Mr. Abdulahad (see paragraphs 44 and 45, above).

[68] In the letter, the officer stated:

> After careful review of the details of your application, due to your membership in the ETIM, an organization that has engaged in terrorism, I am concerned that you are a member of the inadmissible class of persons described in section 34(1)(f) [of the *IRPA*] in reference to paragraph 34(1)(c).
>
> Pursuant to paragraph 34(1)(f) in reference to paragraph 34(1)(c), a foreign national is inadmissible for being a member of an organization that there are reasonable grounds to believe engages, has engaged or will in engage in terrorism.

[69] The letter goes on to explain that the concerns arise from Mr. Mamut having stayed at a Uyghur training camp in Afghanistan for approximately two and one-half months where he received "military training in the form of physical and small-arms training (AK-47/Kalashnikov) and engaged in security duties for this camp and participated in building the camp." The letter states that this indicates his role as a member of the ETIM, which ran the training camp. The letter then notes that the ETIM had been listed as a terrorist organization by the United Nations

Security Council on the basis of its terrorist activities in China as early as May 1998. Mr. Mamut was given 60 days to address these concerns.

[70] In response, on February 13, 2020, DLS requested disclosure of certain documents in order to be able to respond properly to the concerns raised in the procedural fairness letter. Specifically, DLS requested disclosure of any notes arising from Mr. Mamut's interview with IRCC on January 30, 2018; the sources relied on by IRCC to show links between the Uyghur village and the ETIM; and any other documents relating to the inadmissibility concerns on security grounds outlined in the February 7, 2020, letter. At this time, while Mr. Mamut had learned from an access to information request that his application for permanent residence had been subject to security screening, he was unaware of the details of the CSIS and CBSA assessments mentioned above.

[71] Despite the lack of a response to the disclosure request, on April 7, 2020, DLS provided a comprehensive response to the February 7, 2020, procedural fairness letter. DLS also requested a decision on Mr. Mamut's application for permanent residence within 60 days.

[72] Eventually, in response to the earlier disclosure request, on July 1, 2020, the Migration Section of the CGNY provided Mr. Mamut with a copy of notes from the January 30, 2018, interview in Bermuda. It also provided him with a copy of the June 17, 2005, Memorandum from the Department of Defense, Joint Task Force Guantanamo (see paragraphs 27 and 28, above). The covering letter does not address Mr. Mamut's requests for other information. (The CSIS and CBSA assessments dated, respectively, August 5, 2016, and January 25, 2018, were

eventually disclosed to Mr. Mamut as part of the CTR prepared in connection with the present application. Both were subject to redactions under section 87 of the *IRPA* that were confirmed by the Court, although a non-injurious summary of redacted information in the letters was ordered released.)

[73] On August 27, 2020, DLS provided a detailed response to the information disclosed on July 1, 2020. DLS also requested a decision on Mr. Mamut's application for permanent residence within 30 days. In a follow-up letter dated October 2, 2020, DLS reiterated its request that a decision be made as soon as possible.

[74] On December 1, 2020, DLS requested that the processing of Mr. Mamut's application for permanent residence be held in abeyance temporarily so that further submissions could be provided on the implications of the recent decision by the United States to de-list the ETIM as a terrorist organization. These further submissions were provided on February 12, 2021. Once again, DLS requested a decision within 60 days.

[75] On May 11, 2021, the migration officer at the CGNY assigned to Mr. Mamut's case wrote a detailed email to the NSSD pursuant to the contrary outcome process, described above. As noted, the NSSD provided IRCC with a non-favourable inadmissibility recommendation in the case of Mr. Mamut on January 25, 2018. Evidently, the IRCC migration officer initiated the contrary outcome process because, as with Mr. Abdulahad, he was considering approving the application for permanent residence despite the NSSD's recommendation.

[76] The CTR in relation to Mr. Mamut's *mandamus* application was produced on December 22, 2022. It included the May 11, 2021, email from the migration officer to the NSSD (albeit in redacted form). Despite being produced 19 months after the migration officer sent the contrary outcome email, the CTR does not include any response from the NSSD. The respondent has not provided any evidence of when or even if the NSSD responded. In the meantime, as already noted, the validity periods of the 2016 and 2018 security assessments have elapsed.

[77] At some point (the record does not disclose when), Mr. Mamut's application was assigned to a new IRCC officer.

[78] On May 24, 2023, the CGNY convoked Mr. Mamut for another interview. It took place in Bermuda on June 5, 2023.

[79] In October 2023, Mr. Mamut received British citizenship.

[80] On March 15, 2024, Mr. Mamut received another procedural fairness letter from the Migration Section of the CGNY.

