Federal Court  Cour fédérale

Date: 20160202

Docket: T-1931-14

Citation: 2016 FC 119

Vancouver, British Columbia, February 2, 2016

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

ABDALLA OSAMA KHALIFA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is a motion in writing by the Respondent Minister under Rule 369 of the *Federal Courts Rules*, SOR/98-106, for an order that the Applicant's application for judicial review seeking an order in the nature of *mandamus* to process his citizenship application is moot and should, therefore, be dismissed. The motion is opposed by the Applicant.

II. Background

[2] The Applicant, a citizen of Egypt, arrived in Canada on November 18, 2003. On November 9, 2004, he was determined to be a Convention refugee. On October 26, 2006, the Applicant became a permanent resident of Canada.

[3] On December 31, 2010, the Applicant completed an application for Canadian citizenship which was received by the processing centre in Sydney, Nova Scotia on February 4, 2011. In his application, the Applicant indicated that he had been absent from Canada for 353 days, from December 31, 2006, to December 31, 2010, and disclosed several trips to Egypt and an American travel document. He wrote his citizenship test in Vancouver on July 10, 2012, and met with an officer who requested that he complete a residence questionnaire. The officer started a Citizenship Application Review file. The file was reviewed on November 19, 2013, with notations referring to a "shortfall and U.S. residency". On January 20, 2014, a citizenship judge reviewed the file and determined that a residency hearing would be required.

[4] On August 1, 2006, the Applicant became a permanent resident of the United States. On February 11, 2011, the Applicant applied for a permanent resident card at the Canadian visa office in Seattle, Washington. He confirmed that he was then living and working in the United States.

[5] In May 2012, the Applicant was granted U.S. citizenship. This fact was brought to the attention of the Minister in November 2013. It was determined that to obtain US citizenship the

Applicant would have had to establish five years of continuous residence in that country, and consequently, the Minster initiated an investigation. Following an exchange of correspondence with the Applicant and his counsel, cessation proceedings were commenced on March 3, 2014.

[6] On March 6, 2014, the Applicant filed an application for leave and judicial review of the Minister's decision to commence a cessation application. In an unreported judgment dated October 20, 2014, Madam Justice Tremblay-Lamer dismissed the application: *Khalifa v Canada (Minister of Citizenship and Immigration),* Court File No. IMM-1407-14. In her judgment, Justice Tremblay-Lamer certified a serious question of general importance. On November 19, 2014, the Applicant filed a notice of appeal to the Federal Court of Appeal. The Applicant discontinued the appeal on March 6, 2015.

[7] The cessation application was heard by the Refugee Protection Division (RPD) of the Immigration and Refugee Board on November 5, 2014, who rendered a decision on February 20, 2015. The RPD determined that the Applicant's Convention refugee status had ceased pursuant to ss 108 (c) and (e) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (*IRPA*) and that the Applicant was no longer a permanent resident of Canada.

[8] On March 10, 2015, the Applicant filed an application for leave and judicial review of the RPD's decision ceasing his refugee status. On October 20, 2015, Mr. Justice Annis dismissed that application: *Khalifa v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1181.

[9] The Applicant's Canadian citizenship application remained pending throughout these proceedings. A citizenship judge reviewed the application on January 20, 2014, and due to concerns about undeclared absences, the Applicant was advised on July 28, 2014, that a hearing would take place on August 12, 2014. That hearing was canceled. In a letter dated August 21, 2014, the Applicant provided additional evidence for consideration in the determination of his citizenship application, and acknowledged that he had previously submitted erroneous information.

[10] The underlying application for a writ of *mandamus* was filed on September 8, 2014. The processing of the application was suspended under s 13.1 of the *Citizenship Act*, R.S.C., 1985, c. C-29 (the *Act*), as the Applicant was the subject of an ongoing CBSA investigation. The Applicant agreed to the suspension pending the final determination of his application for judicial review of the RPD's cessation decision.

[11] On April 9, 2015, the parties appeared before the undersigned judge for the hearing of the underlying *mandamus* application and jointly requested that it be adjourned *sine die* pending the outcome of the cessation proceedings. As noted above, that decision was rendered by Mr. Justice Annis on October 20, 2015.

