Federal Court  Cour fédérale

Date: 20180517

Docket: T-121-17

Citation: 2018 FC 520

Ottawa, Ontario, May 17, 2018

PRESENT: Mr. Justice Grammond

BETWEEN:

ALEN NIU

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Alen Niu is a 12-year old permanent resident of Canada. His mother became a Canadian citizen. However, she is presently the subject of an investigation that may lead to the revocation of her citizenship. Meanwhile, Mr. Niu applied for citizenship, on the basis that he has a Canadian parent. Citizenship and Immigration Canada [CIC] suspended the treatment of his application, because the revocation proceedings against his mother may affect his entitlement to citizenship. He now seeks judicial review of the suspension of his citizenship application and an

order directing CIC to process it. This type of order is known as a *mandamus*. I am denying this application, because the suspension of the processing of his application is clearly supported by the legislation.

I. Legislative Background and Issues

[2] Two sections of the *Citizenship Act*, RSC 1985 c C-29 [the Act], are relevant to this case. Section 5 provides that citizenship shall be granted to a permanent resident who is the minor child of a Canadian citizen. Section 13.1 provides that the processing of an application may be suspended "for as long as is necessary to receive […] any information or evidence or the results of any investigation or inquiry for the purpose of ascertaining whether the applicant meets the requirements under this Act relating to the application […]."

[3] *Mandamus* will issue only if the respondent has a non-discretionary duty to act (*Apotex Inc v Canada (Attorney General)*, [1994] 1 FC 742 (CA) at 766-769 [*Apotex*], affirmed [1994] 3 SCR 1100). In appropriate cases, section 5 of the Act imposes such a duty on the Minister (*Conille v Canada (Minister of Citizenship and Immigration)*, [1999] 2 FC 33 (TD) [*Conille*]; *Murad v Canada (Citizenship and Immigration)*, 2013 FC 1089 [*Murad*]; *Stanizai v Canada (Citizenship and Immigration)*, 2014 FC 74). However, if a person's application is suspended under section 13.1, then the Minister no longer has a duty to act and *mandamus* is not available (*Canada (Citizenship and Immigration) v Nilam*, 2017 FCA 44 at para 27 [*Nilam*]).

[4] Hence, this application turns on whether Mr. Niu's application for citizenship was validly suspended. The decision to suspend the processing of a citizenship application under section 13.1

is reviewed on a standard of reasonableness: *Nilam* at paras 18-19. In his written submissions, Mr. Niu argues that CIC could not invoke section 13.1 for two reasons: (1) section 13.1 does not authorize a suspension where the person who is the subject of an inquiry is not the person making the application; (2) the revocation proceedings against Mr. Niu's mother were legally non-existent when Mr. Niu brought this application for *mandamus* and whatever happened afterwards is irrelevant. Moreover, in his oral submissions, Mr. Niu insisted heavily on the three-year delay since he filed his application for citizenship. He argues that CIC has not provided a meaningful explanation for that delay.

II. Analysis

A. *Section 13.1 and Investigations Concerning another Person*

[5] Mr. Niu first argues that section 13.1 cannot apply to him as he is not personally under investigation. I am unable to read the restriction suggested by Mr. Niu in the wording of section 13.1. In this connection, my colleague Justice Richard Bell has already noted that section 13.1 is drafted in much broader language than its predecessor provision, former section 17: *Tayeb Ali v Canada (Citizenship and Immigration)*, 2016 FC 1051 at paras 27-33, [2017] 1 FCR 372. In many cases, one's entitlement to citizenship hinges upon one's parents' citizenship. Where section 13.1 refers to "whether the applicant meets the requirements under this Act," this may include whether one's parents are entitled to citizenship. There is no restriction in the wording of section 13.1 that would suggest otherwise. Indeed, in a previous decision of this Court, section 13.1 was interpreted as encompassing inquiries as to misrepresentations made by an applicant's parent: *Chen v Canada (Citizenship and Immigration)*, 2017 FC 1171 at para 41.

