Federal Court  Cour fédérale

Date: 20170510

Dockets: T-1584-15
T-6-16
T-27-16
T-1-16
T-213-16
T-273-16
T-2154-15
T-438-16

Citation: 2017 FC 473

Ottawa, Ontario, May 10, 2017

PRESENT: The Honourable Madam Justice Gagné

Docket: T-1584-15

BETWEEN:

ABDULLA AHMAD HASSOUNA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA

Respondent

Docket: T-6-16

BETWEEN:

TAREQ MADANAT

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Docket: T-27-16

BETWEEN:

THOMAS GREGORY GUCAKE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA

Respondent

Docket: T-1-16

BETWEEN:

HISHAM AJJAWI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA

Respondent

Docket: T-213-16

BETWEEN:

PHILIPP PARKHOMENKO

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES, AND CITIZENSHIP CANADA

Respondent

Docket: T-273-16

BETWEEN:

CHAOHUI SITU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Docket: T-2154-15

BETWEEN:

MUHAMMAD SHAHID BANDUKDA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Docket: T-438-16

BETWEEN:

SAKR, MARIE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] These applications for judicial review are brought forward by the eight Applicants in lead cases challenging the constitutionality of the revocation or proposed revocation of citizenship on grounds of fraud or misrepresentation under the *Citizenship Act*, RSC 1985, c C-29, as amended by the *Strengthening Canadian Citizenship Act*, SC 2014, c 22 [SCCA].

[2] Under the former revocation system, all persons who received a Notice of intent to revoke their citizenship had the option to have the issue of whether they had obtained their citizenship through fraud or misrepresentation considered by this Court. The new system brought forward by the SCCA provides for two different procedures: a judicial model for complex cases, as identified by statute; and an administrative model for "non-complex" cases. Only the administrative model is under review in these applications.

[3] On January 19, 2016, this Court granted an injunction preventing the Minister of Citizenship and Immigration (now the Minister of Immigration, Refugees and Citizenship or MIRC or IRCC) from further processing cases of individuals who had received a Notice of intent to revoke their citizenship but had not yet received a final decision regarding same.

[4] On February 23, 2016, Justice Russell Zinn, acting as case management judge, issued an order stating that this case managed litigation would be proceeding by lead cases on the basis of

common legal issues. All other non-lead cases are held in abeyance pending the final disposition of the lead cases.

[5] Although the lead cases raise common issues, they were likely chosen for the variety of factual backgrounds they offer.

[6] Some Applicants (Mr. Madanat, Mr. Ajjawi, and Mr. Bandukda) have in fact had their citizenship revoked, while no decisions are yet rendered with respect to the others whose files were caught up by the injunction rendered by this Court.

[7] Some Applicants (Mr. Hassouna, Mr. Madanat, and Ms. Situ) had received a Notice of intent to revoke their citizenship under the previous regime and, although they had asked for their files to be referred to this Court for a factual determination, they were not. When sending a second Notice of intent under the current regime, the Minister took the position that the previous Notices were cancelled by virtue of the application of the transitional provisions of the SCCA. Other Applicants only received a Notice of intent to revoke under the current regime.

[8] Some Applicants (Mr. Hassouna, Mr. Ajjawi, Mr. Parkhomenko, and Ms. Situ) would become stateless should their Canadian citizenship be revoked; others would not as they have or had dual citizenship.

[9] Some Applicants (Mr. Gucake, Mr. Parkhomenko, and Ms. Situ) would become foreign nationals should they lose their citizenship – on account of the interplay between the *Citizenship*

Act, as amended by the SCCA, and the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] – as the fraud or misrepresentation was made at the time they acquired their permanent residence. On the other hand, those individuals who are alleged to have committed fraud or to have misrepresented their situation only when they applied for citizenship would revert to being permanent residents.

[10] Finally, the nature of the alleged frauds or misrepresentations, which form the object of the revocations or proposed revocations, varies from one applicant to the other. Mr. Hassouna, Mr. Ajjawi, and Mr. Bandukda are said to have misrepresented details pertaining to their residency during the period immediately preceding their application for citizenship; Mr. Madanat and Ms. Sakr's applications for citizenship also contained alleged misrepresentations regarding their residency, however these applications were submitted on their behalf by a parent as both Applicants were minors at the time; Mr. Gucake and Mr. Parkhomenko's fathers allegedly failed to declare previous criminal convictions when they applied for permanent residence on their behalf and on behalf of their respective families; and Ms. Situ is alleged to have omitted to declare, on her application for permanent residence based on spousal sponsorship, that she no longer lived with her sponsor and was in the process of divorcing him.

[11] As these applications for judicial review do not question the reasonableness of the decisions rendered – when a decision was rendered, but rather deal with the administrative process created by the SCCA, there will be no need for a detailed review of the factual background of each application. The relevant facts will be addressed only if necessary to deal with a common issue.

II. Legal Background

[12] The SCCA came into force on May 28, 2015. It amended and repealed various provisions of the *Citizenship Act*, resulting in material changes to the provisions regarding revocation of citizenship. For convenience of reference hereinafter the *Citizenship Act* as it read prior to the amendments brought by the SCCA shall be referred to as the Former Act, and afterwards, as the Amended Act.

A. *Revocation under the Former Act*

[13] Under the Former Act, an individual's citizenship could be revoked pursuant to section 10 where it was established that citizenship was acquired "by false representation or fraud or by knowingly concealing material circumstances". A final decision could only be reached by the Governor in Council, based on a report by the Minister.

[14] Prior to issuing a report, the Minister was required to send a Notice of intention to revoke citizenship to the affected individual, outlining the grounds for revocation. The individual could then exercise their right to have the matter referred to the Federal Court within 30 days, failing which the Minister could submit his report to the Governor in Council recommending that citizenship be revoked.

[15] If the affected individual did request that the matter be referred to the Federal Court, the Minister would then bring an action in the Federal Court for a declaration that the person obtained Canadian citizenship "by false representation or fraud or by knowingly concealing

material circumstances". The procedure before the Federal Court provided for an oral hearing and full disclosure of relevant materials in the possession of the Minister. If the Federal Court was satisfied that the Minister had established on a balance of probabilities that the individual had obtained citizenship by fraud or misrepresentations, a declaration to that effect would be issued.

[16] Only when such a declaration was made by the Federal Court could the Minister issue his report to the Governor in Council. This report would be disclosed to the individual, who had the opportunity to make written submissions in response. The Minister would consider the written submissions and attach them to the final report. The final determination was made by the Governor in Council, who could consider equitable circumstances and had the discretion to consider humanitarian and compassionate grounds when deciding whether to revoke an individual's citizenship.

B. *Revocation under the Amended Act*

[17] Under the Amended Act, an individual's citizenship can be revoked by the Minister, pursuant to subsection 10(1), if he "is satisfied on a 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". Requirements under subsection 10(3) of the Amended Act prescribe that prior to revoking the citizenship of the individual concerned, the Minister shall provide a written notice that specifies "the person's right to make written representations" and "the grounds on which the Minister is relying to make his or her decision". In some circumstances, the Minister must seek a declaration from the Federal Court before

revoking an individual's citizenship. However, and as indicated above, none of the exceptions apply in these cases.

[18] Under subsection 10(4) of the Amended Act, the Minister has the discretion to allow that a hearing be held if, "on the basis of prescribed factors", he or she "is of the opinion that a hearing is required". Pursuant to section 7.2 of the *Citizenship Regulations*, SOR 93-246, the prescribed factors allow for an oral hearing where there is a serious issue of the individual's credibility, where the individual is unable to provide written submissions, or where the grounds for revocation are related to a conviction and sentence imposed outside Canada for an offence that, if committed in Canada, would constitute a terrorism offence.

[19] Notice of the Minister's final determination regarding the revocation of the individual's citizenship is made in writing. There is no appeal provided under the Amended Act; the sole recourse against a decision by the Minister is an application for leave for judicial review to this Court pursuant to section 22.1 of the *Citizenship Act*.

C. *Transitional provisions under the Amended Act*

[20] In order to address matters which arose prior to the effective date of the Amended Act, the SCCA contains transitional provisions that can be found at its sections 32 and 40. Most relevant to the cases before me is subsection 40(1) which provides that "[a] proceeding that is pending before the Federal Court immediately before the day on which section 8 comes into force, as a result of a referral under section 18 of the *Citizenship Act* as that section 18 read

immediately before that day, is to be dealt with and disposed of in accordance with that Act, as it read immediately before that day".

[21] For ease of reference, all the relevant statutory provisions are reproduced in annex to these reasons.

III. Issues

[22] The common legal issues to be litigated on the basis of the lead cases, as outlined by Justice Zinn and in light of the submissions made by the parties, are as follows:

A. *Are some of these applications for judicial review premature?*

B. *Where the Minister issued a notice of revocation 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 or the Amended Act?*

C. *Are any of subsections 10(1), 10(3), or 10(4) of the Amended Act unconstitutional as violating paragraphs 1(a) and 2(e) of the* Canadian Bill of Rights*?*

D. *Are any of subsections 10(1), 10(3), or 10(4) of the Amended Act unconstitutional as violating section 7 of the* Charter*?*

E. *Does section 10 of the Amended Act subject an individual to cruel and unusual treatment in violation of section 12 of the* Charter*?*

F. *If there is a violation of either section 7 or section 12 of the* Charter*, can it be saved under section 1 of the* Charter*?*

IV. Analysis

A. *Are some of these applications for judicial review premature?*

[23] The Respondent argues that with respect to those five Applicants for whom no revocation decisions have yet been rendered (Mr. Hassouna, Ms. Sakr, Mr. Parkhomenko, Ms. Situ, and Mr. Gucake), it would be premature for this Court to consider their applications for judicial review. In other words, it would be premature for this Court to decide whether the revocation process breaches the constitutional rights of these Applicants, when the administrative process under review has not yet run its course. Doing so, says the Respondent, would go against the principle that a constitutional challenge should not be adjudicated in a factual vacuum (*Mackay v Manitoba*, [1989] 2 SCR 357). As a consequence, the Respondent opposes those Applicants' position to rely on the others' factual background and legal submissions regarding different issues raised by their applications.

[24] I disagree with the Respondent.

[25] First, in *May v CBC/Radio Canada*, 2011 FCA 130 at paragraph 10, the Federal Court of Appeal held that "ongoing policies that are unlawful or unconstitutional may be challenged at any time by way of an application for judicial review seeking, for instance, the remedy of a declaratory judgment". The five Applicants for whom no decision has yet been rendered as a result of the injunction delivered by this Court are well engaged in the impugned revocation process; they were all sent a Notice of intent to revoke their citizenship under the Amended Act – two of them had received a Notice of intent to revoke under the Former Act, which was

purportedly cancelled by the new Notice; they all filed written submissions with the Minister's delegate, and; most requested and were refused an oral hearing. They are therefore directly affected by the matter in respect of which relief is sought.

