Federal Court  Cour fédérale

Date: 20161107

Dockets: T-1381-15
T-1602-16

Citation: 2016 FC 1223

Ottawa, Ontario, November 7, 2016

PRESENT: The Honourable Mr. Justice Zinn

Docket: T-1381-15

BETWEEN:

THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION,THE CANADIAN ASSOCIATION OF REFUGEE LAWYERS AND ASAD ANSARI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE ATTORNEY GENERAL OF CANADA

Respondents

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Respondents

ORDER AND REASONS

[1] The British Columbia Civil Liberties Association and The Canadian Association of Refugee Lawyers [the Moving Parties] move for an Order staying the operation of subsection 10(1) of the *Citizenship Act*, RSC 1985, c C-29 as amended, on an interlocutory basis pending the resolution of the constitutionality and validity of that section in *Monla v Canada (Citizenship and Immigration)*, Court File T-1570-15 [*Monla*] and the cases being jointly case-managed with it [the Group 2 Revocation Judicial Review Applications].

[2] Subsection 10(1) of the *Citizenship Act* provides that the Minister of Immigration and Citizenship (now the Minister of Immigration, Refugees and Citizenship) [the Minister] may revoke the Canadian citizenship of a person if it was "obtained, retained, renounced or resumed … by false representation or fraud or by knowingly concealing material circumstances."

Subject to subsection 10.1(1), the Minister may revoke a person's citizenship or renunciation of citizenship if the Minister is satisfied on a	Sous réserve du paragraphe 10.1(1), le ministre peut révoquer la citoyenneté d'une personne ou sa répudiation lorsqu'il est convaincu, selon

balance of probabilities that the person has obtained, retained, renounced or resumed his or her citizenship by false representation or fraud or by knowingly concealing material circumstances.	la prépondérance des probabilités, que l'acquisition, la conservation ou la répudiation de la citoyenneté de la personne ou sa réintégration dans celle-ci est intervenue par fraude ou au moyen d'une fausse déclaration ou de la dissimulation intentionnelle de faits essentiels.

[3] The Court has under case-management the Group 2 Revocation Judicial Review Applications brought by individuals who have either received a Notice of Intent to Revoke Citizenship from the Minister pursuant to subsection 10(3) of the *Citizenship Act* – a pre-condition to revocation- or who have had their citizenship revoked. Court file T-1381-15 is included in the Group 2 Revocation Judicial Review Applications.

[4] The revocation procedure in section 10 of the *Citizenship Act* was changed by the *Strengthening Canadian Citizenship Act*, SC 2014, c 22, which came into force on May 28, 2015. The Group 2 Revocation Judicial Review Applications challenge the constitutionality of those amendments.

[5] By Order dated January 19, 2016 [the *Monla* Stay Order], the Court enjoined the Minister from taking any steps or proceedings under the notice to revoke citizenship in eight specific applications for leave and judicial review until they are finally determined.

[6] Following a case-management conference held February 5, 2016, with respect to the Group 2 Revocation Judicial Review Applications, the Court issued an Order dated February 23,

2016, that effectively enjoined the Minister from taking any steps to act on any future notices to revoke citizenship provided the affected person brought an application for judicial review of that decision [the Case-management Order]. Paragraph 3 of the Case-management Order provided as follows:

> The Minister shall take no steps or proceedings under a notice to revoke Canadian citizenship issued under the *Citizenship Act* as amended by the *Strengthening Canadian Citizenship Act* relating to an application for judicial review that is now or in the future included in the Group 2 Revocation Judicial Review Applications, until notice is provided to the applicant and the Common Legal Issues have been litigated on the basis of the Lead Cases have been finally determined.

[7] The Court has set out three questions that are to be addressed by the Court for the Group 2 Revocation Judicial Review Applications on the basis of the identified eight lead cases, which are to be argued at a three-day hearing scheduled to commence in Toronto on November 15, 2016:

a. May the Minister issue a new notice of revocation of Canadian citizenship after the coming into force of the *Strengthening Canadian Citizenship Act*, thereby engaging the new revocation procedure or, by virtue of the transitional provisions of the *Strengthening Canadian Citizenship Act*, where the Minister had issued a revocation notice under the former Act (and the applicant requested a referral to the Federal Court but no such referral was made by the Minister), is the revocation to be determined in accordance with the provisions of the former Act?

b. Are any of subsections 10(1), 10(3), or 10(4) of the *Citizenship Act* as amended by the *Strengthening Canadian Citizenship Act*, unconstitutional as violating

section 7 of the *Canadian Charter of Rights and Freedoms* and/or sections 1(a) and 2(e) of the *Canadian Bill of Rights*, SC 1960, c 44?

c. Does section 10 of the *Citizenship Act* as amended by the *Strengthening Canadian Citizenship Act*, subject an individual to cruel and unusual treatment in violation of section 12 of the *Canadian Charter of Rights and Freedoms*?

[8] Where an applicant's citizenship has been revoked prior to the filing of an application to review the revocation decision, the Court in paragraph 4 of the Case-management Order ordered that the Minister could continue the process and require that the applicant return his or her Canadian passport, unless prevented by further Order following a motion by the applicant:

> If the Minister has revoked an applicant's Canadian citizenship under the *Citizenship Act* as amended by the *Strengthening Canadian Citizenship Act*, then, subject to any further Order of the Court, the Minister may request the applicant to return his or her Canadian passport.