[81] The new procedural fairness letter identifies two potential areas of concern. One is that Mr. Mamut may be inadmissible to Canada under paragraph 34(1)(f) of the *IRPA* for being a member of an organization (the ETIM) that has engaged in terrorism. (It appears that the concern stated in the February 2020 procedural fairness letter that he may also be inadmissible

under paragraph 34(1)(d) for being a danger to the security of Canada is no longer being pursued.) The other is that he has not been truthful in his application for permanent residence. This is the first time this concern has been raised. Several alleged discrepancies between various statements Mr. Mamut has given over the years concerning events in Afghanistan were highlighted. Mr. Mamut was given 30 days to respond.

[82] I pause again to note that the respondent has objected to the manner in which Mr. Mamut provided the March 15, 2024, procedural fairness letter to the Court. Instead of attaching the letter as an exhibit to an affidavit and seeking leave to file the affidavit after the date for filing further affidavits set in the order granting leave had passed, counsel for Mr. Mamut simply appended it to their further memorandum of argument. I agree with the respondent that this was not the proper way to put the letter before the Court. Nevertheless, as I said at the hearing, I consider this to be a mere procedural irregularity that should be overlooked. The fact that another procedural fairness letter was sent to Mr. Mamut is certainly relevant. Given that the letter was produced by an officer acting on behalf of the respondent, there would be no prejudice to the respondent if the Court were to accept it. As well, the usual restrictions on new evidence in judicial review proceedings do not apply in applications for *mandamus.* Finally, in fairness to Mr. Mamut and his counsel, the timing of the letter, which Mr. Mamut received two weeks after the deadline for his further affidavits and four days before his further memorandum of argument was due, was entirely under the respondent's control.

[83] Returning to the unfolding of events, the CGNY issued a corrected procedural fairness letter dated April 17, 2024, giving Mr. Mamut 60 days to respond. (The earlier version had

inadvertently omitted one page. The letters are otherwise identical.) Mr. Mamut provided a detailed response on June 17, 2024.

III. ANALYSIS

A. *Introduction*

[84] The applicants' principal submission is that the delay in rendering decisions on the outstanding applications for permanent residence constitutes an abuse of process and they are entitled to a legal remedy for this. As I have already stated, for several reasons, this submission must fail. On the other hand, I am satisfied that the applicants have met the test for an order of *mandamus.*

[85] I find it helpful to begin with the issue of *mandamus* before turning to abuse of process.

B. *Are the applicants entitled to an order of* mandamus*?*

[86] The test for *mandamus* is well established. *Apotex v Canada (Attorney General)* (1993), [1994] 1 FC 742 (CA) (aff'd [1994] 3 SCR 1100) identified eight preconditions that must be met for an applicant to be entitled to an order of *mandamus*. In summary, these requirements are: (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 that duty; (4) where the duty sought to be enforced is discretionary, certain additional principles apply; (5) no other adequate remedy is available to the applicant; (6) the order sought will have some practical value or effect; (7) there is no equitable

bar to the relief sought; and (8) on a balance of convenience an order of *mandamus* should be issued. See also *Lukács v Canada (Transportation Agency)*, 2016 FCA 202 at para 29.

[87] Separate and apart from the specific *Apotex* requirements, *mandamus* is also available as a remedy for "extreme maladministration" on the part of administrative decision makers (*Doyle v Canada (Attorney General)*, 2022 FCA 56 at para 7) and for an abuse of process (*Law Society of Saskatchewan v Abrametz*, 2022 SCC 29 at para 80). All these frameworks invoke the Court's important role in ensuring the proper administration of the law, including by granting appropriate remedies for delay when warranted. Inordinate delay in administrative proceedings is contrary to the interests of society (*Abrametz*, at para 46). Decisions by administrative decision makers "need to be rendered promptly and efficiently" (*ibid.*). When this has not happened, the remedy of *mandamus* is available to compel administrative decision makers to carry out their duties (*Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at paras 145-150, *per* LeBel J, dissenting in part but not on this point). Like other forms of judicial review, an application for *mandamus* implicates the constitutional duty of courts to ensure that exercises of state power by administrative decision makers are subject to the rule of law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 27-28; *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2 at para 10; *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 82).

[88] Only the third of the *Apotex* requirements is in issue here. The determinative question is whether the applicants have a clear right to performance of the duty on the part of the Minister to render a decision on their applications for permanent residence. Generally speaking, this right is

engaged only if the party seeking *mandamus* has satisfied all the requirements for a decision to be made, they have requested that a decision be made, and the tribunal has either expressly refused to make a decision or it has taken unreasonably long to do so (*Apotex*, at 767). In the present applications, the only live issue is whether the Minister has taken unreasonably long to make a decision.