B. *Crystallization of Entitlement to Mandamus*

[6] Mr. Niu asserts that when he brought his *mandamus* application, the revocation proceedings against his mother were non-existent, so that section 13.1 cannot be invoked. Assessing this argument requires further details about his mother's revocation proceedings. These proceedings were initiated under a former version of the legislation that was declared unconstitutional by this Court in May 2017: *Hassouna v Canada (Citizenship and Immigration)*, 2017 FC 473 [*Hassouna*]. Parliament responded to this Court's judgment by amending the legislation: *Act to amend the Citizenship Act and to make consequential amendments to another Act*, SC 2017 c 14. Mr. Niu's mother was among the persons who had brought applications to quash their revocation proceedings on the same grounds. After the judgment in *Hassouna*, her application was granted and the proceedings against her were declared null: *Monla v Canada (Citizenship and Immigration)*, 2017 FC 668. However, in defence to the present application, CIC has provided affidavit evidence to the effect that an investigation against Mr. Niu's mother is still ongoing. There is no evidence before me as to whether revocation proceedings under the new legislation have been initiated.

[7] In light of these events, Mr. Niu asserts that there was no valid citizenship revocation process against his mother when the present application was brought. Hence, there was no valid reason for suspending the processing of his application under section 13.1. If section 13.1 was inapplicable, there was nothing negating CIC's duty to act and *mandamus* should issue.

[8] In my view, this line of argument is flawed. The right to seek *mandamus* does not crystallize at the moment the application is filed. Rather, the Court must assess the entitlement at the moment the case is heard: *Apotex* at 771; *698114 Alberta Ltd v Banff (Town of)*, 2000 ABCA 237 at para 20, 190 DLR (4th) 353. In other words, if events taking place between the moment the application is filed and the moment the case is heard have the effect of negating the respondent's public duty to act, *mandamus* will not issue. I am aware that my colleague Justice Yvan Roy, in the context of an application for *mandamus*, made a comment to the effect that what took place after the application was filed was irrelevant: *Murad* at para 61. My colleague, however, made that comment while discussing the respondent's "clean hands" argument. I do not understand him to endorse the idea that entitlement to *mandamus* crystallizes on the day the application is filed.

[9] The idea that the right to *mandamus* crystallizes when the application is filed would also defeat the purpose of section 13.1. *Bello v David*, [1992] RJQ 939 (CA), a decision of the Quebec Court of Appeal, provides an illustration. At issue in that case was a provision of the Montreal city charter which allowed for the suspension of building permit applications when a change in the zoning by-laws was contemplated. The Court denied the application for *mandamus* of a landowner who was refused a permit on that ground, noting that:

> [TRANSLATION] It appears clearly from the language quoted above that the legislature, in adopting such a provision, aimed precisely at allowing the City, through such a freeze, to enact any amendment to the zoning by-law prohibiting works such as those contemplated by applications for permits still under consideration, without the applicants being able, through filing plans and documents more quickly, to assert acquired rights, by managing to complete their applications before the long and cumbersome process for the amendment of the zoning by-law reaches its conclusion. (p 943)

[10] Moreover, *mandamus*, like other administrative law remedies, is discretionary (*Apotex* at 769). I may refuse *mandamus* where it will not advance the resolution of the dispute between the parties or will not have "practical value or effect" (*Apotex* at 768). In essence, Mr. Niu is asking me to order CIC to process his application now on the grounds that no grounds for suspension existed in January 2017, when this application was filed. But if I were to do so, CIC could suspend the application once again because a valid investigation is currently underway. The resolution of the case would not have been furthered.

C. *Notice and Delay*

[11] Mr. Niu devoted most of his oral submissions to arguments that relate more to procedure than substance. Relying on *Conille* and subsequent cases, he argues that CIC has not provided satisfactory justification for the three-year delay in processing the application. Initially, CIC responded to his inquiries about the status of his application by merely stating that it was still being processed. It is only in response to this application for judicial review that CIC disclosed that his application had been suspended pursuant to section 13.1. Moreover, CIC's affiants merely stated that Mr. Niu's mother "remains the subject of a revocation investigation under the new process pursuant to ss. 10(1) of the Citizenship Act." Mr. Niu submits that the delay in the processing of his application cannot be justified by a mere statement that an investigation is underway, without more information as to the grounds for the investigation and the timeline for the revocation process.