[26] Second, although it is true that constitutional challenges should not be made in a factual vacuum, it is not the case here. I have a voluminous evidentiary record before me: both parties have filed several affidavits and they conducted cross-examinations of the other party's affiants. In fact, there is sufficient evidence in the file, in terms of statistics (for example: no hearing has yet been held by a Minister's delegate; and the Minister's discretion was only exercised once to not revoke the citizenship of an interested person who filed written submissions), to strongly suggest that, absent their applications for judicial review, those five Applicants would likely have had their citizenship revoked.

[27] Finally, it was decided during a hearing management conference that counsel for the Applicants would share the time allocated for the hearing of these eight lead cases. It was also decided who would be speaking to what issue. To avoid repetition, all relied on the others' written and oral submissions. That is quite acceptable and viewed as conducive to the proper administration of justice. As these cases have been joined for hearing, with the consent of the Respondent, it is also quite acceptable that the evidentiary record be considered jointly for the purpose of the declarations sought by all Applicants and the assessment of the common issues.

[28] I therefore conclude that none of the applications for judicial review before me are premature.

B. *Where the Minister issued a notice of revocation 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 or the Amended Act?*

[29] Counsel for Mr. Hassouna spoke to that issue and argued that his client's file, and that of the two other Applicants who have received a Notice of intent to revoke under the Former Act, should be addressed in accordance with the former revocation process.

[30] He argues that section 40 of the SCCA should be interpreted in a manner that gives a meaning to each of its subsections (1) to (4) and that it should not be interpreted such that the Amended Act has a retroactive effect. He further argues that the interpretation he suggests is compliant with the decisions of this Court in *Canada (Minister of Citizenship and Immigration) v Zakaria*, 2014 FC 864 and *Canada (Citizenship and Immigration) v Rubuga*, 2015 FC 1073.

[31] He suggests that subsection 40(1) of the SCCA, and consequently the former revocation process, apply in both of the following scenarios:

i. when the notice was given under the Former Act, the affected individual had requested that the file be referred to the Federal Court within the 30 days time limit, and the Minister had served and filed its statement of claim with this Court, and

ii. when the notice was given under the Former Act, the affected individual had requested that the file be referred to the Federal Court within the 30 days time limit, but the Minister had not yet served and filed its statement of claim.

[32] Counsel for Mr. Ajjawi supports those arguments and further pleads that, in several cases before me, there was an unreasonable and unjustified delay between the time the Minister was

informed of the alleged fraud or misrepresentations and the time the Applicants received the Notice of intent to revoke under the Amended Act. This delay far exceeds the inherent time requirement to process the matter and results in an abuse of process.

(1) Applicants concerned by those issues

[33] Mr. Hassouna, a Palestinian refugee who was born in Lebanon and was granted Canadian citizenship on April 19, 2006, received a revocation notice under the Former Act in February 2012. The notice followed an investigation stemming from the sponsorship applications he made for his wife and son. The investigation concluded that Mr. Hassouna was continuously residing in Kuwait during the relevant period prior to obtaining citizenship.

[34] Eight days after Mr. Hassouna received the notice, he requested that the matter be referred to the Federal Court. In the 3 years and 105 days that followed before the SCCA came into force, the Minister did not refer the matter to the Federal Court.

[35] Instead, Mr. Hassouna received a second revocation notice on July 13, 2015, pursuant to the Amended Act, 46 days after it came into force. The second revocation notice purports to cancel the initial revocation notice.

[36] Mr. Madanat is a citizen of Jordan who became a Canadian permanent resident on August 15, 2001. He was granted Canadian citizenship on December 16, 2005.

[37] On June 29, 2011, Mr. Madanat received a notice of revocation pursuant to the Former Act. He requested that the matter be referred to the Federal Court; however, in the years between the issuance of the notice of revocation and the coming into force of the SCCA, he did not receive any communication from the Minister.

[38] Instead, he received a second notice of revocation in September 2015, pursuant to the Amended Act. His citizenship was revoked on December 7, 2015.

[39] Ms. Situ, a Chinese citizen, came to Canada as a student in 2002. She became a permanent resident on November 5, 2003, and a Canadian citizen on June 14, 2007.

[40] Ms. Situ received a Notice of intent to revoke citizenship, dated July 28, 2011, pursuant to the Former Act. On September 21, 2011, she requested that the matter be referred to the Federal Court. No statement of claim was filed by the Minister.

[41] Instead, almost 5 years later, Ms. Situ received a new Notice of intent to revoke citizenship, dated February 3, 2016, pursuant to the Amended Act. The record demonstrates that the Minister was apprised of Ms. Situ's date of divorce on March 2, 2007, prior to granting her Canadian citizenship in June 2007.

[42] Mr. Ajjawi only received a Notice of intent to revoke his citizenship under the Amended Act. However, IRCC was aware of the alleged fraud or misrepresentation and was in possession

of all the evidence necessary to initiate the revocation process as early as 2006 and yet, waited until 2015 to do so.

[43] He requested that his personal circumstances be considered and cited disastrous consequences flowing from the revocation of his citizenship, such as the fact that he would be rendered stateless by the loss of Canadian citizenship, he would lose his employment in the United Arab Emirates, and in turn would be forced to return to Lebanon where Palestinians such as himself are deprived of civil rights. The Senior Analyst refused to grant him the requested hearing and on November 30, 2015, a decision by the Minister was rendered and Mr. Ajjawi's citizenship was revoked.

[44] Messrs. Gucake and Parkhomenko also only received a Notice of intent to revoke under the Amended Act, but respectively after 8 and 14 years of IRCC having been made aware of the alleged fraud or misrepresentations.

(2) Transitional provisions

[45] Subsection 40(1) of the SCCA states that in circumstances where a proceeding was pending before the Federal Court, as a result of a referral requested by the affected individual under section 18, prior to the coming into force of the Amended Act, the proceeding ought to be dealt with in accordance with the provisions of the Former Act.

[46] With respect, I am unable to read that provision as including the second scenario envisaged at paragraph 31 ii) above. In my view, the plain meaning of the words used indicates

that in order for these Applicants' cases to be dealt with pursuant to the Former Act, a proceeding had to be pending before the Federal Court prior to May 28, 2015. A proceeding is commenced by the issuance of an originating document (*Vaughan v R*, [2000] FCJ No 311; *Federal Courts Rules*, SOR/98-106, r 62). Therefore, in order for a proceeding to be pending before this Court, a statement of claim had to be served and filed. I disagree with the Applicants that a proceeding was pending before this Court by virtue of the mere request, on their part, to have the matter referred to the Court for adjudication under the previous scheme.

[47] The Applicants rely on *Zakaria* in support of the proposition that once the Minister made allegations in the Notice of intent of revocation, the legal process begins and the proceeding is pending. I only partially agree. The Applicants are correct to interpret *Zakaria* to mean that once the Minister sends a Notice of intent to revoke, the citizenship revocation process begins. However, I do not agree that this means that a proceeding is pending before the Federal Court. It is not merely a proceeding which must be pending, but rather a proceeding before the Federal Court, which is a unique prong of the former citizenship revocation process. I do not think that a request for referral to the Federal Court, without more, gives rise to a proceeding which can be said to be pending before this Court.

[48] The Applicants also rely on *Rubuga*, in which this Court stated that where an applicant has taken positive action in the procedure by exercising his or her right to request that the case be referred to the Federal Court, they are deemed to have "already participated in the proceeding" (*Rubuga*, above at para 45). However, this was in reference to the overall procedure to revoke

the applicant's citizenship, not the distinct adjudication proceeding before the Federal Court – the two ought not to be confounded.

[49] The former citizenship revocation process began once a Notice of intent of revocation was made out by the Minister. However, the question is not whether the Minister had commenced a revocation process against the Applicants; for the purpose of subsection 40(1) of the SCCA, the question is whether a proceeding was pending before the Federal Court. This, in my opinion, requires more.

[50] Accordingly, the notices issued to Messrs. Hassouna and Madanat, and to Ms. Situ, under the Former Act, were cancelled pursuant to subsection 40(4) of the SCCA.

(3) Unreasonable and unjustified delay

[51] In *Blencoe v British Columbia (Human Rights Commission)*, [2000] 2 SCR 307, 2000 SCC 44 at paragraph 101, the Supreme Court of Canada held that in order for a delay to warrant a stay of proceedings as a result of an abuse of process, there must be significant prejudice which results from that delay.

[52] Before me, counsel for Mr. Ajjawi did not argue that the fairness of the hearing was compromised as a result of the delay. Rather, he argued that this delay amounts to an abuse of process because it is clearly unacceptable and because it directly caused Mr. Ajjawi significant prejudice. Had the revocation process been initiated in 2006 when IRCC was made aware of all the relevant facts, Mr. Ajjawi's citizenship would have been revoked under the previous process

and Mr. Ajjawi could have reapplied for citizenship after five years rather than after the ten-year delay provided for under the Amended Act.

[53] In *Chabanov v Canada (Citizenship and Immigration)*, 2017 FC 73, this Court recently applied the three factors to be considered in assessing delay (*Chabanov*, above at para 47; *Blencoe*, above at para 160), to the revocation process established by the Amended Act. Those factors are:

> 1. The time taken compared to the inherent time requirements;
>
> 2. The causes of the delay beyond the inherent time requirements of the matter; and
>
> 3. The impact of the delay, including prejudice and other harms.

[54] In *Chabanov*, IRCC had waited eleven years after it had received, from the Royal Canadian Mounted Police [RCMP], a confirmation of the applicant's overseas convictions, before initiating the revocation process. There, Justice Strickland did not feel the need to decide whether for delay to qualify as an abuse of process, it must be part of an administrative or legal proceeding already underway, as it was held in *Torre v Canada (Citizenship and Immigration)*, 2015 FC 591. She rather found that if the whole eleven-year period had to be considered, it was well beyond the normal time within which a matter of this nature can be concluded. She was therefore ready to concede that the first *Blencoe* factor was met. I reach the same conclusion regarding Messrs. Ajjawi, Gucake, and Parkhomenko, as well as Ms. Situ.

[55] As to the second *Blencoe* factor, Justice Strickland found that the respondent had not provided sufficient evidence, in an affidavit from a legal assistant with the Department of Justice,

to justify the delay. Mere assertions by the respondent that the citizenship program was under-resourced and had growing file inventories, and that by 2010 citizenship revocation was identified as priority, has not been found sufficient.