[12] In my order dated April 9, 2015, I provided the following:

> 1 The hearing of the application for judicial review hearing is adjourned *sine die*;
>
> 2. Counsel for the parties shall advise the Court Registry when the matter may be set down again for hearing and provide a proposed schedule for the completion of the remaining steps required to perfect the application; and

> 3. Should it occur that there were no grounds for continuing the present application; counsel for the Applicant shall file a Notice of Discontinuance at the earliest opportunity with the Court Registry.

[13] On November 16, 2015 counsel for the Applicant wrote to the Court. He advised that as a result of the dismissal of the application for judicial review of the decision ceasing his refugee protection, the Applicant is no longer a permanent resident of Canada pursuant to ss 46 (1) (c.1) of *IRPA* and is currently ineligible for a grant of citizenship. Counsel noted that I had indicated at the hearing on April 9, 2015, that the matter of the *mandamus* application would presumably be moot if the judicial review of the cessation decision was dismissed. Counsel indicated that there continued to be an issue with regard to whether the Court had the jurisdiction to grant Mr. Khalifa a remedy, and asked that the Minister not make a decision on the outstanding application for citizenship until the Court had given direction on the matter.

[14] Normally, the correct and proper way to deal with an application for judicial review is to proceed to a hearing on the merits. However, the Court may, when it is appropriate, dismiss an application when it is moot and the Court chooses not to exercise its discretion to hear the matter; *Rahman v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 137, at paras 8-11.

[15] Accordingly, a direction was issued on December 4, 2015, that the Minister file a motion for a determination of whether the underlying *mandamus* application is now moot. The Respondent filed the motion on January 8, 2016, and the Applicant's memorandum of argument was received January 18, 2016.

III. Issues

[16] The sole issue is whether the application for judicial review seeking an order of *mandamus* is now moot and should be dismissed without a hearing on the merits.

IV. Submissions of the Parties

[17] The Respondent submits that in *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342, at para 16 (*Borowski*), the Supreme Court of Canada set out two criteria for determining whether a matter is moot:

> 1. Whether the Court's decision would have any practical effect on resolving some live controversy between the parties; and
>
> 2. Whether the issues between the parties have become "academic" or "the tangible and concrete dispute has disappeared".

[18] The Court's exercise of discretion in determining whether to hear the matter should be guided by the three policy rationales underlining the doctrine: the presence of an adversarial context; the concern for judicial economy; and the need for the court to be sensitive to its role as the adjudicative branch in government: *Borowski*, at para 16; *R v Adams*, [1995] 4 SCR 707 at pp 718-719.

[19] The Respondent concedes that there remains an adversarial context as the Applicant argues that the Minister was not entitled to suspend the scheduled interview with a citizenship judge. However, the Respondent requests that the Court not exercise its discretion to hear the

case on the grounds of judicial economy and non-interference with ongoing administrative processes. The Applicant's personal circumstances do not make this case one where the public's interest is at stake. The Respondent submits that if he does not meet the statutory requirements, he may pursue a grant of citizenship under ss 5 (4) of the *Citizenship Act*, citing reasons of "special and unusual hardship".

[20] It is the Respondent's position that the relief sought by the Applicant, namely that his application for citizenship be processed, is not being contested. There is no refusal on the part of the Minister to determine the application. It was suspended at the request of the Applicant pending the outcome of the final determination of the judicial review of the RPD's cessation decision. There is no longer any legal or factual basis to continue to suspend the processing of the application. Accordingly, the relief sought in the underlying application for *mandamus* is moot.

[21] The Applicant argues that the Court has the jurisdiction to issue a declaratory order *nunc pro tunc* that his citizenship application be assessed as of the date initiating this application seeking an order in the nature of *mandamus*. He contends that the actions of the Minister in refusing to fulfill a statutory duty to make a decision on the Applicant's outstanding citizenship application on the basis that there was a pending cessation investigation against him were unlawful and constitute an abuse of process. Once the application was referred to a citizenship judge, the Applicant argues, the judge has 60 days to determine whether or not the person who made the application meets the requirements of the Act as set out in s 14 of the *Citizenship Act*.

Mr. Khalifa submits that his application was referred to a citizenship judge on July 19, 2012, or at the very latest by January 20, 2014.

[22] An individual applying for citizenship in Canada must first be a permanent resident: *Citizenship Act*, s 5(1) (c). By virtue of amendments to *IRPA* brought into effect on June 28, 2012, permanent residence status is lost when the RPD finds that an individual has ceased to be a protected person: *IRPA*, s 40.1 (2). Section 46(1) (c.1) of *IRPA*, which came into force on November 5, 2014, provides that a person loses permanent residence status when their refugee protection has ceased for any of the reasons described in paragraphs 108 (1)(a) to (d).

[23] Under s 13.1 of the *Citizenship Act*, which came into force on August 1, 2014, the Minister may suspend an application. This suspension may continue without time limitation, for as long as it is necessary to receive information or evidence or the results of any investigation or inquiry for the purpose of ascertaining whether the applicant meets the requirements under the *Act* relating to the application.

[24] The Applicant relies on the decision of Mr. Justice Russell in *Godinez Ovalle v Canada (Minister of Citizenship and Immigration)*, 2015 FC 935, and argues that he is similarly situated to the applicant in *Murad v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1089.

[25] The Respondent submits that in both *Godinez Ovalle* and *Murad*, the Minister had determined that the applicants met all of the requirements for citizenship prior to the Minister initiating cessation investigations. In this case, however, neither the Minister nor a citizenship

judge has determined that the Applicant met the statutory requirements for citizenship. Whether or not the Applicant met the residence requirement was still at issue and had been since he submitted his application in 2010 and completed the questionnaire in 2012.

V. Analysis

[26] This case is not similar to that of *Bermudez v Canada (Minister of Citizenship and Immigration)*, 2015 FC 639, in which I suggested at paragraph 28 that CBSA officials had been "lying in the weeds" until the law was changed to facilitate cessation applications. In that case, the applicant had not sought to obtain protection from a third country, his trips to his homeland did not indicate any intention to reacquire the protection of that country, and the Minister initiated the cessation proceedings several years after learning about the return trips.

[27] In this matter, the record indicates that the Minister initiated the cessation application only after learning that for the Applicant to have been granted U.S. citizenship he would have had to establish five years of continuous residence in the United States. Having provided the Applicant with an opportunity to submit information regarding his actions, and giving him an extension of time in which to do so, the decision to file the cessation application in February 2014 was not abusive.

[28] I agree with the Respondent that the fact of submitting an application for citizenship does not shield the Applicant from an investigation into his refugee status, the predicate upon which he held permanent residency in this country. It was the Applicant's actions that resulted in the RPD's cessation decision: he alone chose to maintain residence and obtain citizenship in the

United States while concurrently seeking to maintain refugee protection in Canada. What the Applicant describes as "a race to strip him of his permanent residence status" could also be described as a race on his part to obtain citizenship in Canada before he lost that status on account of his actions.

[29] Even if I were to agree that an abuse of process had occurred and set the matter down for a hearing on the merits, the Applicant could not obtain the remedy he seeks. The Applicant does not dispute that he is no longer a permanent resident of Canada and, for that reason, is ineligible for citizenship. What's more, the inherent jurisdiction to issue an order *nunc pro tunc* is limited to circumstances in which a litigant can demonstrate prejudice by an act or delay of the court: *Canada (Attorney General) v Hislop*, [2007] 1 SCR 429; *Canadian Imperial Bank of Commerce, v Green*, 2015 SCC 60. The Court cannot override a statute and defeat the intent of Parliament: *Shukla v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1461, at para 42.

[30] In an analogous case, *Magalong v Canada (Minister of Citizenship and Immigration)*, 2014 FC 966, an order of *mandamus nunc pro tunc* was denied because the applicant was statutorily prohibited from taking the oath by reason of a subsequent conviction for an indictable offense.

[31] In the result, I am satisfied that the Court should not exercise its discretion to hear the matter notwithstanding that it is moot, and the motion for an order dismissing the application is granted. As the Respondent has not requested costs, none will be awarded.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The motion is granted;
2. The Application for Judicial Review is dismissed; and
3. No order is made as to costs.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1931-14
STYLE OF CAUSE:	ABDALLA OSAMA KHALIFA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION

MOTION IN WRITING CONSIDERED AT VANCOUVER, BRITISH COLUMBIA PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

JUDGMENT AND REASONS:	MOSLEY J.
DATED:	FEBRUARY 2, 2016

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