[12] CIC is not required to give notice when it suspends the processing of an application under section 13.1. After all, invoking section 13.1 does not amount to a decision on an application for

citizenship – it merely delays the decision. When the applicant makes an inquiry, however, CIC should tell the truth about the status of the application, unless there is reason to believe that revealing the information would compromise the investigation in that particular case (see, by analogy, *Lam v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8738 (FC) at para 23). A blanket policy to the effect that suspensions under section 13.1 are kept secret is not acceptable. In this case, CIC should have told Mr. Niu that his citizenship application was suspended. The failure to do so, however, does not entitle Mr. Niu to *mandamus*. The governing question is whether CIC's resort to section 13.1 was reasonable.

[13] Mr. Niu relies on *Conille*, which set up a three-part test to ascertain whether the delay in processing a citizenship application was justifiable. *Conille*, however, pre-dates section 13.1 of the Act. At that time, section 17 of the Act, now repealed, provided that applications for citizenship could be suspended for a maximum period of six months where information necessary to determine the application was missing. This Court has held that there was no authority to suspend an application outside of section 17 (*Valverde v Canada (Citizenship and Immigration)*, 2015 FC 1111 at paras 51-52). Moreover, this Court was prepared to grant *mandamus* where, roughly, the delay in processing a citizenship application exceeded three years (see, for example, *Conille*; *Gondara v Canada (Citizenship and Immigration)*, 2006 FC 204; *Stanizai*). Parliament appears to have enacted section 13.1 to overcome the limitations flowing from *Conille* and subsequent cases. Hence, the *Conille* test does not apply when section 13.1 is validly invoked.

[14] Does it follow, as Mr. Niu contends, that a citizenship application can be suspended indefinitely on the bald assertion that there is an ongoing investigation that might affect its outcome? I would not go that far. As any governmental power, the power granted by section 13.1 remains subject to judicial review. The principles of administrative law remain applicable. If, for example, an investigation bears no relationship with a person's entitlement to citizenship, a suspension based on section 13.1 might be substantively unreasonable. Likewise, if the suspension remains in effect for a longer time than "is necessary," to use the wording of section 13.1, it might also become unreasonable. I would only add that in those cases, the burden of proving the relevant facts lies on the applicant.

[15] In this case, both parties appear to have decided to file as little information as possible in evidence. As a result, I know very little about the investigation into Mr. Niu's mother's citizenship, the grounds for that investigation or the timeline for the citizenship revocation process going forward. What I know is that a portion of that delay, possibly a major portion, is attributable to the fact that the validity of the citizenship revocation process was challenged before this Court and that Parliament enacted remedial legislation to respond to this Court's judgment. In those circumstances, I am not prepared to hold that the three-year delay in processing Mr. Niu's application is unreasonable. In the absence of more precise evidence, I am not prepared either to predict that the citizenship revocation process against Mr. Niu's mother will result in unreasonable delays.

[16] Accordingly, this application for judicial review will be dismissed.

[17] At the end of the hearing, I asked both parties whether they proposed a question for certification under section 22.2(d) of the Act. According to the Federal Court of Appeal, “to be certified, a question must (i) be dispositive of the appeal and (ii) transcend the interests of the immediate parties to the litigation, as well as contemplate issues of broad significance or general importance” (*Mudrak v Canada (Citizenship and Immigration)*, 2016 FCA 178 at para 16). The parties were unable to say whether there are similar pending cases. As a result, I am not persuaded that the questions at issue here are of “broad significance or general importance.” Thus, I decline to certify a question.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. the application for judicial review is dismissed;

2. no question is certified.

"Sébastien Grammond"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Aris Daghighian	FOR THE APPLICANT
Alison Engel-Yan	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Green and Spiegel LLP Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT