Federal Court  Cour fédérale

Date: 20140923

Docket: T-1952-13

Citation: 2014 FC 909

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Montréal, Quebec, September 23, 2014

PRESENT: The Honourable Madam Justice Bédard

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Plaintiff

and

CÉLESTIN HALINDINTWALI

Defendant

ORDER AND REASONS

[1] This is a motion for order of confidentiality filed by the plaintiff in the action brought under section 18(1)(*b*) of the *Citizenship Act*, RSC, 1985, c C-29 (the Act). The purpose of the action is to have the Court declare that the person obtained Canadian citizenship by false representation or fraud or by knowingly concealing material circumstances.

[2] For the reasons that follow, this motion for confidentiality is granted.

I. **Background**

[3] The defendant became a permanent resident of Canada on July 22, 1997, and obtained Canadian citizenship on June 21, 2001. The plaintiff contends that the defendant made false representations when he applied for permanent residency in order to hide from Canadian authorities his participation in the Rwandan genocide in 1994, and that he completely fabricated his account in order to be admitted in to Canada as a refugee.

[4] The Act (in force as of June 6, 2013) provides a procedure that enables the Governor in Council to make an order revoking a person's citizenship if he is satisfied that the person obtained citizenship by false representation or fraud or by knowingly concealing material circumstances. The Governor in Council's power in this respect is provided in section 10 of the Act, which reads as follows:

Order in cases of fraud	**Décret en cas de fraude**
10. (1) Subject to section 18 but notwithstanding any other section of this Act, where the Governor in Council, on a report from the Minister, is satisfied that any person has obtained, retained, renounced or resumed citizenship under this Act by false representation or fraud or by knowingly concealing material circumstances,	10. (1) Sous réserve du seul article 18, le gouverneur en conseil peut, lorsqu'il est convaincu, sur rapport du ministre, que l'acquisition, la conservation ou la répudiation de la citoyenneté, ou la réintégration dans celle-ci, est intervenue sous le régime de la présente loi par fraude ou au moyen d'une fausse déclaration ou de la dissimulation intentionnelle de faits essentiels, prendre un décret aux termes duquel l'intéressé, à compter de la date qui y est fixée :
(a) the person ceases to be a citizen, or	
(b) the renunciation of citizenship by the person shall	

be deemed to have had no effect, as of such date as may be fixed by order of the Governor in Council with respect thereto. **Presumption** (2) A person shall be deemed to have obtained citizenship by false representation or fraud or by knowingly concealing material circumstances if the person was lawfully admitted to Canada for permanent residence by false representation or fraud or by knowingly concealing material circumstances and, because of that admission, the person subsequently obtained citizenship. 1974-75-76, c. 108, s. 9.	a) soit perd sa citoyenneté; b) soit est réputé ne pas avoir répudié sa citoyenneté. **Présomption** (2) Est réputée avoir acquis la citoyenneté par fraude, fausse déclaration ou dissimulation intentionnelle de faits essentiels la personne qui l'a acquise à raison d'une admission légale au Canada à titre de résident permanent obtenue par l'un de ces trois moyens. 1974-75-76, ch. 108, art. 9.

[5] As set out in subsection 10(1), the Governor in Council acts after receiving a report from the Minister of Citizenship and Immigration (the Minister). However, under section 18 of the Act, the Minister must give notice of his intention to submit a report to the Governor in Council recommending that citizenship be revoked to the person in respect of whom the report is to be made. That person may then request that the matter be referred to the Federal Court, which will determine whether there has been false representation, fraud or knowing concealment of material circumstances. When the person concerned requests that the matter be referred to the Court, the Minister must wait for the Court's decision before submitting his report to the Governor in Council. If the Court decides that citizenship has been obtained by false representation or fraud or by knowingly concealing material circumstances, he may then submit his report recommending that the Governor in Council revoke the person's citizenship.

[6] Section 18, which governs this process, reads as follows:

Notice to person in respect of revocation
18(1) The Minister shall not make a report under section 10 unless the Minister has given notice of his intention to do so to the person in respect of whom the report is made and

(a) that person does not, within thirty days after the day on which the notice is sent, request that the Minister refer the case to the Court; or

(b) that person does so request and the Court decides that the person has obtained, retained, renounced or resumed citizenship by false representation or fraud or by knowingly concealing material circumstances.

Nature of notice
(2) The notice referred to in subsection (1) shall state that the person in respect of whom the report is to be made may, within thirty days after the day on which the notice is sent to him, request that the Minister refer the case to the Court, and such notice is sufficient if it is sent by registered mail to the person at his latest known address.

Decision final
(3) A decision of the Court made under subsection (1) is final and, notwithstanding any other Act of Parliament, no appeal lies therefrom.
1974-75-76, c. 108, s. 17.

Avis préalable à l'annulation
18. (1) Le ministre ne peut procéder à l'établissement du rapport mentionné à l'article 10 sans avoir auparavant avisé l'intéressé de son intention en ce sens et sans que l'une ou l'autre des conditions suivantes ne se soit réalisée :

a) l'intéressé n'a pas, dans les trente jours suivant la date d'expédition de l'avis, demandé le renvoi de l'affaire devant la Cour;

b) la Cour, saisie de l'affaire, a décidé qu'il y avait eu fraude, fausse déclaration ou dissimulation intentionnelle de faits essentiels.

Nature de l'avis
(2) L'avis prévu at paragraphe (1) doit spécifier la faculté qu'a l'intéressé, dans les trente jours suivant sa date d'expédition, de demander au ministre le renvoi de l'affaire devant la Cour. La communication de l'avis peut se faire par courrier recommandé envoyé à la dernière adresse connue de l'intéressé.

Caractère définitif de la décision
(3) La décision de la Cour visée au paragraphe (1) est définitive et, par dérogation à toute autre loi fédérale, non susceptible d'appel.
1974-75-76, ch. 108, art. 17.

[7] On June 6, 2013, the plaintiff sent a notice to the defendant informing him of his intention to recommend that the Governor in Council revoke his citizenship pursuant to section 18 of the Act.

[8] On June 21, 2013, the defendant, through his counsel, requested that the matter be referred to the Court.

II. **History of this proceeding and default proceedings**

[9] The plaintiff filed his statement of claim with the Registry of the Court on November 27, 2013. The defendant was served with the statement of claim pursuant to Rule 128(1)(*b*) of the *Federal Courts Rules* SOR/98-106 (the Rules). In accordance with Rule 128(2), service of the statement of claim on the defendant was effective on December 20, 2013, and the defendant had 30 days to challenge the action by serving and filing his statement of defence (Rule 204). The 30-day period, taking into account the holiday period, ended on February 5, 2014, and the defendant had not served or filed his statement of defence.

[10] The plaintiff made many enquiries to ensure that the defendant had not inadvertently failed to file his statement of defence. Counsel for the plaintiff tried unsuccessfully to contact counsel for the defendant by telephone and left him messages that were never returned. On February 28, 2014, counsel for the plaintiff sent a letter by fax to counsel for the defendant informing him that unless he received some reply by March 10, 2014, he intended to file a motion for a default judgment. Rule 210 of the Rules authorizes and provides for default proceedings when a defendant fails to serve and file a statement of defence within the time set out in Rule 204.

[11] On June 16, 2014, the Court sent the parties a Notice of Status Review. On June 27, 2014, the plaintiff filed written submissions in reply to the Notice of Status Review. In his submissions, the plaintiff informed the Court that he intended to file a motion for confidentiality and a motion for default judgment.

[12] On August 8, 2014, Prothonotary Morneau ordered that the proceeding continue as a specially managed proceeding. Moreover, given the importance of the case and although it is not required under the Rules because the defendant had not filed a statement of defence, Prothonotary Morneau ordered the plaintiff to serve on the defendant a copy of the order as well as copies of the motions for confidentiality and default judgment. In this case, this is a precaution to ensure that the defendant truly chose to not participate in this hearing.

[13] The evidence establishes that Mr. Morneau's order and the plaintiff's two motions were served on defendant, in accordance with Rule 140 of the Rules, on August 12, 2014. I am thus satisfied that this motion for confidentiality may proceed by default.

III. **The motion for confidentiality**

[14] In this case, the plaintiff alleges that the defendant made several misrepresentations in the permanent residence application that he filed in 1995 and knowingly concealed material circumstances. More specifically, the plaintiff submits that the defendant falsely stated that he had never committed a crime against humanity, whereas the defendant, he claims, participated in the perpetration of crimes against humanity against the Tutsi people during the Rwandan genocide. The plaintiff also submits that the defendant lied about his country of nationality, place

of birth, where he had studied, his employment history, his marriage and his grounds for his fear of persecution.

[15] In support of his motion for default judgment, and to adduce evidence of fraud and concealment of information, the plaintiff filed the affidavit of Rudy Exantus, a police officer with the Royal Canadian Mounted Police (RCMP). Mr. Exantus is currently assigned to the RCMP Sensitive and International Investigations Unit, but from July 2001 to 2012, he was assigned to the RCMP War Crimes Unit.

[16] As part of his work, starting in August 2008, Mr. Exantus participated in a criminal investigation into the possible involvement of the defendant in the 1994 Rwandan genocide. Since 2011, he has also completed research and investigation mandates regarding the procedure for revoking the defendant's citizenship, on the request of the Crimes Against Humanity and War Crimes Section of the Department of Justice.

[17] In his affidavit, Mr. Exantus stated that he had personally interviewed witnesses as part of the criminal investigation and the investigation related to the process to revoke the defendant's citizenship. He also stated that he was aware of statements obtained by colleagues who had also participated in the investigations. Mr. Exantus stated that as part of these investigations many people (the affidavit refers to the testimony of 20 witnesses) were interviewed in Canada, Rwanda, Belgium and Holland. These people allegedly witnessed, in different respects, the defendant's participation in the genocide in the Butare prefecture between April and July 1994.

[18] Mr. Exantus' affidavit addresses statements allegedly made by the people that were interviewed.

[19] The version of Mr. Exantus' affidavit filed in Court identifies the witnesses by pseudonyms and has some portions that are redacted.

[20] The plaintiff submits that the safety of the witnesses interviewed as part of the investigations and whose statements are reported in Mr. Exantus' affidavit, could be compromised if their identity were disclosed publicly. That is the reason why the plaintiff and Mr. Exantus identified the witnesses by pseudonyms. The plaintiff also submits that the redacted excerpts of the affidavit contain and are limited to information that would be likely to identify the people who made the statements.

[21] Through the motion for confidentiality, the plaintiff thus seeks to preserve the confidentiality of the identities of the witnesses who were interviewed and whose statements are recounted or summarized in Mr. Exantus' affidavit. The plaintiff is willing to file an unredacted copy of the affidavit but asks that it be declared confidential and that the redacted copy be the only copy placed in the Court's public file.

IV. **Analysis**

[22] It is well known that one of the foundations of our legal system is the open court principle. In principle, Court proceedings are public as are Court files, pleadings and evidence entered in the Court record. These principles are clearly reflected in subsections 26(1) and 29(1) of the Rules. Nonetheless, there are recognized exceptions to the open court principle.

[23] Rule 151of the Rules sets out how motions for confidentiality are dealt with and reads as follows:

Motion for order of confidentiality 151. (1) On motion, the Court may order that material to be filed shall be treated as confidential. **Demonstrated need for confidentiality** Before making an order under subsection (1), the Court must be satisfied that the material should be treated as confidential, notwithstanding the public interest in open and accessible court proceedings.	**Requête en confidentialité** 151. (1) The Court peut, sur requête, ordonner que des documents ou éléments matériels qui seront déposés soient considérés comme confidentiels. **Circonstances justifiant la confidentialité** (2) Avant de rendre une ordonnance en application du paragraphe (1), The Court doit être convaincue de la nécessité de considérer les documents ou éléments matériels comme confidentiels, étant donné l'intérêt du public à la publicité des débats judiciaires.

[24] Under Rule 151, before making an order of confidentiality, the Court must be satisfied that the documents at issue should be treated as confidential, notwithstanding the public interest in open and accessible court proceedings. It is clear from Rule 151 and the jurisprudence that confidentiality is an exception to the general open court rule and it must be applied carefully and after thorough analysis.

[25] In *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 SCR 522 (*Sierra Club*), the Supreme Court set out the framework and the test to be applied by a court hearing a motion for confidentiality. Thus, before making an order of confidentiality, the Court must be satisfied that the need for preserving the confidentiality of a document outweighs the public interest in open and accessible Court proceedings. The Court reiterated and adapted to the

context of the case before it the two-branch test it had previously set out in other decisions (*Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835, 1994 CanLII 39 (SCC) (*Dagenais*); *Canadian Broadcasting Corp v New Brunswick (Attorney General)*, [1996] 3 SCR 480, 1996 CanLII /84 (SCC); *R v Mentuck*, 2001 SCC 76, [2001] 3 SCR 442) (*Mentuck*)). The Court stated, at paragraph 53 (*Sierra Club*), a confidentiality order should only be granted when the Court determines that

> i. such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
>
> ii. the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

[26] The Court also reiterated that three elements must be considered under the first branch of the test: (1) the risk in question must be real and substantial, well grounded in the evidence; (2) the Court should guard against protecting an excessive number of documents from disclosure; and (3) the Court must consider whether reasonable alternatives to a confidentiality order are available and restrict the order as much as is reasonably possible (*Sierra Club*, paras 53-56).

[27] In *Canadian Broadcasting Corp. v The Queen*, 2011 SCC 3, [2011] 1 SCR 65 at para 13, the Court noted that the analytical approach developed in *Dagenais* and *Mentuck* applies to all discretionary decisions that affect the openness of proceedings.

[28] These principles have been applied by our Court and by the Federal Court of Appeal in motions for confidentiality filed under Rule 151 (*Grace Singer v Canada (Attorney General)*,

2011 FCA 3, 196 ACWS (3d) 717; *Bah v Canada (Minister of Citizenship and Immigration)*, 2014 FC 693; *British Columbia Lottery Corporation v Canada (Attorney General)*, 2013 FC 307, [2013] FCJ No 1425 (*British Columbia*)). In *McCabe v Canada (Attorney General)*, 2000 CanLII 15987 (FC), [2000] FCJ No 1262, Justice Dawson discussed the applicable test and the burden that rests on the party seeking a confidentiality order:

> [8] The justifiable desire to keep one's affairs private is not, as a matter of law, a sufficient ground on which to seek a confidentiality order. In order to obtain relief under Rule 151, the Court must be satisfied that both a subjective and an objective test are met. See: *AB Hassle v. Canada (Minister of National Health and Welfare*), [1999] F.C.J. No. 808 (A-289-98, A-315-98, A-316-98, May 11, 1999, F.C.A.) affirming (1998) 81 C.P.R. (3d) 121. Subjectively, the party seeking relief must establish that it believes its interest would be harmed by disclosure. Objectively, the party seeking relief must prove, on a balance of probabilities, that the information is in fact confidential.
>
> (see also *British Columbia* at para 36).

[29] In the present case, the Minister has satisfied me that the identity of the witnesses whose statements are reported or summarized in Mr. Exantus' affidavit should remain confidential.

[30] The ground raised to support the confidential nature of the witnesses' identities is the risk that the safety of these persons would be compromised if their identities were disclosed publicly.

[31] The uncontradicted evidence shows that some of the people interviewed during the RCMP investigation expressed their fear of reprisals from members of their community if their identity were revealed. The evidence, specifically the affidavit of Alfred Kewnde, Chief of Investigations at the Office of the Prosecutor of the International Criminal Tribunal for Rwanda, which was filed with the Superior Court during the trial of Jacques Mungwarere and was filed as

an exhibit in support of Mr. Exantus' affidavit, shows that the fear for personal safety expressed by the people interviewed during the investigations is serious and genuine.

[32] Thus, I am satisfied that there are grounds for preserving the confidentiality of the identity of the people interviewed during the RCMP investigations about the defendant's alleged participation in the Rwandan genocide to avoid compromising their security. The threat to the safety of witnesses is a serious risk that should be avoided to preserve an important interest. I am also of the opinion that in order to avoid any risk to their safety there are no reasonable options other than preventing the public identification of the witnesses' identities.

[33] Furthermore, I am of the view that the salutary effects of the confidentiality order outweigh its deleterious effects, including on the right to freedom of expression and the public's interest in open and accessible Court proceedings. I would like to point out that steps were taken to preserve the confidentiality of witnesses also by the superior courts of Quebec and Ontario in the criminal trials of Désiré Munyaneza (*R v Munyaneza*, 2001 QCCS 7113, [2007] JQ 25381) and Jacques Mungwarere, (*R v Mungwarere* , 2011 CSON 1247, [2011] OJ No 2593), accused of participating in the Rwandan genocide.

[34] I am of the view that the findings sought by the plaintiff are measures that limit as much as possible the information that will be declared confidential in this case.

ORDER

THIS COURT ORDERS that:

1. The plaintiff's motion is granted and the identities of the people interviewed during the RCMP investigations that Rudy Exantus refers to are declared confidential.

2. Within five (5) days of the date of this order, the plaintiff must file under seal with the Court an unredacted copy of the affidavit of Rudy Exantus that must also provide the real names of the witnesses and the Court will treat this copy as confidential.

3. The redacted copy of the affidavit of Rudy Exantus will remain in the Court's public record.

4. The plaintiff's motion for a default judgment is fixed for hearing on Tuesday, January 13, 2015, at 9:30 am, at the Federal Court, 30 McGill Street, City of Montréal, Province of Quebec.

5. The style of cause will be translated.

6. The undersigned will retain jurisdiction over this matter in order to settle any issues that may arise from the implementation of this order.

7. No costs are awarded.

"Marie-Josée Bédard"
Judge

Certified true translation
Monica F. Chamberlain, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1952-13
STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION v CÉLESTIN HALINDINTWALI
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	SEPTEMBER 22, 2014
ORDER AND REASONS	BÉDARD J.
DATED:	SEPTEMBER 23, 2014

APPEARANCES:

Sébastien Dasylva Dieudonné Detchou	FOR THE PLAINTIFF

SOLICITORS OF RECORD

William F. Pentney Deputy Attorney General of Canada	FOR THE PLAINTIFF