[56] More substantial evidence was presented before me. According to the Respondent, the citizenship program was under-resourced and the file inventory was up to 300 files; the former revocation system – with judicial bifurcation – was simply not working. In 2009, as a result of an RCMP investigation into a scheme involving immigration consultants who charged exorbitant fees to assist individuals in obtaining citizenship fraudulently, IRCC observed a 700% increase in the inventory of possible citizenship revocations. For example, from July 2011 to December 2011, the number of people under investigation rose from 1,800 to 2,100 and IRCC was able to process only 31 revocation files. Priority shifted at IRCC and by April 2012, $600,000 was temporarily allocated to the Case Management Branch to provide it with the capacity to begin the revocation process for 300 cases during the 2012-2013 fiscal years. During a press conference held by the then Minister in September 2012, he noted that IRCC was investigating 11,000 individuals from over 100 countries and had identified 3,100 Canadian citizens who were suspected of having obtained their citizenship fraudulently. At that point, individuals who received notices of intent to revoke their citizenship were seeking referrals to the Federal Court in unusually high number. In sum, the Respondent argues that the previous revocation process was ill-equipped to address this unanticipated increase.

[57] It could be that part of the delay in initiating and processing the citizenship revocation files of the Applicants is the result of a political choice by the government and IRCC and priorities identified by them.

[58] However, and although the Applicants did not contribute to or waive part of the delay, I am of the view that the special circumstances resulting from the extensive fraud exposed by the RCMP during the course of 2009 and 2010 exerted substantial pressure on a system that was already saturated and overburdened. IRCC used as efficiently as possible those resources which it had available (*Blencoe*, above at para 160). Thus, those special circumstances justify, in large part, the prolonged delay.

[59] Since I conclude that the second *Blencoe* factor is not met, I do not need to fully analyze the third factor, which is the impact of the delay on the Applicants. Suffice it to say that in my view, the evidence does not support a conclusion that Mr. Ajjawi suffered significant prejudice as a result of the delay.

[60] Mr. Ajjawi's argument that he could have reapplied for citizenship in five years rather than ten years after the revocation, had the process been initiated under the Former Act, is merely speculative. We do not know what Mr. Ajjawi would have done without his Canadian citizenship and without his employment in the United Arab Emirates for a period of five years. On the other hand, Mr. Ajjawi was able to maintain his employment during the whole period because he remained a Canadian citizen. It seems to me that in his case, the benefits outweigh the disadvantages.

[61] I therefore conclude that the *Blencoe* factors are not met and that the delay in the initiation of the Applicants' revocation process does not warrant a stay of proceedings.

C. *Are any of subsections 10(1), 10(3), or 10(4) of the Amended Act unconstitutional as violating paragraphs 1(a) and 2(e) of the* Canadian Bill of Rights*?*

[62] This issue was also argued by counsel for Mr. Hassouna and Mr. Ajjawi.

[63] Section 2(e) of the *Canadian Bill of Rights*, SC 1960, c 44 provides:

> 2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to […]
>
> (e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations.

[64] Before addressing the alleged breaches of the Applicants' right to a fair hearing in accordance with the principles of fundamental justice, what must be determined from the outset is whether section 2(e) of the *Bill of Rights* applies in respect of the Minister's decision-making process.

[65] The *Bill of Rights* was enacted as an ordinary statute of the Parliament of Canada applying only to federal laws. With the adoption of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, the *Bill of Rights* lost most of its importance as the majority of the rights and

freedoms guaranteed by it are now embedded in the *Charter* (*Canadian National Railway Company v Western Canadian Coal Corporation*, 2007 FC 371 at para 18).

[66] Nevertheless, two provisions of the *Bill of Rights* are not duplicated by the *Charter*; one of which is the guarantee of a fair hearing for the determination of a person's rights and obligations, as found in section 2(e). This provision extends beyond the protection afforded in the *Charter* and remains an operative constraint on federal activity (Hogg, Peter W, *Constitutional Law of Canada*, Toronto: Carswell, loose-leaf ed at 32-2). Therefore, the *Bill of Rights* continues to operate notwithstanding the *Charter* (*MacBain v Lederman*, [1985] 1 FCR 856).

[67] In *The Queen v Drybones*, [1970] SCR 282, the Supreme Court of Canada confirmed that where a statute is inconsistent with the *Bill of Rights*, it is to be declared inoperative, unless it expressly declares that it operates notwithstanding the *Bill of Rights*.

[68] In *Singh v Minister of Employment and Immigration*. [1985] 1 SCR 177, at paragraph 96, the Supreme Court of Canada concluded that the following must be established in order for a breach of section 2(e) to exist: (1) and individual's rights and obligations fall to be determined; and (2) the individual must not have been afforded a fair hearing in accordance with the principles of fundamental justice.

[69] This Court expanded on the above conditions in *Canadian National Railway Company*, at paragraph 22, and established that four basic conditions must be met in order for paragraph 2(e) to be engaged:

> 1. The applicant must be a "person" within the meaning of paragraph 2(e);
>
> 2. The arbitration process must constitute a "hearing […] for the determination of [the applicant's] rights and obligations";
>
> 3. The arbitration process must be found to violate "the principles of fundamental justice"; and
>
> 4. The alleged defect in the arbitration process must arise as a result of a "law of Canada" which has not been expressly declared to operate notwithstanding the *Canadian Bill of Rights*.

[70] For the following reasons, I agree with the Applicants that the four above-mentioned conditions are met and therefore, pursuant to section 2(e), subsections 10(1), 10(3), and 10(4) of the *Citizenship Act* ought to be declared inoperative.

(a) *1st Requirement*

[71] The first requirement is met in this case. As individuals affected by the legislation, the Applicants clearly constitute "persons" within the meaning of section 2(e). Nothing more needs to be established to meet the first requirement.

(b) *2nd Requirement*

[72] The second condition requires that the process constitute a hearing for the determination of the Applicants' rights. A low threshold must be met in order for a process to be considered a

"hearing" for the purpose of section 2(e). According to the Supreme Court of Canada in *Authorson v Canada (Attorney General)*, [2003] 2 SCR 40, 2003 SCC 39 at paragraph 61, a hearing falls under the ambit of section 2(e) of the *Bill of Rights* where there is "the application of law to individual circumstances in a proceeding before a court, tribunal or similar body".

[73] In my view, a determination by an immigration officer in this case involves a decision concerning the Applicants' right to citizenship; it involves the application of law, namely section 10 of the Amended Act, to the Applicants' individual circumstances. Therefore, the determination of an immigration officer pursuant to section 10 of the Amended Act constitutes a hearing for the purpose of section 2(e) of the *Bill of Rights*.

[74] In order to satisfy the second condition, the hearing must be for the determination of the Applicants' "rights and obligations". The Respondent argues that citizenship is a privilege and not a right (*Benner v Canada (Secretary of State)*, [1997] 1 SCR 358 at para 72; *Canada (Minister of Citizenship and Immigration) v Tobiass*, [1997] 3 SCR 391 at para 108; *Canada (Minister of Citizenship and Immigration) v Dueck*, [1998] 2 FCR 614 at para 42; *Canada (Citizenship and Immigration) v Pereira*, 2014 FC 574 at para 21). Consequently, they argue that it does not attract the protection of the *Bill of Rights*. Respectfully, I do not agree.

[75] In my opinion, citizenship is a privilege only when it has not yet been obtained. Access to citizenship, for someone to whom it has not yet been granted, is a privilege (*Benner*, above at para 72). In order to be granted citizenship, the *onus* is on the applicant to demonstrate that they meet the requirements of the Act (*Pereira*, above at para 21). In *Canadian National Railway*

Company, at paragraph 28, this Court stated that section 2(e) has been held to be inapplicable to the granting of a mere "privilege", such as citizenship.

[76] However, this ought not to be interpreted so as to extend to the rights associated with citizenship, once granted. Once acquired, the rights flowing from citizenship have vested. Therefore, once acquired, citizenship is a right (*Taylor v Canada (Minister of Citizenship and Immigration*, 2006 FC 1053 at para 44).

[77] The Applicants have already obtained citizenship and as a result possess a bundle of derivative rights such as the right to vote (a right under section 3 of the *Charter*), the right to enter or remain in Canada (a right under subsection 6(1) of the *Charter*), the right to travel abroad with a Canadian passport, and access to the Federal Public Service. These are the rights they obtain once they transition from being permanent residents to citizens.

[78] The balance of rights which would be lost, were the Applicants to revert to foreign nationals – which is the case for the Applicants who allegedly misrepresented on their permanent residence applications – is even larger. Those affected individuals who would become foreign nationals would lose, on top of the rights enumerated above, access to most social benefits that Canadians receive, such as health care coverage; the ability to live and work in any province (rights under subsection 6(2) of the *Charter*), or study anywhere in Canada; and, for a period of ten years, the ability to apply for Canadian citizenship (*Citizenship Act*, above, s 22(1)(*f*)).

[79] In light of the numerous rights granted by the acquisition of citizenship, and what is at stake as a result of the citizenship revocation process, it is clear in my mind that citizenship revocation ought to fall within the "rights and obligations" threshold provided by section 2(e) of the *Bill of Rights*.

(c) *3rd Requirement*

[80] I also find that the third requirement, namely that the process be found to violate the principles of fundamental justice, is satisfied in these cases.

[81] In *Duke v The Queen*, [1972] SCR 917 at page 923, the Supreme Court of Canada held that section 2(e) requires that a federal tribunal adjudicating upon rights must "act fairly, in good faith, without bias and in a judicial temper", and must give a party the opportunity to adequately state his or her case (*Duke*, above at 923).

[82] The jurisprudence indicates that when conducting an analysis under the *Bill of Rights*, one must establish the degree of procedural fairness owed.

[83] The duty of procedural fairness varies with the context of each case, the particular statute, and the rights affected (*Canadian National Railway Company*, above at para 33). In *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, Justice L'Heureux-Dubé stated at paragraph 21:

> The existence of a duty of fairness, however, does not determine what requirements will be applicable in a given set of circumstances. As I wrote in *Knight v. Indian Head School*

> *Division No. 19*, 1990 CanLII 138 (SCC), [1990] 1 S.C.R. 653, at p. 682, "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case". All of the circumstances must be considered in order to determine the content of the duty of procedural fairness: *Knight*, at pp. 682-83; *Cardinal*, supra, at p. 654; *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, 1990 CanLII 31 (SCC), [1990] 3 S.C.R. 1170, *per* Sopinka J.

[84] The Supreme Court of Canada, in *Baker*, identified the following non-exhaustive factors as relevant in determining the content of the duty of procedural fairness:

> 1. the nature of the decision being made and process followed in making it;
>
> 2. the nature of the statutory scheme and the terms of the statute pursuant to which the body operates;
>
> 3. the importance of the decision to the individual or individuals affected;
>
> 4. the legitimate expectations of the person challenging the decision; and
>
> 5. the choices of procedure made by the agency itself.