[9] The Moving Parties submit that they have public interest standing to bring these applications and this motion. They further submit that the question of whether a stay should be granted, as requested, has already been determined by this Court in the *Monla* Stay Order and that "nothing dictates a different result on this motion."

[10] The Moving Parties accept that "for those who have the ability, knowledge and resources to identify, contact and retain counsel at an early stage, they receive individual stays of their proceedings as a matter of course." They bring this motion for those persons receiving a notice

of intent to revoke citizenship who do not commence an application for judicial review "either because they lack the knowledge, resources or skills needed to retain counsel."

[11] The Minister opposes the motion. He submits that the Court ought to deny the Moving Parties public interest standing in these applications "since individual litigants directly affected by the impugned legislation can reasonably and effectively challenge it." Moreover, the Minister submits that the issues raised in these applications will be addressed next month when the three common issues are before the Court for decision "on a full record."

[12] I have decided that the question of the public interest standing of the Moving Parties does not need to be decided because this motion must fail merely by application of the well-established principles relating to the granting of the equitable remedy of an injunction.

[13] The Supreme Court of Canada in *Manitoba (Attorney General) v Metropolitan Stores (MTS) Ltd*, [1987] 1 SCR 110 adopted the three-stage test to be applied when considering an application for an interlocutory injunction. A court must determine that there is a serious issue or question to be tried, that the applicant would suffer irreparable harm if the injunction were to be refused, and that the balance of convenience (assessed by examining which of the parties will suffer the greater harm from granting or refusing the injunction) rests with the applicant. All three of these must be met to be granted injunctive relief.

[14] In the motion before the Court, I am not persuaded that the Moving Parties, even if granted public interest standing, can establish irreparable harm.

[15] In *RJR – MacDonald Inc v Canada*, [1994] 1 SCR 311 at 341 the Supreme Court of Canada explained what is meant by the term 'irreparable harm':

> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other.

[16] Harm which can be avoided, or if unavoidable can be cured, is not irreparable harm.

[17] Justice Stratas in *Glooscap Heritage Society v Canada (Minister of National Revenue – MNR)*, 2012 FCA 255 at para 31, explained what a party seeking an injunction must establish in regards to irreparable harm:

> To establish irreparable harm, there must be evidence at a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will result unless a stay is granted. Assumptions, speculations, hypotheticals and arguable assertions, unsupported by evidence, carry no weight.

[18] All that the Moving Parties have provided regarding irreparable harm is a single statement in the affidavits from officials of each of the two parties that are nearly identical and which reads:

> The BCCLA [or CARL] is deeply concerned that there are individuals who have received such notices, but have been unable to avail themselves of what is a *de fac*to right to a stay under *Monla*, either because they lack the knowledge, resources or skills needed to retain counsel.

[19] The Minister submits that these statements fall within the description of "assumptions, speculations, hypotheticals and arguable assertions" and is not evidence of irreparable harm.

The Moving Parties submit that the evidence of the gap between the number of notices of revocation that have been issued and the much lower number of applications for judicial review establishes that there is a strong probability that there are some persons that fall within the category of persons who have not sought the *de facto* stay under *Monla* "because they lack the knowledge, resources or skills needed to retain counsel".

[20] In my view, there is a more fundamental problem with the request made by the Moving Parties: They cannot establish that the harm alleged is not avoidable.

[21] At the time of the motions which led to the granting of the *Monla* Stay Order came before the Court, those applicants had no other relief available to them to avoid the harm of the revocation proceeding, other than to seek the Court's intervention by way of a stay of the revocation process. The harm to them was unavoidable and the Court found that it was also irreparable harm.

[22] Here, as the Moving Parties admit, the harm to anyone in receipt of a Notice of Intent to Revoke Citizenship is avoidable. They need merely file an application to this Court for leave and judicial review of that revocation notice and they are granted an automatic stay. To date, many have done so.

[23] If now or in the future there are persons in receipt of a Notice of Intent to Revoke Citizenship who through ignorance or lack of resources fail to challenge that decision in this Court, does that change the harm from an avoidable one to an unavoidable one? I think not.

[24] The harm described in the Reasons leading to the *Monla* Stay Order, is either an unavoidable harm or an avoidable harm – it cannot be both at the same time. At the time the *Monla* Stay Order was issued, it was unavoidable. After the *Monla* Case-management Order issued, that harm became avoidable. The failure of a person, for whatever reason, to take advantage of the *de facto* stay available, does not change the fact that it is available to them and that it will avoid the harm.

[25] Because the harm that may follow receipt of a Notice of Intent to Revoke Citizenship is now an avoidable harm, injunctive relief is not available and these motions must be dismissed.

ORDER

THIS COURT ORDERS that the motions are dismissed.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1381-15
STYLE OF CAUSE:	THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION ET AL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION ET AL
DOCKET:	T-1602-16
STYLE OF CAUSE:	THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION ET AL v THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP ET AL
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 21, 2016
ORDER AND REASONS:	ZINN J.
DATED:	NOVEMBER 7, 2016

APPEARANCES:

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