[89] The jurisprudence does not set fixed limits on what is a reasonable time to make an administrative decision or, conversely, fixed markers for when delay becomes unreasonable (*Almuhtadi v Canada (Citizenship and Immigration)*, 2021 FC 712 at para 37; see also *Abrametz*, at paras 45-49). Whether a delay in making a decision is unreasonable depends on the facts and circumstances of the case at hand. As LeBel J. stated in *Blencoe*, "a court's assessment of a particular delay in a particular case before a particular administrative body has to depend on a number of contextual analytic factors" (at para 158, dissenting in part but not on this point).

[90] In *Conille v Canada (Minister of Citizenship and Immigration)* (1998), [1999] 2 FC 33, which concerned a long-delayed decision on a citizenship application, Justice Tremblay-Lamer held (at 43) that three requirements must be met for 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 is not responsible for the delay; and (3) the authority responsible for the delay has not provided a satisfactory justification.

[91] Again, the points in issue here can be narrowed significantly.

[92] Surprisingly, despite delays of over 9 years and nearly 11 years, respectively, the respondent suggests that, *prima facie,* it has not taken longer to make a decision Mr. Mamut's or Mr. Abdulahad's applications for permanent residence than the process required. I reject this categorically. The delays in these cases clearly surpass what would usually be required to process an application for permanent residence by the spouse of a protected person.

[93] To establish that, *prima facie*, the delays in their cases have been longer than the nature of the process requires, the applicants rely on IRCC's published processing time (as of March 19, 2024) of 28 months for applications for permanent residence by protected persons (together with IRCC's policy that dependent applicants should be processed within the same time period as the principal applicant). The respondent submits that the applicants' reliance on this is misplaced because "those times are not a guaranteed service standard and are not applicable to complicated files involving security concerns" (*Respondent's Further Memorandum of Argument*, paragraph 78).

[94] In my view, the respondent has conflated the first and third parts of the *Conille* test. IRCC's published processing times simply provide a helpful baseline understanding of average processing times in order to assess whether the specific delay in question is longer, *prima facie*, than is typically required (*Saravanabavanathan v Canada (Citizenship and Immigration)*, 2024 FC 564 at para 30). When factors such as the need for security screening increase the amount of time beyond what is typically required, they are properly considered under the third part of the test.

[95] In any event, given the length of the delay in these cases, it is not necessary to identify any particular threshold of what is a typical processing time. It has presumably varied over the time that has passed since the applicants' first submitted their applications for permanent residence. As I understand it, the purpose of the first part of the *Conille* test is to screen out cases where the delay is not unusual and, as a result, where there is no need for further inquiry into the reasons for the delay, nor any reason to require the respondent to justify the delay, if it can, under the third part of the test. In the present cases, *prima facie*, the delays clearly surpass any reasonable measure of the time that is typically required and an inquiry into the reasons for the delay is therefore warranted. As well, while from time to time the applicants have requested extensions of time to provide materials to the decision maker and, in late 2020, they a requested a brief pause in the processing of their applications so that they could address a highly material development (the delisting of the ETIM by the US government), in the overall history of these matters, the applicants bear very little responsibility for how long their cases have taken. The determinative issue, therefore, is whether the respondent has provided a satisfactory explanation for the delays.

[96] As I will explain, I find that the respondent has fallen well short of doing so.

[97] The respondent submits that the processing of the applications for permanent residence has not taken longer than necessary "given the obvious security concerns, voluminous evidence, and overall complexity of the cases, including the contrary outcome process" (*Respondent's Further Memorandum of Argument*, paragraph 78). There is no question that background checks and security screening are important requirements under the *IRPA.* They are necessary to

maintain the security of Canadian society, one of the fundamental objectives of the *IRPA* (see paragraphs 3(1)(h) and (i) of the Act). Nor is there any question that, depending on the circumstances, the need to take such steps can justify even lengthy processing delays (*Jaber v Canada (Citizenship and Immigration)*, 2013 FC 1185 at para 26; *Carrero v Canada (Citizenship and Immigration)*, 2021 FC 891 at paras 14-15). I also accept that the applicants have provided comprehensive submissions to the decision maker at several junctures (including expert opinion evidence) and that this would have added to the time required to process their applications. I am not satisfied, however, that the mere presence of these factors justifies the delay in these cases.

[98] I begin by noting that the respondent did not offer any evidence to explain the delays beyond the information in the CTRs. Unfortunately for the respondent, this information leaves substantial periods of delay in both cases completely unexplained. This includes not only periods of time covered by the CTRs but also the delay that has continued to accrue after the CTRs were produced (now almost 16 months ago in the case of Mr. Abdulahad and almost two years ago in the case of Mr. Mamut). The order granting leave provided that the respondent could file additional evidence by March 12, 2024. The respondent chose not to take advantage of this opportunity.