[85] I am of the view that the nature of the decision being made, and the importance of the decision to the affected individuals clearly augur in favour of a high degree of procedural fairness being owed to the Applicants. The fundamental importance of the nature of the decision, specifically a determination of the Applicants' right to remain Canadian citizens, weighs in favour of a high degree of procedural fairness. The revocation of citizenship "has exceptional importance to the lives of those with an interest in its result" (*Baker*, above at para 31).

[86] Clearly, citizenship revocation is an important decision. The Applicants are barred from applying for citizenship for ten years after the revocation. Some will revert to foreign national status and some may even be rendered stateless. This, along with the loss of many crucial rights associated with citizenship, augurs in favour of a high degree of procedural fairness.

[87] Since there is no right of appeal from a revocation decision of the Minister under the Amended Act, the need for procedural fairness is all the more acute.

[88] The Applicants submit that the Amended Act creates a discretionary regime lacking in basic procedural protections for the affected individuals. They contend that this is not consistent with fundamental justice as the procedural protections within subsection 10(3) of the Amended Act are too minimal. They summarize the procedural protections provided for in the Amended Act as follows, at pages 20 and 21 of Mr. Hassouna's factum:

> They require only that (1) the person is given notice of the grounds on which the Minister is relying to make a decision and (2) is informed of their right to make written representations within a specified period of time.
>
> The new regime fails to afford sufficient protections to meet the requirements of natural justice for the following reasons: (1) the Act does not guarantee an oral hearing in all circumstances where such a hearing is necessary; (2) the Act does not guarantee a hearing before an independent and impartial magistrate; (3) the Act does not require the Minister to disclose relevant information in his possession to the individual; (4) by requiring that the Minister notify an individual of the grounds upon which he is relying to render his decision, but not necessarily the evidence supporting those grounds, the Act does not guarantee the right to know the case put against one and to answer that case; and (5) the Act does not provide for a consideration of all the circumstances of the case, but is narrowly focused on determining whether fraud has occurred at some stage of the immigration or citizenship application process.

[89] The Respondent submits that the statutory scheme in the Amended Act provides individuals with sufficient protection to ensure that the principles of fundamental justice are met.

[90] I side with the Applicants on this issue.

[91] In order for the revocation process to be procedurally fair, the Applicants ought to be entitled to: (1) an oral hearing before a Court, or before an independent administrative tribunal, where there is a serious issue of credibility; (2) a fair opportunity to state the case and know the case to be met; and (3) the right to an impartial and independent decision-maker. None of these are guaranteed under the Amended Act.

[92] First, the Applicants ought to be entitled to an oral hearing where there is a serious issue of credibility. Currently, subsections 10(3) and 10(4) of the Amended Act provide:

> (3) Before revoking a person's citizenship or renunciation of citizenship, the Minister shall provide the person with a written notice that specifies
>
> > (a) the person's right to make written representations;
> >
> > (b) the period within which the person may make his or her representations and the form and manner in which they must be made; and
> >
> > (c) the grounds on which the Minister is relying to make his or her decision.
>
> (4) A hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required.

[93] Section 17 of the Amended Act provides that the government is not obliged to personally serve the notice referred to in subsection 10(3), nor is it required to obtain confirmation that the notice was actually received by the affected individual. The notice may be sent by regular or electronic mail to the individual's last known address. If the notice is not received by the individual, the revocation procedure proceeds and their citizenship may be taken away. Therefore, in circumstances where a hearing may be necessary, the Amended Act still allows for the revocation of citizenship to proceed without the individual's knowledge of the revocation proceedings underway, and without him or her providing any written or oral submissions.

[94] Subsection 10(4) is complemented by section 7.2 of the *Citizenship Regulations* which states that a hearing may be held on the basis of three prescribed factors, including "the existence of evidence that raises a serious issue of the person's credibility".

[95] The Minister is therefore afforded a double discretion in subsection 10(4), by virtue of the wording which states that the Minister may hold an oral hearing on the basis of the prescribed factors if he is of the opinion that a hearing is required. This suggests that the Minister could be of the opinion that there is a serious issue of credibility, even coupled with an inability for the individual to provide written submissions, and still could exercise his discretion to deny a request for an oral hearing. This is inconsistent with the decision of the Supreme Court in *Singh*, which stands for the principle that where there are serious issues of credibility, the opportunity to make written submissions would be insufficient (*Singh*, above).

[96] Second, the Applicants ought to be entitled to proper disclosure. Under the previous regime, applicants had the opportunity to request that their matter be referred to the Federal Court for adjudication. At this stage, applicants were entitled to full disclosure and production of all relevant documents within the party's possession. Since there is no judicial proceeding available under the Amended Act, access to full disclosure is no longer available, and there is no general disclosure requirement placed on the government.

[97] Although the Minister is obliged to provide a written notice which includes "the grounds on which the Minister is relying to make his or her decision", this is not sufficient. The disclosure provided in the Amended Act is inadequate as it does not encapsulate information which may undermine the basis for the revocation, even if the Minister were in possession of it and aware of its relevance. Relevant information in general is also not part of the required disclosure by the Minister, as the Minister is only required to disclose the "grounds" on which he is relying. There is no requirement to disclose the evidence that supports those grounds.

[98] I am of the view that the insufficient disclosure mandated by the Amended Act erodes the right to know the case to be met and the right to make a defence, in violation of the principles of fundamental justice.

[99] Third, the Applicants ought to have access to an impartial and independent decision-maker. The procedural requirements that apply to a particular tribunal will "depend upon the nature and the function of the particular tribunal" (*Newfoundland Telephone Co v Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 SCR 623 at 636).

[100] The Applicants argue that the structure under the Amended Act lacks judicial independence and impartiality, whether the decision-maker is in fact the Minister himself or a delegate. To this, the Respondent submits that the investigation, the writing of the notice, and the determination of whether to proceed and ultimately revoke are done by three different persons and as such, the investigative and adjudicative functions are kept separate. Even in cases where the Minister's delegate acts in both capacities, namely sends out the notice and renders the revocation decision, this does not demonstrate a lack of impartiality or independence.

[101] I agree with the Applicants in that regard.

[102] The Senior Analysts only send out notices when the threshold for misrepresentation is satisfied on a balance of probabilities (Cross-Examination of Amélie Laporte-Lestage at 70, 99). This is the same standard required under the Amended Act for the revocation of citizenship (*Citizenship Act*, above, s 10(1)). A reasonably informed bystander could reasonably perceive bias on the part of the adjudicator, when the adjudicator who must decide on a balance of probabilities whether a misrepresentation has occurred, has already determined on a balance of probabilities that a misrepresentation occurred by virtue of having sent out the initial notice.

[103] In addition to the rights enunciated above, counsel for Ms. Sakr argued that the expertise of the decision-maker should be added as a component of the procedural fairness requirements.

[104] In *Canada (Prime Minister) v Khadr*, 2010 SCC 3, [2010] 1 SCR 44, the Supreme Court of Canada described as follows the analysis to be performed when assessing the principles of fundamental justice:

> [23] The principles of fundamental justice "are to be found in the basic tenets of our legal system": *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 503. They are informed by Canadian experience and jurisprudence, and take into account Canada's obligations and values, as expressed in the various sources of international human rights law by which Canada is bound. In *R. v. D.B.*, 2008 SCC 25, [2008] 2 S.C.R. 3, at para. 46, the Court (Abella J. for the majority) restated the criteria for identifying a new principle of fundamental justice in the following manner:
>
> (1) It must be a legal principle.
>
> (2) There must be a consensus that the rule or principle is fundamental to the way in which the legal system ought fairly to operate.
>
> (3) It must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.

[105] This three-part test was also confirmed and applied in *Canada (Attorney General) v Federation of Law Societies of Canada*, 2015 SCC 7, [2015] 1 SCR 401.

[106] Counsel for Ms. Sakr relies on *Dunsmuir v New Brunswick*, 2008 SCC 9 for the proposition that the expertise principle is a legal principle embodied in our Canadian administrative law. There, the Supreme Court held that administrative decision-makers are expected to render decisions that meet the standards of transparency, justifiability, and rationality. According to the Applicants, those standards could not be achieved if the decision-maker does not have sufficient expertise in the particular area.

[107] With respect, I do not read *Dunsmuir* as a confirmation that the expertise of decision-makers is an established legal principle. Rather, I view the expertise of the decision-maker as a legal factor informing standards of review of administrative decision-making; it is one of the factors to be considered in the standard of review analysis.

[108] Furthermore, the Applicants have not established that there is a consensus that the expertise principle would be vital to our societal notion of justice. Recognition of that principle is not critical to ensuring confidence in the administration of justice; judicial review of administrative action exists to ensure the legality, reasonableness, and fairness of the decision-making processes and their outcome.

[109] In addition, the notion of expertise is, in part, a subjective concept; reasonable people may disagree on what constitutes sufficient expertise in given circumstances. To establish strictly objective criteria in order to determine what constitutes adequate expertise in given circumstances may result in arbitrary standards, as expertise is dependent on the nature of the adjudication process and can only be observed on a spectrum; different individuals acquire expertise at a different pace.

[110] For these reasons, I am of the view that the expertise principle should not be recognized as a principle of fundamental justice.

[111] Finally, in addition to the above, counsel for Mr. Madanat argued that fundamental justice requires a consideration of equitable or humanitarian and compassionate grounds in

citizenship revocation cases. The Applicants are of the view that the *Citizenship Act* should specifically state that the decision-maker needs to consider an affected individual's personal situation when humanitarian and compassionate grounds are at stake.

[112] The Respondent replied that the revocation process does not exclude and therefore allows the consideration on equitable grounds and that in fact, Mr. Madanat somehow was afforded such a consideration.

[113] I agree with the Applicants.

[114] The Former Act guaranteed that at the last step of the process, once this Court had found that citizenship was acquired by fraud or misrepresentation or by concealing relevant facts, there was residual discretion afforded to the Governor in Council to review the entire situation in light of all the facts and, if appropriate, to reject the Minister's recommendation (*League for Human Rights of B'Nai Brith Canada v Odynsky*, 2010 FCA 307 at para 81). This wide discretion included the discretion to consider the case on humanitarian and compassionate grounds – in fact, Justice Décary preferred the use of the expression "personal interests", and a decision that failed to formally recognize and consider those factors when raised was considered unreasonable (*Oberlander v Canada (Attorney General)*, 2004 FCA 213 at paras 57-58).

[115] Under the Amended Act, the final decision is made by the Minister or his delegate after a simple fact-finding process of determining whether there has been fraud or misrepresentation in the granting of citizenship.

[116] In my view, given the importance of Canadian citizenship and the severe consequences that could result from its loss, the principles of fundamental justice require a discretionary review of all the circumstances of a case. This includes the consideration of humanitarian and compassionate grounds, the consideration of personal interests, or equitable discretion, whichever expression is preferred.

[117] I agree with the Applicants that the afforded discretion to consider the personal interests of the affected individual satisfies the requirement set out in *Khadr* and in *Federation of Law Societies of Canada*, in that: (1) the ability to make a decision on humanitarian and compassionate grounds is a legal principle; (2) there can be little doubt that this discretionary capacity has been essential to the fairness of the citizenship revocation process in the past, in that it has acted as a necessary safeguard against arbitrariness; and (3) there is sufficient precision in the process as to what factors should be taken into consideration, as described in the jurisprudence (see the recent decision of the Supreme Court of Canada in *Kanthasamy v Canada (Minister of Citizenship and Immigration)*, [2015] 3 SCR 909).

[118] For example, I wish to outline the situation of Mr. Gucake for whom, in my view, humanitarian and compassionate grounds should have been considered.

[119] Mr. Gucake was born in the Republic of Fiji. He was a minor when he was listed as a dependent on his parents' permanent residence application. He became a permanent resident of Canada on November 23, 2001 when he was 15 years old.

[120] When he was 18 years old, Mr. Gucake made an application for Canadian citizenship on his own behalf. He was granted Canadian citizenship on November 29, 2005.

[121] In February 2007, Mr. Gucake enrolled in the Canadian Armed Forces. After completing Basic Training, he served with the Second Battalion Princess Patricia's Canadian Light Infantry for seven years. During that time, he was deployed on three operational tours to Afghanistan. Mr. Gucake was awarded numerous certificates and awards for his deployments, and on May 12, 2014, he was honourably discharged from the Canadian Armed Forces and moved back home to Canada.

[122] In November 2015, Mr. Gucake received a notice of revocation pursuant to subsection 10(1) of the Amended Act. The Report of the Minister contained information received in 2007, eight years prior to the coming into force of the SCCA, alleging that Mr. Gucake's father may have failed to disclose a minor criminal conviction in Australia.

[123] It seems highly unfair to me that under the Amended Act, there is no requirement that Mr. Gucake's personal situation be considered by the immigration officer.

[124] I therefore find that consideration of personal interests or humanitarian and compassionate factors should form part of the procedural fairness offered to affected individuals by the citizenship revocation process.

(d) *4th Requirement*

[125] Finally, the fourth requirement is also met in this case. The defect giving rise to conflict with section 2(e) must arise by operation of a "law of Canada" not expressly declared to operate notwithstanding the *Bill of Rights* (*Canadian National Railway Company*, above at para 29). The citizenship revocation regime has as its legal source the *Citizenship Act*. The *Citizenship Act*, a federally enacted statute, does not expressly declare that it operates notwithstanding the *Bill of Rights*. Therefore, the protections of section 2(e) apply.

[126] Thus, I find that the impugned provisions violate section 2(e) of the *Canadian Bill of Rights* as they deprive the Applicants of the right to a fair hearing in accordance with the principles of fundamental justice. In light of the number of procedural guarantees that are missing, I do not see how the conflict between the impugned provisions and the *Bill of rights* could be avoided by interpretation.

D. *Are any of subsections 10(1), 10(3), or 10(4) of the Amended Act unconstitutional as violating section 7 of the* Charter*?*

[127] Counsel for Ms. Sakr and Mr. Madanat spoke to that issue and argued that subsections 10(1), 10(3), and 10(4) of the Amended Act, and the revocation process contemplated therein, violate their clients' rights to liberty and security of their persons as guaranteed by section 7 of the *Charter*:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[128] The *onus* is on the Applicants to demonstrate the violation of constitutional rights (*Chaoulli v Quebec (Attorney General)*, 2005 SCC 35 at para 30).

[129] In order to demonstrate a violation of section 7, the Applicants must establish that: (1) the impugned provisions interfere with, or deprive them of, their life, liberty or security of their person; and that (2) the deprivation in question is not in accordance with the principles of fundamental justice (*Carter v Canada (Attorney General)*, 2015 SCC 5 at para 55).

[130] Liberty protects "the right to make fundamental personal choices free from state intervention" (*Blencoe*, above at para 54). Security of the person encompasses "a notion of personal autonomy involving […] control over one's bodily integrity free from state interference" (*Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519 at 587-88) and it is engaged by any state action that causes physical or serious psychological suffering (*New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46 at para 58; *Carter*, above at para 64).

[131] For the reasons below, I conclude that the impugned provisions dealing with the revocation of citizenship for fraud or misrepresentations do not infringe the right to liberty and security of the Applicants, and of persons in their position. Therefore, the revocation provisions are not inconsistent with section 7 of the *Charter*.

(a) *Prior jurisprudence on subsection 18(1) of the Citizenship Act*

[132] In my view, since what is at stake at the first stage of a section 7 analysis is the same as what was at stake under the previous revocation process – that is the revocation of one's Canadian citizenship for fraud or misrepresentations, the prior jurisprudence is relevant, though not determinative of the issue.

[133] The Applicants argue that at least one Court, the Ontario Superior Court of Justice, had previously found that the former revocation process clearly engaged section 7 of the *Charter* (*Oberlander v Canada (Attorney General)*, [2004] OJ No 34 [*Oberlander ONSC*]). The Respondent, on the other hand, argues that the Federal Court of Appeal in *Canada (Secretary of State) v Luitjens*, [1992] FCJ No 319 had found the opposite. With respect, I am of the view that neither of these assertions is correct.

[134] In *Oberlander ONSC*, the Ontario Superior Court of Justice was seized with two interlocutory motions presented by the parties to a procedure to quash the order in council revoking Mr. Oberlander's Canadian citizenship for misrepresentations. A motion for a stay of proceedings before the Immigration and Refugee Board with respect to Mr. Oberlander's deportation, and a motion by the Minister contesting the Court's jurisdiction to hear the merits of the application. At paragraph 45 the Court stated that:

> There can be no question that the revocation of citizenship, particularly in the circumstances of this case, triggers s. 7 of the Charter. A revocation of citizenship engages both liberty interests and security of the person. I cite two easy examples. Prior to the revocation of his citizenship, Mr. Oberlander had full mobility rights, as guaranteed by s. 6 of the Charter. He no longer has these rights. Neither does he have the right to vote in an election or to run for office, as enshrined in s. 3. I need not go on with the impact that the revocation of his citizenship has had upon both Mr. Oberlander and his family. If revocation of his citizenship is

> justified, then the consequences must be justified. However, if revocation of his citizenship was not justified, was not in accordance with the principles of fundamental justice, then the impact upon his liberty and his security cannot be tolerated. In sum, I can think of no consequence, apart from a sentence of several years' imprisonment in a penitentiary, which would be more significant to a responsible citizen than the loss of that citizenship (*Oberlander ONSC*, above at para 45 (leave to appeal that decision on jurisdictional grounds was granted, but the appeal never went forward)).

[135] I see several reasons why this comment is not dispositive of the issue.

[136] First, the Court only made preliminary remarks as to the violation of section 7 of the *Charter* in order to confirm its jurisdiction over the matter. At paragraph 6 of its reasons, the Court gives this warning:

> For reasons I shall presently enunciate, I conclude this court should, indeed must, assume carriage of the application on its merits with respect to some of the issues raised. In any comments I may make during the course of this ruling, I do not want to be seen as passing final judgment on such merits.

[137] This warning was subsequently repeated at paragraph 25 of the reasons.

[138] Second, the two examples of violation of liberty and security interests provided at paragraph 45 of the decision are, with all due respect, questionable. The purpose of section 7 is not to protect other fundamental rights enshrined in the *Charter*. The ability to travel is protected by section 6 and the right to vote or run for office is guaranteed by section 3 of the *Charter*. As stated by Justice Phelan in *Khadr v Canada (Attorney General)*, 2006 FC 727 at paragraph 75, "…[i]f one provision of the Charter covers a specific freedom, other sections of the Charter

should not be presumed to cover the same freedom. There is a presumption against redundancies in legislation". The Court does not otherwise state how Mr. Oberlander's liberty and security would be violated by revoking his citizenship for misrepresentations.

[139] I would further add that the liberty interest in section 7 should not be employed to offer protection from an act of government which results in rendering the affected individuals ineligible for certain other Charter protections (reserved for Canadian citizens) or which deprives them of rights they once held under the Charter. "Liberty" in section 7 does not, in my mind, cover the freedom to be protected by the Charter.

[140] Third, in *Oberlander ONSC*, the Court acknowledges that the argument before it is not that the provisions themselves infringe Mr. Oberlander's rights guaranteed by section 7 of the *Charter*. The Court adds that "[i]t is conceded that s. 10 and s. 18 provide a structure within which, by custom and practice, a process may occur for the revocation of citizenship which is in accordance with the principles of fundamental justice" (*Oberlander ONSC*, above at para 48). With such a comment, it is hazardous to conclude that the Court found that the act of revoking someone's Canadian citizenship interferes with, or deprives that person of his or her life, liberty or security of the person, such that the first part of a section 7 analysis would have been conclusive. In fact, the focus was rather on the process followed by the Governor in Council in revoking Mr. Oberlander's citizenship and on the fact that the process was neither equitable nor made in accordance with natural justice. The Court considers the fact-finding decision of Justice MacKay of this Court, the Minister's strong recommendation to revoke Mr. Oberlander's citizenship, and the expert evidence on constitution and functioning of the Governor in Council

and finds that there would be a breach of fundamental justice: i) if the Minister of Citizenship and Immigration and the Attorney General of Canada presided as members of the Cabinet, as they would then be in a clear conflict of interest; and ii) if the reasons for the Governor in Council's decision were deemed to be found in the Minister's recommendation.

[141] Without commenting on the merits of those findings, those issues could very well have been brought before Justice Martineau of this Court who heard Mr. Oberlander's application for judicial review of the same Governor in Council's decision (*Oberlander v Canada (Attorney General)*, 2003 FC 944). That could explain why leave to appeal the Ontario Superior Court of Justice's decision was granted on a jurisdictional question (although no appeal was brought forward) and why Mr. Oberlander's file was sent back and is still before the Federal Courts (see the most recent decision in *Oberlander v Canada (Attorney General)*, 2016 FCA 52, leave to appeal denied).

[142] Similarly, I do not view the decision of the Federal Court of Appeal in *Luitjens* to be dispositive of the issue. At paragraph 8, the Federal Court of Appeal concluded that section 7 could only be engaged at later stages of the revocation process:

> [A]t the time of the decision of the court, at least, s. 7 was not engaged in that there was not yet any deprivation of Mr. Luitjen's "life, liberty and security of the person". All that was decided by the trial judge was the fact that Mr. Luitjens obtained his Canadian citizenship by false representations. This finding may well form the basis of decisions by others, which may interfere with those rights at some future time, but this decision does not do so. Therefore, it is merely one stage of a proceeding which may or may not result in a final revocation of citizenship and deportation or extradition. There may be a right of review or appeal at a later stage, which is usually the case.

[Emphasis added.]

[143] In *Canada (Citizenship and Immigration) v Houchaine*, 2014 FC 342 at paragraph 69 and in *Montoya v Canada (Attorney General)*, 2016 FC 827 at paragraph 50, this Court came closer to a finding that revoking one's Canadian citizenship for fraud or misrepresentations does not interfere with, or deprive that person of, his or her liberty or security of the person.

[144] In *Houchaine*, Justice Mactavish stated that:

> The Federal Court of Appeal has indeed been clear that citizenship revocation proceedings do not engage section 7 of the Charter: see, for example, *Luitjens*, above.

[145] Although this statement seems quite general, the mere reference to *Luitjens* leads me to take it as referring only to the fact-finding stage of the former process.

[146] In *Montoya*, the applicant argued that deportation, not the revocation of his Canadian citizenship, would violate his section 7 rights. It is in that context that Justice Manson found that :

> [50] […] …Though the Applicant may ultimately be subject to removal from Canada, I agree with the Respondent that the Applicant has failed to demonstrate how, at this juncture, revocation of his citizenship constitutes a deprivation of his life, liberty or security of his person.

[147] Therefore, prior jurisprudence with respect to the former revocation process, although relevant to the present analysis, has not fully answered the question as to whether citizenship revocation for fraud or misrepresentations under the Amended Act engages section 7.

(b) *Whether a final citizenship revocation decision interferes with an affected individual's liberty and security of the person*

[148] In answering that question, we need to avoid confusion or insufficient distinction between both parts of the section 7 analysis. There needs to be interference with, or a violation of, a person's right to liberty or security of the person, as defined by the jurisprudence, for section 7 to be engaged.

[149] For the first part of the analysis, the question is whether revoking citizenship for fraud or misrepresentation violates an individual's liberty or security of the person, and not whether the current revocation process violates the principles of fundamental justice. Only if the first question is answered in the affirmative will the process be examined against principles of fundamental justice in the second part of the analysis.

[150] Also, a finding that a person's liberty or security is engaged by the revocation of his or her citizenship for fraud or misrepresentation is quite distinct from a finding that such a revocation affects his or her rights, for the purpose of paragraph 2(e) of the *Bill of Rights*.

[151] With that in mind, I am of the view that revoking a person's citizenship by reason of fraud or misrepresentation does not, *per se*, interfere with, or violate, that person's right to liberty or security of the person, and that as such, section 7 of the *Charter* is not engaged.

[152] In reaching that conclusion, I am mindful that in *Odynsky*, at paragraph 80, the Federal Court of Appeal recognized the importance placed by the government itself on citizenship and the serious consequences associated with its loss:

> Revocation of citizenship is a most important matter. Citizenship of Canada gives Canadians certain rights. Some of these are so important that they are guaranteed under our Constitution. These include the right to vote under section 3 of the Charter and the right to enter, remain in, and move about Canada under section 6 of the Charter. Given the consequences of revoking citizenship, it makes sense that Parliament would enact a scheme that provides for judicial fact-finding, a Ministerial recommendation, and then a final level of full review by a broad body representing all constituencies and perspectives within government.

[153] I also acknowledge that the loss of citizenship through revocation brings with it the loss of many rights cherished by Canadians. These rights will be lost for at least ten years, in application of paragraph 22(1)(*f*) of the *Citizenship Act.*

[154] However, the question is not whether important consequences could flow from the revocation of citizenship but rather whether it violates the right to liberty or security of the person. A person who has acquired his or her citizenship by fraud or misrepresentation should not have been vested with those important rights to start with. And the most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or

remain in Canada (*Canada (Minister of Employment and Immigration) v Chiarelli*, [1992] 1 SCR 711 at 733).

[155] Citizenship or nationality is not a right guaranteed by the *Charter*.

[156] Through the revocation process, the Minister has the power to revoke the grant of citizenship as a status, but does not necessarily impact the Applicants' liberty or security interests.

[157] That change of status could eventually lead to consequences that would interfere with their liberty or security interests if, for example, they are deported to a country where they would be subjected to torture. But deportation is not even foreseeable for those Applicants who would be reverting to the status of permanent residents or for those who have been living abroad for years. In that sense, it is not the revocation of citizenship *per se* that engages or violates liberty or security interests but rather events that could occur at a later stage, but that would not necessarily occur in the Applicants' situations. Events that would engage the liberty or security interests protected by virtue of section 7 of the *Charter* are not the necessary consequences of revoking one's citizenship.

[158] Similar reasoning was adopted by the Supreme Court in *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9, however, in the context of a security certificate issued under subsection 77(1) of the IRPA. There, the Court found that the previous provisions of the Act engaged the security of the applicants because they were deprived from the protection

provided by subsection 115(1) of the IRPA and that as such, they would be deported in application of its subsection 115(2). It was therefore the automatic deportation to countries where they could face torture that engaged or violated the applicants' right to the security of their persons, not the mere fact that a security certificate was issued or declared reasonable.

[159] In *Medovarski v Canada (Minister of Citizenship and Immigration),* 2005 SCC 51 at paragraph 46, the Supreme Court goes further and says that the deportation of a non-citizen in and of itself cannot implicate the liberty and security interests protected by section 7 of the *Charter*.

[160] If the liberty and security of a person who faces deportation is not automatically engaged, *a fortiori* the liberty and security of an individual who acquired his or her citizenship through fraud or misrepresentation is not engaged by the revocation of his or her citizenship.

[161] Since I have found that the revocation of Canadian citizenship for fraud or misrepresentation does not interfere with, or deprive a person of, his or her life, liberty or security, there is no need for me to engage in the second part of a section 7 analysis or in the impact of section 1 of the *Charter*.

E. *Does section 10 of the Amended Act subject an individual to cruel and unusual treatment in violation of section 12 of the* Charter*?*

[162] The threshold for demonstrating an infringement of section 12 of the *Charter* is high (*Charkaoui*, above at para 95). As stated by Justice Lamer in *Smith*, treatment or punishment will

rise to the level of cruel and unusual if it is "so excessive as to outrage [our] standards of decency" (*R v Smith (Edward Dewey)*, [1987] 1 SCR 1045, 1987 CanLII 64 (SCC) at para 54; *Charkaoui*, above at para 95). Essentially, though the state may impose punishment, the effect must not be grossly disproportionate to what would have been appropriate and the punishment must be more than merely excessive (*Smith*, above at paras 54-55).

[163] In order to fall under the scope of protection of section 12, the Applicants must demonstrate two things: first that they are "subjected to treatment or punishment at the hands of the state, and second, that such treatment or punishment is cruel and unusual" (*Rodriguez*, above at 608-609).

[164] In this case, the Applicants submit that the active action of the government in taking steps to revoke an individual's citizenship and remove him or her from the country has the effect of imposing upon them cruel and unusual treatment.

(a) *Whether the impugned provisions of the Amended Act constitute "treatment" within the meaning of section 12*

[165] Counsel for Mr. Gucake and Mr. Parkhomenko spoke to that issue.

[166] First, they submit that the impugned provisions of the Amended Act constitute "treatment" within the meaning of section 12 of the *Charter*. They concede that section 12 is most often applied in criminal terms of punishment; nevertheless they rely on jurisprudence which has taken the notion outside the bounds of the criminal sphere.

[167] The Supreme Court has left open the possibility that "treatment" may include "that imposed by the state in contexts other than that of a penal or quasi-penal nature" (*Rodriguez*, above at 611). Specifically, the Court in *Rodriguez* highlighted cases, outside of the penal context, which have been seen to constitute "treatment" for the purposes of section 12, such as: strip searches (*Weatherall v Canada (Attorney General)*, [1988] 1 FC 369 (TD), reversed in part on other grounds, [1989] 1 FC 18 (CA)); and medical care imposed without consent on mentally ill patients (*Howlett v Karunaratne*, [1988] OJ No 591, 64 OR (2d) 418).

[168] Furthermore, in the immigration context, the Supreme Court held in *Chiarelli*, that the deportation order at issue in that case was not a punishment for any particular offence, but that deportation may come within the scope of a "treatment" under section 12. In so finding, the Court adopted the definition of treatment from the Concise Oxford Dictionary (1990) as "a process or manner of behaving towards or dealing with a person or thing […]" (*Chiarelli*, above at 735). However, the Court did not decide this point as it was of the view that the deportation authorized in that case was not cruel and unusual. Nevertheless, the deportation order did not result from a particular offence being committed; it was imposed by the state in order to enforce a state administrative structure – the immigration system (*Rodriguez*, above at 610).

[169] For the purposes of determining whether the impugned provisions constitute "treatment" within the meaning of section 12, the case must be one in which an "individual is in some way within the special administrative control of the state" (*Rodriguez*, above at 611-612).

[170] The Applicants submit that the active action of the government in taking steps to revoke an individual's citizenship and removing them from this country is certainly a form of administrative treatment.

[171] Firstly, in the interest of clarity, what is at issue is not whether the removal from this country, or deportation, is a form of "treatment", as is alleged by the Applicants. The impugned provisions deal strictly with the revocation of citizenship. Again, whether deportation follows the revocation of citizenship depends on many factors.

[172] Therefore, the question remains, whether the citizenship revocation process and the resulting loss of status are "treatment" for the purposes of section 12. In my opinion, they are not.

[173] The Applicants rely on the decision in *Canadian Doctors for Refugee Care v Canada (Attorney General)*, 2014 FC 651 where this Court examined the question of whether the non-action of the government in refusing to continue to provide health care services to a class of refugees fell within the ambit of "treatment" under section 12. This Court stated that "those seeking the protection of Canada are under immigration jurisdiction, and as such are effectively under the administrative control of the state" (*Canadian Doctors*, above at para 585).

[174] In my view, the situation of the Applicants differs significantly from that of the applicants in *Canadian Doctors*. The Applicants are not under the administrative control of the state and they are not intentionally targeted by the government, in implementing the impugned

provisions, as a vulnerable, poor or disadvantaged group of persons. The Applicants rather compose a somewhat heterogeneous group with a variety of personal situations. The only common denominator between them is that they are said to have obtained their Canadian citizenship through fraud, misrepresentation, or concealing important information. The consequences of having their citizenship revoked will also vary from one Applicant to the other.

[175] The Applicants in this case are not seeking the protection of Canada, as refugees. It is the Applicants' entitlement to the benefits of citizenship that depends upon the outcome of the revocation process and the decisions made by the Minister throughout. This, in my view, does not place the Applicants within the administrative control of the state.

[176] Although deportation may "come within the scope of a 'treatment' in s. 12" (*Chiarelli*, above at 735), citizenship revocation for fraud or misrepresentation, in my view, does not.

(b) *Whether the impugned provisions of the Amended Act are "cruel and unusual" within the meaning of section 12*

[177] Even if the process for revoking citizenship for fraud or misrepresentation was considered a "treatment" for the purpose of section 12 of the *Charter*, any such treatment would not be cruel and unusual.

[178] In fact, this Court has clearly stated that in law there is nothing intrinsically "cruel and unusual" about the revocation of citizenship (*R v Sadiq*, [1990] FCJ No 1102 at para 21).

[179] I agree with the Respondent that there is no free-standing right to a grant of Canadian citizenship. In order to be entitled to citizenship, a person must satisfy the requirements of the legislation. Misrepresenting oneself in order to satisfy the requirements of the legislation amounts to a breach of the social contract between the individual and the government (*Dueck*, above at para 92). I also agree with the Respondent that revocation is therefore the logical result.

[180] The Applicants state that the nine factors enumerated by the Supreme Court in *Smith* not only apply outside the context of penal or criminal matters, but that they are met in this case. These factors are whether the treatment :

1. Goes beyond what is necessary to achieve a legitimate aim;
2. Has adequate alternatives;
3. Is unacceptable to a large segment of the population;
4. Can be applied upon a rational basis in accordance with ascertained or ascertainable standards;
5. Is arbitrary;
6. Has no value or social purpose, like reformation, rehabilitation, deterrence or retribution;
7. Accord with public standard of decency or propriety;
8. Shocks the general conscience or is intolerable in fundamental fairness; and
9. Is unusually severe and hence degrading to human dignity and worth.

[181] The Applicants argue that the impugned provisions allow an overbroad and cruelly disproportionate application of measures to ensure compliance with immigration rules, as applied to them and those similarly situated.

[182] I rather agree with the Respondent that the Applicants' reliance on *Smith* and other cases in the minimum punishment context is inappropriate. In those cases, section 12 was engaged because the statute did not allow for any discretion not to impose a minimum punishment, whereas decision-makers in the revocation process do have the discretion to not revoke a person's citizenship – although there is no guidance as to what factors should be considered in exercising that discretion and although the evidence shows that it was not seriously exercised.

[183] In any event, I am of the view that the impugned provisions are not arbitrary, they do not go beyond what is necessary to achieve their legitimate aim, and they do not shock the general conscience nor are they intolerable in fundamental fairness.

[184] Again, what is under review is the revocation process and not what could occur to any particular individual once his or her citizenship is taken away for fraud or misrepresentation.

[185] Arbitrariness exists where there is no direct connection between the impugned effect on the individual and the purpose of the law or where there is no relation between them (*Canada (Attorney General) v Bedford*, [2013] 3 SCR 1101, 2013 SCC 72 at para 111). Here, the provisions and their effect on affected individuals are rationally connected to the purpose of the law. The revocation process ensures that those who are granted Canadian citizenship have in fact met the statutory requirements and that those who had not met the statutory requirements do not continue to be entitled to the right to citizenship. As such, the effect of revoking citizenship is clearly rationally connected to the purpose of protecting program integrity.

[186] The impugned provisions are not overbroad as they do not go too far and they do not interfere with conduct that bears no connection with their objective (*Bedford*, above at para 119). The revocation process does not capture persons whose possible revocation has no connection to program integrity. For those who were minors when they became citizens, they had to be included in their parents' applications. Revoking their citizenship by virtue of the fraud or misrepresentation upon which their citizenship was granted is consistent with the intent and purpose of the impugned provisions. I do not see that as visiting "the sins of parents on their innocent children" as was found by this Court in the context of false refugee claimants whose children benefit from medical services while their claim is being processed (*Canadian Doctors*, above at para 664). In fact, the opposite finding could harm the integrity of the system as it would be an incentive for parents to misrepresent their situation in order for their child to acquire citizenship.

[187] Finally, the impugned provisions do not shock the general conscience, nor are they intolerable in fundamental fairness. The Applicants have filed several newspaper publications to support their argument that the public is shocked at laws which punish children for their parents' actions in the absence of a hearing. Again, a distinction has to be made between revoking citizenship acquired as a minor for the parents' misrepresentation – a government prerogative that existed under the Former Act – and the fairness of the new revocation system. The media seem to confuse the two. What mostly shocked public opinion is the fact that the revocation would occur without a hearing, and not the mere fact that citizenship acquired as a minor could be revoked for the fraud or misrepresentation of a parent, in proper circumstances. In fact, the media coverage was rather triggered by groups involved in the defence of refugees who used the

personal situation of Minister Maryam Monsef to stimulate the public opinion. Minister Monsef was apparently recently informed that she was born in Iran and not in Afghanistan as her mother told her. The consensus seems to be that it is exactly for cases such as that of Minister Monsef that the revocation process needs to be fair and equitable.

[188] The Applicants have not demonstrated that the revocation of citizenship *per se* rises to the level of "cruel and unusual".

[189] That is not to say that the revocation of one's Canadian citizenship and deportation could never rise to that level. In the instance of someone who did not personally misrepresent his or her situation and who would become stateless and revert to the status of foreign national, for example, the decision-maker ought to balance that individual's *Charter* protections and personal circumstances against IRCC's statutory mandate (*Doré v Barreau du Québec*, 2012 SCC 12 at paras 55-56).

[190] However, none of the Applicants before me, for whom a revocation decision was rendered, became stateless and a foreign national as a result. Mr. Madanat is a citizen of Jordan and he would become a permanent resident should he lose his Canadian citizenship; although he would become stateless, Mr. Ajjawi would remain a permanent resident, and; Mr. Bandukda would be a Pakistani citizen and a permanent resident of Canada.

F. *If there is a violation of either section 7 or section 12 of the* Charter*, can it be saved under section 1 of the* Charter*?*

[191] In light of my conclusion that the impugned provisions of the Amended Act do not violate section 7 or section 12 of the *Charter*, it is not necessary to engage in a section 1 analysis.

V. Certification

[192] Post hearing, the Applicants have proposed the following questions for certification:

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. *Is section 10 of the* Citizenship Act *as amended by the* Strengthening Canadian Citizenship Act *unconstitutional as violating sections 1(a) and 2(e) of the* Canadian Bill of Rights*?*

C. *Is section 10 of the* Citizenship Act *as amended by the* Strengthening Canadian Citizenship Act *unconstitutional as violating section 7 of the* Charter*? If so, can the section 7 violation(s) be saved under section 1 of the* Charter*?*

D. *Does section 10 of the* Citizenship Act *as amended by the* Strengthening Canadian Citizenship Act *unconstitutional as violating section 12 of the* Charter*? If so, can the section 12 violation(s) be saved under section 1 of the* Charter*?*

E. *Do any of the subsections 10(1), 10(3), or 10(4) of the* Citizenship Act *as amended by the* Strengthening Canadian Citizenship Act*, violate the principles of procedural fairness?*

F. *Is the "expertise principle" a principle of fundamental justice? If so, do subsections 10(1), 10(3) or 10(4) of the* Citizenship Act *breach this principle?*

G. *Is equitable consideration on humanitarian and compassionate grounds a principle of fundamental justice, which is breached by the failure of the* Citizenship Act *to incorporate it into the analysis under subsections 10(1), 10(3) or 10(4)?*

[193] The Respondent replied and expressed the view that there was redundancy in the formulation of those questions and that some exceeded the scope of the common legal issues raised by these applications. The Applicants conceded and I agree that the following questions of

general importance are dispositive of these cases and that they would be dispositive of an appeal. They will therefore be certified:

H. *Do subsections 10(1), 10(3) and 10(4) of the* Citizenship Act*, by which the Minister may revoke citizenship that was obtained by "false representation, fraud or knowingly concealing material circumstances", violate section 7 or 12 of the* Charter*, or section 2(e) of the* Canadian Bill of Rights*?*

I. *Does the transitional provision found in subsection 40(4) of the* Strengthening Canadian Citizenship Act*, serve to cancel a revocation notice issued by the Minister under subsection 18(1) of the* Citizenship Act*, as it read prior to May 28, 2015, where no originating document had been filed with the Federal Court?*

VI. Conclusion

[194] I find that a proceeding was not pending before the Federal Court by virtue of the mere request, on the part of the Applicants, to have the matter referred to this Court for adjudication under the previous scheme. Therefore, the notices issued to Mr. Hassouna, Mr. Madanat, and Ms. Situ under the Former Act were cancelled pursuant to subsection 40(4) of the SCCA.

[195] In light of the above, I am of the view that the impugned provisions of the *Citizenship Act* violate section 2(e) of the *Bill of Rights*. The Applicants should be afforded (1) an oral hearing before a Court, or before an independent administrative tribunal, where there is a serious issue of credibility; (2) a fair opportunity to state the case and know the case to be met; (3) the right to an impartial and independent decision-maker; and (4) an opportunity to have their special circumstances considered when such circumstances exist. I am finally of the view that the conflict between the impugned provisions and the *Bill of Rights* cannot be avoided by interpretation and consequentially, I will declare the impugned provisions inoperative.