[99] In Mr. Abdulahad's case, at the outset, security screening proceeded at a reasonable pace. CBSA requested security advice from CSIS on February 24, 2015, shortly after IRCC had received all the information it required from Mr. Abdulahad and Ms. Yahefu. CSIS provided its advice on August 18, 2015. The NSSD provided its inadmissibility assessment to IRCC on

November 20, 2015. After this, however, there are lengthy periods of unexplained delay, including the following:

- November 20, 2015, to November 25, 2016 – the time between completion of the NSSD assessment and the first procedural fairness letter (12 months)

- August 12, 2015, to January 16, 2018 – the time between cancelation of the first interview and the interview being re-scheduled (29 months)

- January 30, 2018, to February 7, 2020 – the time between the re-scheduled interview and the second procedural fairness letter (24 months)

- April 7, 2020, to May 26, 2021 (less the period from November 17, 2020, to February 12, 2021) – the time between the response to the second procedural fairness letter and the email initiating the contrary outcome process (10 months)

- May 26, 2021, to January 4, 2024 – the time between the email initiating the contrary outcome process and the scheduling of the second interview (31 months)

- January 31, 2024 to present – the time since the second interview.

[100] Notably, despite the email sent on May 26, 2021, initiating the contrary outcome process, there is no evidence of any further involvement in the security screening process by the CBSA or any of its security partners since then. On the record on this application, nothing more has happened in this regard. Indeed, despite Mr. Abdulahad's potential inadmissibility on security grounds being the predominant if not the only concern, on the record before me, the most recent activity in this regard occurred nearly ten years ago (the 2015 NSSD assessment). The last

apparent involvement by CSIS dates from even longer ago. The validity period of CSIS's assessment has elapsed. I accept that engaging the contrary outcome process would likely increase the amount of time required to reach a final decision. However, in the complete absence of evidence of any steps being taken under this process after the IRCC officer sent his email on May 26, 2021, the fact that this process was triggered does little to assist the respondent in explaining why a decision has still not been made.

[101] Likewise in the case of Mr. Mamut, the security screening process began at a reasonable pace. The CBSA requested security screening advice from CSIS on May 6, 2016, shortly after IRCC had received the additional information it required from Mr. Mamut and Ms. Aizezi. CSIS provided its advice on August 5, 2016. After this, however, there are lengthy periods of unexplained delay, including the following:

- August 5, 2016, to January 25, 2018 – the time between delivery of the CSIS assessment and preparation of the NSSD assessment (17 months)

- January 30, 2018, to February 7, 2020 – the time between the interview in Bermuda and the first procedural fairness letter (24 months)

- April 7, 2020, to May 11, 2021 (less the period from December 1, 2020, to February 12, 2021) – the time between the response to the first procedural fairness letter and the contrary outcome process email (11.5 months)

- May 11, 2021 to May 24, 2023 – the time between the email initiating the contrary outcome process and being convoked for a second interview (24 months)

- June 5, 2023 to March 15, 2024 – the time between the second interview and the second procedural fairness letter (9 months).

[102] As with Mr. Abdulahad, despite the email sent on May 11, 2021, initiating the contrary outcome process, there is no evidence of any further involvement in the security screening process for Mr. Mamut by the CBSA or any of its security partners since then. On the record on this application, nothing more has happened in this regard. Again as with Mr. Abdulahad, despite Mr. Mamut's potential inadmissibility on security grounds being the predominant if not the only concern, the most recent activity in this regard that is apparent on the record (the 2018 NSSD assessment) occurred nearly seven years ago and its validity period has long since elapsed. The last involvement by CSIS dates from even longer ago. The validity period of its assessment has also elapsed. As with Mr. Abdulahad, in the complete absence of evidence of any steps being taken under the contrary outcome process after the IRCC officer sent his email on May 11, 2021, the fact that this process was triggered does little to assist the respondent in explaining why a decision has still not been made in Mr. Mamut's case, either.

[103] In my view, the respondent's reliance on the need for security screening hardly rises above a bare assertion that the time that has been taken is justified because security screening takes time. This Court has held repeatedly that blanket statements like this are insufficient to justify delay: see *Abdolkhaleghi v Canada (Minister of Citizenship and Immigration)*, 2005 FC 729 at para 26; *Kanthasamyiyar v Canada (Citizenship and Immigration)*, 2015 FC 1248 at paras 49-50; *Almuhtadi*, at para 40; *Samideh v Canada (Citizenship and Immigration)*, 2023 FC 854 at paras 36-37; *Jahantigh v Canada (Citizenship and Immigration)*,

2023 FC 1253 at para 19; *Ran v Canada (Citizenship and Immigration)*, 2023 FC 1447 at paras 30-31; and *Saravanabavanathan v Canada (Citizenship and Immigration)*, 2024 FC 564 at para 34. As Justice McHaffie held in *Jahantigh*, "For the Court to assess whether the length of a security review is reasonable, it must have some information about the review and the reasons for its length" (at para 20). Likewise, Justice Tremblay-Lamer held in *Abdolkhaleghi* that what will constitute an adequate explanation for delay will depend "on the relative complexity of the security considerations in each case" (at para 26).

[104] It is true that the records in the present cases disclose the core security inadmissibility concern: the applicants' alleged membership in or association with the ETIM. To that extent, this distinguishes the present cases from those cited above, where nothing at all was offered to explain the delay except the fact that a security investigation is required. However, the applications for permanent residence have been before the Minister for a considerable time, to say the least. Even accepting, as I do, that there are inherent time requirements for conducting effective security screening and that what is required can vary from one case to the next, the need for security screening is not a blank cheque. Once the third step of the *Conille* test has been reached, to avoid *mandamus* being ordered, the respondent must provide a reasoned explanation, supported by evidence, for the time that has been taken to make a decision. As outlined above, the record before me leaves substantial periods of delay largely if not entirely unexplained.

[105] I am unable to agree with the respondent that the "overall complexity" of the cases explains the delay. The salient events took place long ago. The respondent acknowledges that the focus of the inadmissibility concerns is what happened in Afghanistan in 2001. Those events

are well documented and have been scrutinized by various parties in the years and decades since. Information relating to the security concerns raised by the applicants' personal histories was a matter of public record long before the applicants applied for permanent residence in Canada. This information was presumably available to the Minister and to security partners from the moment the applicants submitted their applications. While the cases are certainly unusual, the respondent has not persuaded me that they are particularly complex. On the contrary, the factual circumstances of the cases, outlined above, are reasonably straightforward. At the very least, they are not so complex as to justify nearly a decade or more of consideration by the Minister.

[106] While far from determinative, it is instructive to compare the applicants' cases with that of Ayoob Haji Mohammed. Mr. Mohammed is also a Uyghur who stayed at the same village in Afghanistan as the applicants, who was captured with them in Pakistan, and who was also held at Guantanamo Bay as an enemy combatant. In 2014, after he was released from Guantanamo Bay for resettlement in Albania, Mr. Mohammed applied for permanent residence in Canada under the sponsorship of his wife, who is a Canadian citizen. Like Mr. Abdulahad's and Mr. Mamut's applications for permanent residence, Mr. Mohammed's application gave rise to concerns over whether he is inadmissible on security grounds due to his alleged association with the ETIM in Afghanistan.

[107] When Mr. Mohammed's application was first considered by IRCC, it took slightly over two years for a decision finding him inadmissible on security grounds to be made. (For a summary of the chronology of his case, see *Mohammed v Canada (Immigration, Refugees and Citizenship)*, 2019 FC 326 at paras 4-10.) After his application was ordered redetermined

because of a breach of procedural fairness, it took 17 months for a new decision to be rendered. Again, the application was rejected on security inadmissibility grounds: see *Mohammed v Canada (Citizenship and Immigration)*, 2022 FC 980 at paras 1-3.

[108] While the applicants are obviously hoping for a different result, the relative speed with which two different decisions were made in Mr. Mohammed's case belies the respondent's contention that the lengthy delays in the applicants' cases are explained by the security concerns arising from them. Those concerns are essentially the same as in Mr. Mohammed's case yet decisions were made in his case without anything remotely close to the delays the applicants have faced. Even if, as appears to be the case, the contrary outcome process was not engaged in Mr. Mohammed's case, for the reasons I have already stated, that process does little to explain why it has taken so much longer to render decisions in the applicants' cases compared to Mr. Mohammed's.

[109] Finally, the requirements of procedural fairness – the need to ensure that the applicants know the case against them and have a reasonable opportunity to respond – may explain some of the time it has taken to process the applications for permanent residence but they certainly do not justify the lengthy delays on the Minister's part.

[110] In sum, the respondent has failed to provide a satisfactory explanation for the delay in either case. I would therefore conclude under the *Conille* test that the delay in both cases is unreasonable. As a result, under the *Apotex* test, the applicants are entitled to a remedy.

[111] The applicants requested that the Court order that decisions be made on their applications for permanent residence within 30 days of the Court's decision. The respondent submitted that, in the event that the Court found that the *Apotex* test was met, 30 days was too short a time for a decision to be made; instead, a further six months should be granted. The respondent did not offer any evidence to support either of these positions.

[112] Considering the length of time these matters have been before the Minister, and in the absence of any evidence to show why more time is required, I can see no reason not to accede to the applicants' requests. Accordingly, decisions shall be made on the applications for permanent residence within 30 days of the date of this judgment. This is without prejudice to the right of the respondent to request more time to make the decisions. If the extension of time is not opposed, the request may be submitted informally. If the extension is opposed, a motion record and supporting evidence will be required. I will remain seized with these matters to consider any such request or other issues that may arise.

C. *Does the delay constitute an abuse of process?*

[113] As I have already mentioned, the applicants' request for *mandamus* is really their secondary request for relief. Their principal submission is that the delay in the processing of their applications for permanent residence constitutes an abuse of process for which they are entitled to a remedy.

[114] Drawing on the principles articulated in *Blencoe* and *Abrametz*, the applicants contend that the inordinate delay on the part of the Minister has impaired their ability to address the

Minister's concerns about their potential inadmissibility on security grounds, thereby compromising the fairness of the security assessment process (*Abrametz*, at para 41). They also contend that the delay has caused them significant personal prejudice such that the administration of justice would be brought into disrepute if the security inadmissibility proceedings were permitted to continue (*Abrametz*, at paras 42-43). The remedy the applicants seek has been framed in different ways but the central idea is that the Minister should be precluded from finding them inadmissible on security grounds, at least as those grounds relate to their alleged links to the ETIM.

[115] For several reasons, I am not persuaded that any remedy with this effect is warranted.

[116] First, the applicants have requested orders staying the security admissibility proceedings for inordinate delay and abuse of process. It may be open to debate whether the notion of a stay of proceedings is even applicable to the process underway before the Minister; however, it would be unduly formalistic to reject the applicants' claims for a remedy on this basis alone. Even if their requests strain the meaning and usual function of a stay of proceedings, it is clear that what the applicants are seeking are orders barring further consideration of the issue of their inadmissibility on security grounds. At least in principle, in the exercise of its remedial discretion under subsection 18.1(3) of the *Federal Courts Act*, RSC 1985, c F-7 (*FCA*), the Court could make such an order.

[117] The parties agree that, however it is framed, the remedy the applicants seek requires a balancing of public interests. Drawing on the discussion in *Abrametz* (at para 84), on the one

hand, the public has an interest in ensuring that the security inadmissibility assessment follows fair procedures and is untainted by an abuse of process. On the other hand, given the singular importance of protecting national security, the public also has an interest in the resolution of this issue on its merits. The applicants contend that the balance favours an administrative process untainted by abuse; the respondent contends that the balance favours having the issue of security inadmissibility determined on its merits.

[118] It is not necessary to decide where the balance falls in these cases. This is because, even if the balance fell in the applicants' favour, and even if they also met the "clearest of cases" requirement (as the respondent contends they must), the orders the applicants seek would be self-defeating. The parties hold differing views on which *IRPA* provisions govern the applications for permanent residence but there is no issue that, whichever provisions apply, before the applications can be approved, an IRCC officer must be satisfied that the applicants are not inadmissible. Absent the granting of a constitutional remedy, which the applicants have not sought, the Court does not have the power to order the administrative decision maker(s) to ignore or act contrary to the requirements of the statute under which they are acting (*JP Morgan Asset Management (Canada) Inc v Canada*, 2013 FCA 250 at para 94). Consequently, if the Court were to bar any further consideration of the issue of the applicants' inadmissibility on security grounds, this would leave the IRCC officer(s) unable to be satisfied that the applicants are not inadmissible. In such circumstances, the officer(s) would have no choice but to refuse the applications for permanent residence, something the applicants obviously do not want.

[119] Second, this conundrum could be avoided if, instead of staying the security inadmissibility assessments, the Court were to direct the IRCC decision maker(s) to find that the applicants are not inadmissible on security grounds (at least as those grounds relate to their alleged association with or membership in the ETIM). Alternatively, the Court could prohibit the Minister from finding the applicants are inadmissible on these grounds. Either way, the effect would be the same: the applications for permanent residence could not be refused on security grounds relating to the applicants' alleged links to the ETIM.

[120] The Court's power to make such an order flows from paragraph 18.1(3)(a) of the *FCA*, which provides that, on an application for judicial review, the Court may "order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing." In effect, this is a form of *mandamus*: see *Canada (Public Safety and Emergency Preparedness) v LeBon*, 2013 FCA 55 at para 14. However, *mandamus* in this form, where the reviewing court effectively becomes the merits-decider, is available "only where the facts and law are such that the administrative decision-maker has no choice and must determine the matter in a particular way" (*Sexsmith v Canada (Attorney General)*, 2021 FCA 111 at para 40; see also *Canada (Citizenship and Immigration) v Tennant*, 2019 FCA 206 at paras 71-75). Put other ways, directly or indirectly, a reviewing court may render the decision that would ordinarily be rendered by the administrative decision maker only when that decision maker "could not reasonably come to any other decision on the facts and the law" (*Canada (Attorney General) v Philps*, 2019 FCA 240 at para 41) or where the outcome of the case on the merits is a "foregone conclusion" because the law and the evidence "can lead only to one result" (*D'Errico v Canada (Attorney General)*, 2014 FCA 95 at para 16).

[121] I am not satisfied that this requirement is met here. Crucially, there are material factual issues bearing on the issue of inadmissibility on security grounds that remain unresolved. Among other things, the nature of the Uyghur village, why the applicants went there, and what they did there remain live issues. So, too, is the fundamental question of whether the ETIM can properly be characterized as a terrorist organization. It is true that many of the issues bearing on the applicants' potential inadmissibility on security grounds were ultimately resolved in their favour by US courts. Those determinations, however, are not binding on Canadian authorities (even if they would presumably be given significant weight). These are exactly the sorts of questions of fact and mixed fact and law that Parliament has decided should be answered in the first instance by administrative decision makers (in the present cases, by IRCC officers), and not by reviewing courts: see, generally, *Safe Food Matters Inc v Canada (Attorney General)*, 2022 FCA 19 at para 37, and the authorities cited therein. When, as is the case here, central factual issues remain unresolved, it will rarely be appropriate for the reviewing court to substitute its opinion for that of the administrative decision maker (*Canada (Minister of Human Resources Development) v Rafuse*, 2002 FCA 31 at para 14; *Canada (Attorney General) v Allard*, 2018 FCA 85 at para 45). The fact of lengthy – even inordinate – delay does not make it appropriate to do so in these cases. The applicants have not persuaded me that theirs are among those rare cases where the Court sitting in judicial review should (or even could) decide the underlying factual issues for itself.

[122] Third, either of these remedies – a stay of the inadmissibility assessments or an order directing the decision maker(s) to find that the applicants are not inadmissible on security grounds – would overshoot the mark. The applicants' principal complaint, which I have

accepted, is that there has been inordinate delay on the part of the Minister. Indeed, I agree with the applicants that the Minister's delay is so inordinate as to be an affront to the proper administration of justice. But this alone does not entitle the applicants to a favourable answer to the question of their inadmissibility on security grounds. Standing on its own, at most it entitles the applicants to decisions without further undue delay.

[123] To support their claim for a remedy over and above an order that the Minister render decisions without further undue delay, the applicants submit that they have endured significant personal hardship while waiting for a decision. I accept that this is the case. But, again, this does not entitle the applicants to a favourable answer to the question of their inadmissibility on security grounds. The Supreme Court of Canada has recognized that remedies for abuse of process arising from administrative delay can serve several purposes, including compensating a party for the prejudice caused by the delay, giving the decision maker an incentive to address any problems of systemic delay, and expressing the court's concern relating to delay in the administrative system (*Abrametz*, at para 75). A favourable decision on the question of whether they are inadmissible on security grounds does not meaningfully respond to the prejudice the applicants have suffered because of the delay. As well, the Court's orders of *mandamus* (discussed above) and costs (discussed below), are sufficient to meet the other remedial goals; a further remedy is therefore not required.

[124] The applicants also submit that the delay has undermined the fairness of the security inadmissibility determination process. They point out that they have been questioned many times about events that happened long ago, their memories of these events are fading, and they

naturally may have forgotten or overlooked certain details. As the applicants see it, the Minister's goal seems to be to keep eliciting statements from them, whether by interviewing them repeatedly or issuing procedural fairness letters to which they must respond, so that eventually they can be caught in enough inconsistencies to warrant rejecting their exculpatory accounts, finding that they were not truthful in their applications, and, as a result, finding that they are inadmissible on security grounds, due to misrepresentation, or perhaps even both.

[125] The applicants' concerns are understandable, especially considering the number of times the Minister has gone back to them for further information and the tenor of the latest procedural fairness letter sent to Mr. Mamut. However, at this stage, their concerns that adverse decisions will be built on such a foundation are wholly speculative. As of yet, Mr. Abdulahad has not received a procedural fairness letter along the lines of the last one sent to Mr. Mamut. But even if I assume for the sake of argument that he, too, will be receiving such a letter, I cannot presume that the concerns articulated in the letters will become the reasons for finding the applicants inadmissible. The decision maker(s) may well be persuaded by the applicants' responses to the concerns. If this turns out to be the case, the applicants' concerns about unfairness will have proven to be unfounded. On the other hand, if this turns out not to be the case, the appropriate recourse is an application for judicial review of the adverse decisions. In short, since the applicants have failed to establish that the fairness of the security inadmissibility assessments has been compromised, they have not established their entitlement to a remedy aimed at rectifying the unfairness they allege.

[126] For these reasons, the applicants' requests for a stay of the inadmissibility assessment process or for an order directing that a favourable determination be made on the question of their security inadmissibility must be rejected.

D. *Are the applicants entitled to an award of costs?*

[127] The applicants seek an award of costs. The respondent opposes this request and did not seek costs in the event that the applications were dismissed.

[128] Rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/2002-232, provides that costs may be awarded in an application for judicial review under the *IRPA* only if the Court finds "special reasons" for doing so. The term "special reasons" is not defined in the Rules or in the jurisprudence. Still, it is well established that the threshold for an award of costs is a high one. Whether an award of costs is appropriate turns on the particular circumstances of the case: see *Diakité v Canada (Immigration, Refugees and Citizenship)*, 2024 FC 170 at para 58.

[129] Special reasons justifying costs against the Minister may be found where an official issues a decision only after unreasonable and unjustified delay (*Ndungu v Canada (Citizenship and Immigration)*, 2011 FCA 208 at para 7). Likewise, costs have been awarded on the basis of excessive delay on the part of decision makers in cases involving *mandamus*: see *Aghdam v Canada (Public Safety and Emergency Preparedness)*, 2011 FC 131 at paras 21-22; *Tameh v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 288 at para 78; *Samideh v Canada (Citizenship and Immigration)*, 2023 FC 854 at paras 46-48; *Ghaddar v Canada*

(Citizenship and Immigration), 2023 FC 946 at paras 45-49; and *Amawla v Canada (Citizenship and Immigration)*, 2024 FC 1132 at paras 28-29.

[130] I am satisfied that the applicants have met the high threshold of demonstrating special reasons for an award of costs in their favour. They have been required to wait far too long for decisions on their applications for permanent residence. As discussed above, the respondent has offered little in the way of explanation or justification for the delay. The applicants have had to endure lengthy, unexplained periods of inaction on the part of the Minister. Their repeated requests for a timely decision were largely if not entirely ignored. Outside the immigration context, a lack of diligence on the part of an administrative decision maker can justify an award of costs (*Blencoe*, at para 136; *Abrametz*, at para 99). An award of costs can also be used, among other things, to express the Court's concern about delay (*Abrametz*, at para 76) and to compensate an applicant for having had to resort to the Court to obtain relief (*Blencoe*, at para 183, *per* LeBel J.). In my view, these considerations can constitute special reasons for awarding costs in *mandamus* applications arising under the *IRPA*, although, to repeat, it all depends on the particular facts of the case at hand.

[131] Having regard to all the circumstances of the present applications, I would award costs to the applicants in each matter in the all-inclusive amount of $3,000.

E. *Should the Court certify questions under IRPA, paragraph 74(d)?*

[132] The respondent proposed two serious questions of general importance for certification. One was contingent on the Court staying the inadmissibility assessments; the other was premised

on the Court accepting the applicants' submission that the *Blencoe* threshold for granting a stay of proceedings should be modified in the refugee protection context. Since the Court has not done either of these things, the proposed questions are entirely hypothetical; as such, they are not appropriate for certification (*Canada (Public Safety and Emergency Preparedness) v XY*, 2022 FCA 113 at para 7). No other questions have been proposed or arise.

IV. CONCLUSION

[133] For these reasons, the applications for judicial review are allowed in part. The Court's judgment is set out below.

JUDGMENT IN IMM-1407-22 AND IMM-8585-22

THIS COURT'S JUDGMENT is that

1. The applications are allowed in part.
2. Decisions shall be made on the applications for permanent residence by Salahidin Abdulahad and Khalil Mamut within thirty (30) days of the date of this judgment.
3. This is without prejudice to the right of the respondent to seek an extension of this deadline.
4. Costs are awarded to the applicants in IMM-1407-22 in the all-inclusive amount of $3,000.
5. Costs are awarded to the applicants in IMM-8585-22 in the all-inclusive amount of $3,000.
6. No question of general importance is stated.
7. I will remain seized with these matters.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1407-22
STYLE OF CAUSE:	KHALIL MAMUT ET AL v MINISTER OF CITIZENSHIP AND IMMIGRATION
AND DOCKET:	IMM-8585-22
STYLE OF CAUSE:	SALAHIDIN ABDULAHAD ET AL v MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	APRIL 16, 2024, MAY 7, 2024
JUDGMENT AND REASONS:	NORRIS J.
DATED:	OCTOBER 8, 2024

APPEARANCES:

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