[196] However, I do not find that the impugned provisions violate either section 7 or section 12 of the *Charter*.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. These applications are granted in part:

2. The Notices of Intent to Revoke the citizenship of the Applicants are null and void and hereby quashed because they violate section 2(e) of the *Canadian Bill of Rights* and are therefore of no force or effect;

3. The decisions rendered by the Minister of Citizenship and Immigration (now the Minister of Immigration, Refugees and Citizenship) respectively on December 7, 2015, November 30, 2015, and November 23, 2015 revoking the citizenship of Tareq Madanat, Hisham Ajjawi and Muhammad Shahid Bandukda are null and void and hereby quashed because they were rendered in violation of section 2(e) of the *Canadian Bill of Rights* and are therefore of no force or effect;

4. The Minister of Citizenship and Immigration (now the Minister of Immigration, Refugees and Citizenship) or his delegate(s) are prohibited from applying subsections 10(3) and 10(4) of the *Citizenship Act* against the Applicants because they are inconsistent with the *Canadian Bill of Rights*;

5. Subsections 10(1), 10(3) and 10(4) of the *Citizenship Act*, as amended by the *Strengthening Canadian Citizenship Act* are hereby declared inoperative as they violate section 2(e) of the *Canadian Bill of Rights* in a way that can not be avoided by interpretation;

6. Subsections 10(1), 10(3) and 10(4) of the *Citizenship Act*, as amended by the *Strengthening Canadian Citizenship Act* do not violate sections 7 and 12 of the *Canadian Charter of Rights and Freedoms*;

7. The effect of the present judgment is suspended for a period of 60 days or any other delay as this Court may grant at the request of one of the parties;

8. The following questions of general importance are certified:

   A. *Do subsections 10(1), 10(3) and 10(4) of the* Citizenship Act, *by which the Minister may revoke citizenship that was obtained by "false*

representation, fraud or knowingly concealing material circumstances", violate section 7 or 12 of the Charter, or section 2(e) of the Canadian Bill of Rights*?*

B. *Does the transitional provision found in subsection 40(4) of the* Strengthening Canadian Citizenship Act*, serve to cancel a revocation notice issued by the Minister under subsection 18(1) of the* Citizenship Act*, as it read prior to May 28, 2015, where no originating document had been filed with the Federal Court?*

9. Costs in the amount $5,000 each, inclusive of all disbursements, are granted to the Applicants.

"Jocelyne Gagné"

Judge

ANNEX

Citizenship Act, RSC 1985, c C-29

Loi sur la citoyenneté, LRC 1985, c C-29

Revocation by Minister — fraud, false representation, etc.	**Révocation par le ministre — fraude, fausse déclaration, etc.**
10 (1) 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 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.	**10 (1)** Sous réserve du paragraphe 10.1(1), le ministre peut révoquer la citoyenneté d'une personne ou sa répudiation lorsqu'il est convaincu, selon 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.
Notice	**Avis**
(3) Before revoking a person's citizenship or renunciation of citizenship, the Minister shall provide the person with a written notice that specifies	**(3)** Avant de révoquer la citoyenneté d'une personne ou sa répudiation, le ministre l'avise par écrit de ce qui suit :
(a) the person's right to make written representations;	**a)** la possibilité pour celle-ci de présenter des observations écrites;
(b) the period within which the person may make his or her representations and the form and manner in which they must be made; and	**b)** les modalités — de temps et autres — de présentation des observations;

(c) the grounds on which the Minister is relying to make his or her decision.

c) les motifs sur lesquels le ministre fonde sa décision.

Hearing

(4) A hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required.

Audience

(4) Une audience peut être tenue si le ministre l'estime nécessaire compte tenu des facteurs réglementaires.

Notice of decision

(5) The Minister shall provide his or her decision to the person in writing.

Communication de la décision

(5) Le ministre communique sa décision par écrit à la personne.

Presumption

10.2 For the purposes of subsections 10(1) and 10.1(1), a person has obtained or resumed his or her citizenship by false representation or fraud or by knowingly concealing material circumstances if the person became a permanent resident, within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*, by false representation or fraud or by knowingly concealing material circumstances and, because of having acquired that status, the person subsequently obtained or resumed citizenship.

Présomption

10.2 Pour l'application des paragraphes 10(1) et 10.1(1), a acquis la citoyenneté ou a été réintégrée dans celle-ci par fraude ou au moyen d'une fausse déclaration ou de la dissimulation intentionnelle de faits essentiels la personne ayant acquis la citoyenneté ou ayant été réintégrée dans celle-ci après être devenue un résident permanent, au sens du paragraphe 2(1) de la *Loi sur l'immigration et la protection des réfugiés*, par l'un de ces trois moyens.

Prohibition

22 (1) Despite anything in this Act, a person shall not be

Interdiction

22 (1) Malgré les autres dispositions de la présente loi,

granted citizenship under subsection 5(1), (2) or (4) or 11(1) or take the oath of citizenship

nul ne peut recevoir la citoyenneté au titre des paragraphes 5(1), (2) ou (4) ou 11(1) ni prêter le serment de citoyenneté :

(f) if, during the 10 years immediately before the person's application, the person ceased to be a citizen under paragraph 10(1)(a), as it read immediately before the coming into force of section 8 of the *Strengthening Canadian Citizenship Act*, or under subsection 10(1) or paragraph 10.1(3)(a);

f) si, au cours des dix années qui précèdent sa demande, il a cessé d'être citoyen en vertu d'un décret pris au titre de l'alinéa 10(1)a), dans sa version antérieure à l'entrée en vigueur de l'article 8 de la *Loi renforçant la citoyenneté canadienne*, ou en application du paragraphe 10(1) ou de l'alinéa 10.1(3)a)

Citizenship Regulations, SOR 93-246

Règlement sur la citoyenneté, DORS/93-246

Revocation of Citizenship

7.2 A hearing may be held under subsection 10(4) of the Act on the basis of any of the following factors:

(a) the existence of evidence that raises a serious issue of the person's credibility;

(b) the person's inability to provide written submissions; and

(c) whether the ground for revocation is related to a conviction and sentence imposed outside

Révocation de la citoyenneté

7.2 Une audience peut être tenue en vertu du paragraphe 10(4) de la Loi compte tenu de l'un ou l'autre des facteurs suivants :

a) l'existence d'éléments de preuve qui soulèvent une question importante en ce qui concerne la crédibilité de la personne en cause;

b) l'incapacité pour la personne en cause de présenter des observations écrites;

c) le fait que le motif de révocation est lié à une condamnation et à une peine infligées à l'étranger

Canada for a offence that, if committed in Canada, would constitute a terrorism offence as defined in section 2 of the *Criminal Code*.

pour une infraction qui, si elle était commise au Canada, constituerait une infraction de terrorisme au sens de l'article 2 du *Code criminel*.

Strengthening Canadian Citizenship Act, SC 2014, c 22

Loi renforçant la citoyenneté canadienne, LC 2014, c 22

Reports under former section 10

32. If, immediately before the day on which section 8 comes into force, the Minister, within the meaning of the *Citizenship Act*, was entitled to make or had made a report referred to in section 10 of that Act, as that section 10 read immediately before that day, the matter is to be dealt with and disposed of in accordance with that Act, as it read immediately before that day.

Rapport établi sous le régime de la version antérieure de l'article 10

32. Si, à l'entrée en vigueur de l'article 8, le ministre, au sens de la *Loi sur la citoyenneté*, pouvait établir ou avait établi un rapport visé à l'article 10 de cette loi, dans sa version antérieure à cette entrée en vigueur, l'affaire se poursuit sous le régime de cette loi, dans sa version antérieure à cette entrée en vigueur.

Proceeding pending

40. (1) A proceeding that is pending before the Federal Court immediately before the day on which section 8 comes into force, as a result of a referral under section 18 of the *Citizenship Act* as that section 18 read immediately before that day, is to be dealt with and disposed of in accordance with that Act, as it read immediately before that day.

Instances en cours

40. (1) Les instances en cours, à l'entrée en vigueur de l'article 8, devant la Cour fédérale à la suite d'un renvoi visé à l'article 18 de la *Loi sur la citoyenneté*, dans sa version antérieure à cette entrée en vigueur, sont continuées sous le régime de cette loi, dans cette version.

Other cases

(4) If, immediately before the

Autres cas

(4) Si, à l'entrée en vigueur de

coming into force of section 8, a notice has been given under subsection 18(1) of the *Citizenship Act*, as that subsection read immediately before that coming into force, and the case is not provided for under section 32 or any of subsections (1) to (3), the notice is cancelled and any proceeding arising from it is terminated on that coming into force, in which case the Minister, within the meaning of that Act, may provide the person to whom that notice was given a notice under subsection 10(3) of that Act, as enacted by section 8, or may commence an action for a declaration in respect of that person under subsection 10.1(1) of that Act, as enacted by section 8.

l'article 8, un avis a été donné en application du paragraphe 18(1) de la *Loi sur la citoyenneté*, dans sa version antérieure à cette entrée en vigueur, et qu'il ne s'agit pas d'un cas prévu à l'article 32 ou à l'un des paragraphes (1) à (3), l'avis et toute instance qui en découle sont dès lors annulés et le ministre, au sens de cette loi, peut fournir à la personne à qui l'avis a été donné un avis en vertu du paragraphe 10(3) de cette loi, édicté par l'article 8, ou intenter une action pour obtenir une déclaration relativement à cette personne en vertu du paragraphe 10.1(1) de cette loi, édicté par l'article 8.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-1584-15, T-6-16, T-27-16, T-1-16, T-213-16, T-273-16, T-2154-15, T-438-16
DOCKET:	T-1584-15
STYLE OF CAUSE:	ABDULLA AHMAD HASSOUNA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA
DOCKET:	T-6-16
STYLE OF CAUSE:	TAREQ MADANAT v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
DOCKET:	T-27-16
STYLE OF CAUSE:	THOMAS GREGORY GUCAKE v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
DOCKET:	T-1-16
STYLE OF CAUSE:	HISHAM AJJAWI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
DOCKET:	T-213-16
STYLE OF CAUSE:	PHILIPP PARKHOMENKO v THE MINISTER OF IMMIGRATION, REFUGEES, AND CITIZENSHIP CANADA
DOCKET:	T-273-16
STYLE OF CAUSE:	CHAOHUI SITU v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
DOCKET:	T-2154-15
STYLE OF CAUSE:	MUHAMMAD SHAHID BANDUKDA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION

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APPEARANCES:

Lorne Waldman Warda Shazadi Meighen Olivia Mann-Foster	FOR THE APPLICANT ABDULLA AHMAD HASSOUNA
Matthew Jeffery	FOR THE APPLICANT TAREQ MADANAT
Laura Best	FOR THE APPLICANT THOMAS GREGORY GUCAKE
Aris Daghighian	FOR THE APPLICANT PHILIPP PARKHOMENKO
Jacques Beauchemin	FOR THE APPLICANT HISHAM AJJAWI
Mario D. Bellissimo Jamie Boongaling	FOR THE APPLICANT CHAOHUI SITU
Daniel Kingwell	FOR THE APPLICANT MUHAMMAD SHAHID BANDUKDA
Arghavan Gerami Seamus Murphy	FOR THE APPLICANT SAKR MARIE
Mary Matthews Jocelyn Espejo Clarke Meva Motwani Nadine Silverman	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Waldman & Associates Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT ABDULLA AHMAD HASSOUNA
Matthew Jeffery Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANT TAREQ MADANAT
Laura Best Embarkation Law Corporation Vancouver, British Columbia	FOR THE APPLICANT THOMAS GREGORY GUCAKE
Beauchemin Brisson Lawyers Montréal, Quebec	FOR THE APPLICANT HISHAM AJJAWI
Green and Spiegel LLP Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT PHILIPP PARKHOMENKO
Bellissimo Law Group Toronto, Ontario	FOR THE APPLICANT CHAOHUI SITU
Mamann Sandaluk & Kingwell LLP Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT MUHAMMAD SHAHID BANDUKDA
Gerami Law PC Ottawa, Ontario	FOR THE APPLICANT SAKR MARIE
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT