Federal Court Cour fédérale

Date: 20100624

Docket: T-827-08

Citation: 2010 FC 692

Ottawa, Ontario, June 24, 2010

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Plaintiff

and

DEVENDRA KUMAR PAREKH
MANISHABEN DEVENDRA PAREKH

Defendants

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an action brought by the Minister of Citizenship and Immigration for a declaration that Devendra Kumar Parekh and Manish Aben Devendra Parekh obtained Canadian citizenship by false representation or fraud or by knowingly concealing material circumstances. Success in his action would entitle the Minister, pursuant to paragraph 18(1)(b) and subsection 10(1) of the *Citizenship Act*, R.S.C. 1985, c. C-29, to

make a report to the Governor in Council; if that report is accepted, the Defendants will cease to be Canadian citizens.

FACTS

[2] The Defendants do not dispute that they lied in order to obtain Canadian citizenship. The parties have agreed on a statement of facts, the salient points of which are as follows.

[3] The Defendants became permanent residents of Canada on May 11, 1997. In June 1999, they moved to the state of Tennessee in the United States. They then moved to the state of Oklahoma.

[4] Mr. Parekh came back to Canada, moving to Windsor, in August of 2000. Mrs. Parekh followed him in December 2000.

[5] On August 9, 2000, the Defendants applied for Canadian citizenship. Their applications were approved on December 19, 2000, and they became citizens on February 21, 2001.

[6] Shortly thereafter, both were separately charged with, *inter alia*, making false representations on their application for Canadian citizenship, contrary to paragraph

29(2)(a) of the *Citizenship Act*. Both pleaded guilty to that offence in November 2002, and each was fined $700.

[7] Citizenship and Immigration Canada (CIC) became aware of the charges and the convictions against the Defendants in May 2003. On June 10, 2003, CIC officials recommended that the department proceed with the revocation of their citizenship.

[8] On June 17, 2003, Mr. Parekh submitted an application for permanent residence on humanitarian and compassionate grounds (the H&C application) on behalf of his daughter, with support of a sponsorship application by the Defendants. The H&C application was incomplete, and was returned to Mr. Parekh. He submitted a new application on August 26 of the same year, and an updated H&C application in 2006. No decision has yet been made on this application.

[9] The Defendants made several applications for Canadian passports. A number of their applications were refused, but they were issued limited-time passports in December 2003. Mr. Parekh applied for a Canadian passport again in September of 2009. This application was denied. The Defendants did not seek judicial review of this or the other refusals.

[10] In the meantime, no developments took place in the matter of the revocation of the Defendants' citizenship for a year and a half, between June 2003 and December 2004, when a memorandum recommending the revocation of the Defendant's citizenship was

drafted. However, the then Minister of Citizenship and Immigration quit or was removed from her position shortly thereafter, before the memorandum was presented to her.

[11] No further developments took place for two years, until December 2006. During that time, there were several changes of the Minister, each accompanied by shifts in departmental priorities. As a result, the Plaintiff only signed the Notices in Respect of Revocation of Citizenship of the Defendants, as required by section 18 of the *Citizenship Act*, on December 14, 2006.

[12] The Notices were served on the Defendants in early January 2007. On January 26, 2007, the Defendants asked, as authorized by paragraph 18(1)(b) of the *Citizenship Act*, that the Notices be referred to the Federal Court.

[13] The Plaintiff's statement of claim instituting the present proceedings was issued by the Court on May 27, 2008. The reason for the delay of 17 months between the defendant's request that the matter be referred to the Court and the commencement of proceedings was said to be that evidence in support of the allegations in the Notices was still being pursued.

ISSUES

[14] The first issue in this action is whether the Defendants obtained their Canadian citizenship by false representation or fraud or by knowingly concealing material circumstances.

[15] The second issue is whether the continuance of revocation proceedings against the Defendants amounts to an abuse of process under the principles of administrative law and, if so, whether a stay of the proceedings is the appropriate remedy.

THE PARTIES' POSITIONS

The Plaintiff

[16] The Plaintiff submits that, contrary to the information provided on their applications for citizenship, the Defendants resided outside of Canada for a period of approximately 14 months during the four-year period prior to the date of their applications. They pleaded guilty in November 2002 and were convicted under section 29(2) of the *Citizenship Act* of making a false representation on their application for citizenship. On the balance of probabilities, the Defendants knowingly concealed extensive absences from Canada.

[17] Furthermore, the delay in this case did not amount to abuse of process. Mere delay does not constitute abuse of process. It must be found to be clearly unacceptable

and to have caused prejudice to the party invoking it, and must be balanced against the public interest in the enforcement of the legislation. In the present case, the delay is not inordinate and the Defendants have not suffered significant prejudice.

[18] Finally, should the Court find these proceedings constitute an abuse of process, it can deal with this problem in its reasons and by an appropriate order as to costs. A stay is not warranted in the circumstances of this case, and any other remedy, except costs, would be outside of the Court's narrow jurisdiction under subsection 18(1) of the *Citizenship Act*.

The Defendants

[19] As noted above, the Defendants admit to having lied on their applications for Canadian citizenship. They argue, nevertheless, that the Court should not issue the declaration sought by the Plaintiff, but rather stay the proceedings, because they constitute an abuse of process. The Defendants submit that they suffered substantial prejudice as a result of the delay for which they are not responsible.

[20] The Defendants applied for passports several times in 2002, but were unable to obtain them. They were able to obtain "limited" passports in 2003 with strict conditions. The effect of the refusal to issue regular passport has been to preclude the Defendants from traveling to visit family abroad and affected Mr. Parekh's employment opportunities. Further, their application to sponsor their daughter, who was born in the

United States, has not been processed pending the finalization of the revocation proceedings.

[21] While the Defendants would have accepted, and were indeed expecting, a revocation of their citizenship after their guilty pleas in 2002, the time elapsed since then is no longer reasonable. Considering that they would not be subject to deportation if their citizenship were revoked, and that they have been denied many of the benefits of citizenship for so long, it would be unfair to let them lose their citizenship now and have them wait five more years before they can regain it.

[22] In the alternative, if the Court declines to stay the proceedings, it should order that any eventual revocation of the Defendants' citizenship be "backdated" by the Governor in Council to the date on which it would have occurred if the process had been speedy. In the further alternative, the Court should issue a declaration that abuse of process has affected these proceedings and order the Governor in Council to fashion an appropriate remedy.

ANALYSIS

MISREPRESENTATION, FRAUD, OR CONCEALING MATERIAL CIRCUMSTANCES

[23] The undisputed evidence demonstrates that the Defendants knowingly concealed extensive absences from Canada. Therefore, I find that they obtained their citizenship by misrepresentation, fraud, or concealing material circumstances. The sole remaining issues

are whether these proceedings constitute an abuse of process and, if so, what the appropriate remedy is.

ABUSE OF PROCESS

[24] Generally speaking, a court will find that an attempt to apply or enforce legislation has become an abuse of process when the public interest in the enforcement of legislation is outweighed by the public interest in the fairness of administrative or legal proceedings; see *Blencoe v. British Columbia (Human Rights Commission),* 2000 SCC 44, [2000] 2 S.C.R. 307, at par. 120, where the test is set out as follows:

> In order to find an abuse of process, the court must be satisfied that, "the damage to the public interest in the fairness of the administrative process should the proceeding go ahead would exceed the harm to the public interest in the enforcement of the legislation if the proceedings were halted" ([Brown, Donald J. M., and John M. Evans. *Judicial Review of Administrative Action in Canada.* Toronto: Canvasback, 1998 (loose-leaf)], at p. 9-68). According to L'Heureux-Dubé J. in [*R. v. Power*, [1994] 1 S.C.R. 601], at p. 616, "abuse of process" has been characterized in the jurisprudence as a process tainted to such a degree that it amounts to one of the clearest of cases. In my opinion, this would apply equally to abuse of process in administrative proceedings. For there to be abuse of process, the proceedings must, in the words of L'Heureux-Dubé J., be "unfair to the point that they are contrary to the interests of justice" (p. 616). "Cases of this nature will be extremely rare" (*Power*, *supra*, at p. 616). In the administrative context, there may be abuse of process where conduct is equally oppressive.

[25] Such a situation can arise as a result of undue delay in the enforcement of legislation. This will often be so when delay causes the hearing of the matter to become unfair (for example, because memories of witnesses have faded or evidence has otherwise become unavailable). However, Justice Bastarache, speaking for the majority of the Supreme Court in *Blencoe*, above, at par. 115, was "prepared to recognize that

unacceptable delay may amount to an abuse of process in certain circumstances even where the fairness of the hearing has not been compromised." Justice Lebel, dissenting in part, but not on this issue, put the point more forcefully, at par. 154: "[a]busive administrative delay is wrong and it does not matter if it wrecks only your life and not your hearing."

[26] In order for delay to amount to abuse of process, "the delay must have been unreasonable or inordinate." (*Blencoe*, above, at par. 121.) Delay must not only be greater than normal, but also have caused the defendant a substantial prejudice. In other words, it must be "unacceptable to the point of being so oppressive as to taint the proceedings." (*Ibid*.)

[27] The analysis of the reasonableness of administrative delay in a particular case is factual and contextual. As Justice Bastarache explained at par. 122, *ibid*.,

> [t]he determination of whether a delay has become inordinate depends on the nature of the case and its complexity, the facts and issues, the purpose and nature of the proceedings, whether the respondent contributed to the delay or waived the delay, and other circumstances of the case. As previously mentioned, the determination of whether a delay is inordinate is not based on the length of the delay alone, but on contextual factors, including the nature of the various rights at stake in the proceedings, in the attempt to determine whether the community's sense of fairness would be offended by the delay.

[28] Justice Lebel, for his part, also insisted on the need for a contextual analysis. He summarized, in *Blencoe*, at par. 160:

> three main factors to be balanced in assessing the reasonableness of an administrative delay:

> (a) the time taken compared to the inherent time requirements of the matter before the particular administrative body, which would encompass legal complexities (including the presence of any especially complex systemic issues) and factual complexities (including the need to gather large amounts of information or technical data), as well as reasonable periods of time for procedural safeguards that protect parties or the public;
>
> (b) the causes of delay beyond the inherent time requirements of the matter, which would include consideration of such elements as whether the affected individual contributed to or waived parts of the delay and whether the administrative body used as efficiently as possible those resources it had available; and
>
> (c) the impact of the delay, considered as encompassing both prejudice in an evidentiary sense and other harms to the lives of real people impacted by the ongoing delay. This may also include a consideration of the efforts by various parties to minimize negative impacts by providing information or interim solutions.

[29] I now will consider each of the factors outlined by Justice Lebel in turn.

(a) Time Taken Compared to the Inherent Time Requirements

[30] The first of these is the time taken compared to the inherent time requirements for this matter. At trial, Suzanne Demers, the CIC case analyst currently handling the Defendants' file, testified that a typical revocation case might take a couple of years to conclude, depending on the complexity of the case. The time actually elapsed between the moment CIC was aware of the defendants' fraud and the issuance of the statement of claim in this case – five years – is thus rather long even for a typical case.

[31] Ms. Demers explained that normally a substantial period of time might be necessary to collect evidence, for example when the help of Canadian diplomatic missions abroad is needed.

[32] However, the present case is not complex. It does not require unraveling mysteries of long-forgotten events on far-away battlefields. The facts here are, on the contrary, clear and simple. The Defendants have, in 2002, pleaded guilty to the charges of making false representations on their citizenship applications. They thus admitted the facts on which these proceedings are based. They have never gone back on that admission. On the contrary, on both the original and the updated H&C applications Mr Parekh clearly stated that he and his wife had resided in the US for over a year between 1999 and 2000. He repeated this admission in March 2006, in a letter to CIC, referred to at trial as "the confession," outlining his and his wife's residence history. This letter was received by a local office and apparently did not make its way to the officers handling the revocation proceedings against the Defendants, even though the local office had been aware of these proceedings.

[33] The case is so simple that no piece of evidence was shown at trial which could explain the delay. While Ms Demers suggested that background investigations may have been ongoing between the drafting of the first memorandum to the Minister recommending revocation of the Defendants' citizenship in 2004 and the issuance of the statement of claim in 2008, there is no evidence that they were. In fact, Ms Demers was unable to show any new evidence, with one minor exception, gathered between May

2003 and June 2008. The only developments in this case during that period were the memoranda to the Plaintiff recommending the revocation of the Defendants' citizenship in December 2004 and again in 2006.

[34] Nor is this a case where the administrative process was, as in *Blencoe*, slowed down by the procedural safeguards that allow for the participation of the person concerned. On the contrary, the defendants were kept completely in the dark, so that by 2006, with the time elapsed, Mr. Parekh no longer believed that they were subject to revocation proceedings, so much that he did not check the corresponding box on his daughter's updated H&C application, which he had checked on the original application in 2003. Ms. Demers explained that CIC never considered interviewing the defendants – its policy being to let persons it investigates fully enjoy the benefits of citizenship until formal proceedings to revoke it are commenced.

[35] Based on the evidence before me, I conclude, for the first factor, that the length of the administrative proceedings in this case was neither normal nor due to any complexities of the case.

(b) <u>Causes of the delay</u>

[36] The second factor to consider is the cause of the delay beyond the inherent time requirements of this matter. The RCMP became aware of the Defendants'

misrepresentation by March 2001. Yet the Plaintiff took no action to have their citizenship revoked until he served notice of his intention to do so in January 2007.

[37] In November 2002, the Defendants were convicted, pursuant to paragraph 29(2)(a) of the *Citizenship Act*, of making a false representation, committing fraud, or concealing material facts in order to obtain their citizenship. There is no explanation for the delay of 6 months until the case management branch of CIC became aware of their convictions.

[38] Once it did, the case analyst then responsible for the file drafted a memorandum, dated June 10, 2003, to the branch manager, recommending that CIC proceed with revocation "given that we have convictions under s. 29." The branch manager gave his approval on the same day, but nothing more was done.

[39] There is no satisfactory explanation for the delay of three and a half years, from June 2003 to December 2006, to move the revocation process forward. On December 14, 2004, and again on December 22, 2004, the case analyst then working on the file mentioned, in an email message, that no progress had been made on it and that it was necessary to gather more evidence. However, the next day, he drafted a memorandum to the Minister of Citizenship and Immigration, recommending the revocation of the defendants' citizenship.

[40] Thus I cannot accept the Plaintiff's argument that more evidence was needed before a notice of revocation could be issued. It is clear, from the documentary evidence and the testimony given at trial that none was gathered. The memorandum on the basis of which the Plaintiff finally issued the notices of revocation in December 2006 was substantially similar to the one prepared two years earlier, in December 2004. One wonders what additional evidence was needed other than that on the basis of which the RCMP obtained the Defendants' conviction, and indeed that of the conviction itself. If, however further evidence was needed, it was already in CIC's possession, in the shape of the Defendants' daughter's H&C application and the letter sent by Mr. Parekh to CIC.

[41] The Plaintiff further points to changes at the head of the department, which resulted in a continuous administrative reorganization at CIC. However, I note that in *Canada (Minister of Citizenship and Immigration) v. Copeland*, [1998] 2 F.C. 493 (F.C.T.D.), above, at par. 65, he "conceded that the delay from August 1993 to March 13, 1995, the date of the notice of revocation, [that is, "only" one year and a half] was unjustifiable on the basis that it was caused solely by a departmental reorganization."

[42] The Minister is of course entitled to change his mind. On this point, however, I agree with the words of Justice Cullen, in *Canada v. Sadiq*, (1990) [1991] 1 C.F. 757, [1990] F.C.J. No. 1102 (QL), at par. 31: "this case was not given the priority it deserved. Revocation of one's Canadian citizenship is a serious matter and called for more immediate responses than are evident here."

[43] Finally, there is no satisfactory explanation for a delay of almost one and a half years between the Defendants' request that the matter be referred to the Federal Court and the issuance of the statement of claim commencing this action. Ms. Demers stated that more evidence was required before bringing this action to Court. I do not accept this explanation. I note that in this regard, Ms. Demers testified that the only additional evidence collected in the time that elapsed between the Defendants' request that the matter be referred to the Court and the issuance of the statement of claim was the transcript of the hearing that lead to their conviction of an offense under the *Citizenship Act* in 2002.

[44] In final submissions at trial, the Plaintiff argued that the Defendants are responsible for this delay, since they could have forgone the opportunity to refer the case to the Court. I am unable to accept this argument. The Defendants cannot be blamed for asserting their rights. In *Charkaoui v. Canada (Citizenship and Immigration),* 2007 SCC 9, [2007] 1 S.C.R. 350, at par. 114, the Supreme Court stated that recourse by a party to procedural and constitutional challenges reasonably open to that party in the circumstances ought not to count against that party. Further, the Defendants do not invoke the delay caused by the actual court proceedings in this case. The *Citizenship Act* allows them to refer this case to the Federal Court, and when making that reference, they could not have expected that they would wait for almost a year and a half for the court action to commence.

[45] I therefore conclude, on the second factor, that the Plaintiff alone bears the entire responsibility for the delay in this case.

(c) <u>Impact of the Delay</u>

[46] I turn to the question of the impact which the delay had on the Defendants. The Defendants submit that the delay in the revocation proceedings caused them a great deal of uncertainty and distress; that it has deprived them of their ability to travel, which had an adverse effect on both their family life and Mr Parekh's employment prospects; and that it has resulted in the treatment of their daughter's H&C application being put on hold.

[47] Mr. Parekh testified at trial that, initially, they were anticipating the revocation of their citizenship as a consequence of their guilty plea, and that they were willing to accept it. At that time, they were told by an RCMP officer that they would hear from CIC within the following year or two. However, no action was taken and they did not hear from CIC for more than four years after pleading guilty in November 2002; indeed by 2006, Mr. Parekh no longer believed that the revocation proceedings against them were active. He explained with emotion his feelings of distress caused by the continued uncertainty over his status in Canada and the impact it had on his family. His testimony was credible and compelling. I find as a fact that the delay in the treatment of the possible revocation of their citizenship has caused the Defendants great psychological stress.

[48] Uncertainty over their status also had a practical prejudicial impact on the Defendants' lives. Several of their applications for passports were denied. They were only issued limited-time passports in 2003 to allow them to visit an ailing relative in India, and not before the Defendants had incurred significant expenses on futile applications and airplane tickets which they were unable to use without passports. Although these passports were purportedly valid for nine months, the Defendants were told that they would only be valid for two months, and that they would have to surrender them upon their return from India. In 2005, Passport Canada informed the Defendants that it would only consider issuing them limited-time passports if they provided a justification, such as a family emergency, for their need to travel. A further application for a passport was rejected in 2009.

[49] Thus the Defendants' applications for Canadian passports were being denied <u>even as no action was being taken to revoke their citizenship</u>. The documents put in evidence at trial and the testimony of Ms. Demers establish that Passport Canada communicated with CIC and inquired about the Defendants' citizenship status. CIC advised Passport Canada that they intended to proceed with the revocation of the Defendants' citizenship. It is a reasonable inference for the Court to find that Passport Canada's position was a direct consequence of CIC's advice.

[50] The Federal Court of Appeal held, in *Canada (Attorney General) v. Kamel*, 2009 FCA 21, that a refusal to deliver a passport to a Canadian citizen is an infringement of subsection 6(1) of the *Charter*. As Justice Robert Décary, writing for the Court, pointed

out at par. 15, "[t]he fact that there is almost nowhere a Canadian citizen can go without a passport and that there is almost nowhere from which he or she can re enter Canada without a passport are, on their face, restrictions on a Canadian citizen's right to enter or leave Canada, which is, of course, sufficient to engage Charter protection."

[51] Further, I find that the uncertainty which CIC entertained over the Defendants' status in Canada also led to its failure to process their daughter's H&C application. In January 2007, CIC took the position that s. 136 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (*IRPR*), which provides that if a would-be sponsor is subject to, *inter alia*, citizenship revocation proceedings, "the sponsorship application shall not be processed until there has been a final determination of the proceeding," prevented the processing of the H&C application. This position was based on a misunderstanding of section 136 of the *IRPR*, which does not apply to H&C applications. Nevertheless, but for the inordinate delay which affected them, the revocation proceedings against the Defendants would have concluded by 2007, and in all likelihood much earlier, so that CIC's misinterpretation of the *IRPR* would not have delayed the treatment of the Defendants' daughter's H&C application.

[52] I am mindful of Justice Bastarache's comment in *Blencoe*, above, at par. 120, reiterating earlier dicta to the effect that delay or other instances of unfairness only amount to abuse of process in "the clearest of cases." In my opinion, this is such a case. Revocation of citizenship is not an ordinary civil or administrative proceeding. What is at stake is not liability for a sum of money or the issuance of some permit. Along with

Justice Iacobucci, and the unanimous Supreme Court in *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358, "I cannot imagine an interest more fundamental to full membership in Canadian society than Canadian citizenship." Of course, if these interests had only been affected by a timely revocation procedure, the Defendants would have no-one but themselves to blame. But to the extent that they have been interfered with by the state-caused delays in this procedure, the state has indeed impacted greatly on their lives.

[53] It is important to point out that this case is unlike those, such as *Canada (Secretary of State) v. Charran*, (1988), 6 Imm. L.R. (2d) 138, and *Copeland*, above, in which this Court considered that delays in citizenship revocation proceedings were, if anything, to the defendants' advantage, since they allowed them to remain in Canada rather than be deported. The Defendants in the present case gain no advantage from the delays in the revocation of their citizenship.

[54] The Defendants cannot be deported and would remain in Canada even if their citizenship were revoked: subsection 46(2) of the *Immigration and Refugee Protection Act*, S.C. 2001 c. 27, provides that "[a] person who ceases to be a citizen under paragraph 10(1)(a) of the *Citizenship Act*, other than in the circumstances set out in subsection 10(2) of that Act, becomes a permanent resident." Subsection 10(2) of the *Citizenship Act* refers to persons who obtained admission to Canada as permanent residents as a result of misrepresentation, fraud, or concealing material circumstances**.** Therefore, if the Defendants' citizenship is revoked, they will become permanent residents again.

[55] Pursuant to paragraph 22(1)(f) of the *Citizenship Act*, five years after their citizenship is revoked, they would be able to make a new application for citizenship. Indeed, had the Plaintiff not delayed proceeding with the revocation of the Defendants' citizenship for several years, the Defendants could already have applied for, and might have obtained, Canadian citizenship again. Therefore, if these proceedings are not stayed, the Defendants' inability to apply for citizenship for the next five or more years will be a prejudice directly resulting from the Minister's delay.

Abuse of process: conclusion

[56] In these circumstances I find that the delays which have marred these proceedings are inordinate and indeed unconscionable. Nothing in the circumstances of the case justified them. They are not the consequence of the complexity of the case or of any dilatory tactics employed by the Defendants, but of bureaucratic indolence and failure to give the matter the attention it deserved given the rights and interests at stake. The evidence clearly establishes that the Defendants had repeatedly admitted to the misrepresentations and that all the information necessary to proceed with the revocation of their citizenship was already available to CIC.

[57] Instead of using this information, CIC let the proceedings drag on, effectively depriving the Defendants of key benefits of citizenship, such as the ability to travel. In my view, to let the proceedings go on would mean to punish the Defendants twice; once during the five year period before the commencement of this action, and again for a

period that could be dragging for many years before a "possible" revocation and a further five years afterwards to be able to make a new application for citizenship.

[58] In these circumstances, I find that the proceedings are taking on an oppressive character, and that the public interest in putting an end to proceedings that are abusive and oppressive outweighs the interest in the enforcement of the *Citizenship Act*, which does not contemplate deprivation of citizenship for more than five years in a case such as the Defendants'.

[59] Thus, I am satisfied that the test for abuse of process has been met in the present case:

> the damage to the public interest in the fairness of the administrative process should the proceeding go ahead would exceed the harm to the public interest in the enforcement of the legislation if the proceedings were halted.
> *(Blencoe,* above at par. 120, citing Brown and Evans, above, at 9-68.)

I now turn to the question of the remedy to which the Defendants are entitled.

REMEDY

[60] In *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, the Supreme Court**,** reversing a stay ordered by the Federal Court**,** explained, at par. 90, that:

> [i]f it appears that the state has conducted a prosecution in a way that renders the proceedings unfair or is otherwise damaging to the integrity of the judicial system, two criteria must be satisfied before a stay will be appropriate. They are that:

> (1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and
>
> (2) no other remedy is reasonably capable of removing that prejudice.

(The Supreme Court referred to *R. v. O'Connor*, [1995] 4 S.C.R. 411, at par. 75.)

Furthermore, "in certain cases, where it is unclear whether the abuse is sufficient to warrant a stay, a compelling societal interest in having a full hearing could tip the scales in favour of proceeding" (*Tobiass*, above, at par. 92).

[61] In my opinion, these criteria are met in this case.

[62] First, the outcome of this action will manifest and in all likelihood perpetuate the abusive delays which have tarnished these proceedings. The issuance of the declaration sought by the Plaintiff would merely allow him to prepare a report to the Governor in Council, who may or may not then revoke the Defendants' citizenship. The sword of uncertainty which the Plaintiff has left hanging over the Defendants will remain where it has been for the past seven years. During that time, the Defendants will be effectively deprived the benefits of citizenship**,** and the resolution of their situation will be dependant on it finally getting the attention it deserved years ago.

[63] Furthermore, as explained above, had the Minister been timely in his effort to have their citizenship revoked, this could have been done so long ago that they would by now have been eligible to reapply for Canadian citizenship. Thus, allowing the action to

go ahead will deprive the Defendants of what was contemplated by Parliament at paragraph 22(1)(f) of the *Citizenship Act*.

[64] Therefore I find that “the carrying forward of the [proceedings against the Defendants] will offend society’s sense of justice.” (*Tobiass*, above, at par. 91.) The Plaintiff suggests that the Defendants will have the opportunity to have the prejudice done to them corrected by making representations to the Governor in Council if the revocation proceedings go ahead and to further litigate the matter by applying for judicial review of any decision made by the Governor in Council. In my view, this is unacceptable. It would perpetuate the uncertainty over their status and continue for many years the deprivation of the rights of citizenship which they have been unfairly subjected to. In effect, this would amount to double punishment, by depriving the Defendants of the possibility to regain their citizenship for twice as long as Parliament intended in the *Citizenship Act*.

[65] Second, there is no practicable alternative remedy that would obviate the need for a stay. The plaintiff’s reliance on *Tobiass*, above, in this context is misplaced. The problem in that case was an appearance of bias by certain judges of the Federal Court Trial Division. The Supreme Court solved it by ordering that the case be reconsidered by other judges. No such solution can put to right the wrongs inflicted on the Defendants by the administrative delays which affected their case. As for the only alternative remedy actually put forward by the Plaintiff, an award of no costs, it will do absolutely nothing to

rectify the harm to the Defendants which has already been done and which will be done in the future if the revocation proceedings go on.

[66] The Defendants put more efforts than the Plaintiff in suggesting alternative remedies. They proposed that, if the Court rejects their arguments in favour of a stay and issues the declaration sought by the Plaintiff, it also declare that the proceedings against them amounted to abuse of process. They further suggested that the Court order that an eventual revocation of their citizenship by the Governor in Council be “backdated” to December 2004, the date when the first memorandum recommending it ought to have been presented to the Plaintiff. This would of course allow them immediately to reapply for Canadian citizenship. In the further alternative, they suggested that, in addition to declaring that these proceedings are abusive, the Court require the Governor in Council to solve this problem. (Their inspiration for such a remedy is said to be the Supreme Court’s decision in *Canada (Prime Minister) v. Khadr*, 2010 SCC 3.)

[67] The Plaintiff opposed the granting of any of these remedies, arguing that they exceed the Court’s narrow jurisdiction in an action such as this. After consideration, I agree with the Plaintiff for the following reasons.

[68] With respect to the proposed order that the Governor in Council “backdate” the revocation of the Defendants’ citizenship, I note that the Governor in Council is not a party to these proceedings. I do not see how the Court could order a person or entity to do or not to do anything as a result of proceedings in which he, she or it did not take part.

The alternative order suggested by the Defendants, that the Governor in Council find a suitable remedy for the abusive proceedings to which they have been subjected, suffers from the same defect. In addition, *Khadr* is no authority for the proposition that the Court may make such an order. The Supreme Court's <u>disposition</u> – as opposed to its reasons – consists only of a declaration, and does not include any order to the Prime Minister or anyone else (see *Khadr*, above, at par. 48).

[69] As for a declaration that these proceedings amount to an abuse of process – similar to one which the Supreme Court did in fact grant in *Khadr* – it would, in my opinion, exceed the Court's jurisdiction under subsection 18(1) of the *Citizenship Act*. In a passage quoted with approval in *Tobiass*, above, at par. 52, the Federal Court of Appeal said of this Court's decision under subsection 18(1) of the *Citizenship Act* that "[a]lthough the decision followed a hearing at which much evidence was adduced, it was merely a finding of fact by the court … The decision did not finally determine any legal rights." (*Luitjens v. Canada (Secretary of State)*, (1992), 9 C.R.R. (2d) 149 at 152.) In other words, the jurisdiction of this Court, in proceedings brought under subsection 18(1) of the *Citizenship Act*, is confined to answering a single factual question: did the defendants obtain, retain, renounce or resume citizenship by false representation or fraud or by knowingly concealing material circumstances? The declaration sought by the Defendants does not answer that question, and is thus outside the Court's substantive jurisdiction.

[70] Of course, notwithstanding the limits of its substantive jurisdiction in certain kinds of proceedings, the Court remains the master of its own process, in accordance with the *Federal Courts Act*, R.S.C. 1985, c. F-7, the *Federal Courts Rules*, SOR/98-106, and its inherent powers. A stay of the proceedings, an award of costs, or the direction for certain judges to preside over a proceeding are all matters which the Court has the power to control as part of its process, and thus the Court may order these remedies without overstepping its role under subsection 18(1) of the *Citizenship Act*.

[71] Thus, for example, the Court may stay proceedings under subsection 18(1) of the *Citizenship Act* pursuant to paragraph 50(1)(b) of the *Federal Courts Act*, which provides that it "may, in its discretion, stay proceedings in any cause or matter … where for any … reason it is in the interest of justice that the proceedings be stayed." (*Tobiass*, above, at par. 61.) It also has a "full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid," pursuant to paragraph 400(1) of the *Federal Courts Rules.*

[72] In sum, the carrying forward of the revocation proceedings against the defendants will offend society's sense of justice, and no remedy other than a stay is available to this court to prevent this from happening. This is also not a case where "a compelling societal interest … could tip the scales in favour of proceeding." (Tobiass, at par. 92.) While I do not make light of the Defendants' misrepresentation, society's interest in having the revocation pursued in this case cannot be compared to "Canada's interest in not giving

shelter to those who concealed their wartime participation in acts of atrocities," which was at stake in *Tobiass*, above, at par. 93.

CONCLUSION

[73] Dissenting in part, but not on this point, Justice Lebel spoke eloquently about the importance of ensuring that legal proceedings be conducted without undue delay, at par. 140, *ibid*.:

> Unnecessary delay in judicial and administrative proceedings has long been an enemy of a free and fair society. At some point, it is a foe that has plagued the life of almost all courts and administrative tribunals. It's a problem that must be brought under control if we are to maintain an effective system of justice, worthy of the confidence of Canadians. The tools for this task are not to be found only in the *Canadian Charter of Rights and Freedoms*, but also in the principles of a flexible and evolving administrative law system.

[74] These remarks resonate in the present case. Those responsible for the administrative delays have failed both the Defendants, to whom they had a duty to act fairly, and the public which they serve, and to whom they owe it to ensure that legislation is enforced effectively and in a timely fashion.

[75] This Court finds that the Plaintiff's conduct in this case constitutes an abuse of process and orders that the proceedings be stayed, the whole with costs to the Defendants.

JUDGMENT

THIS COURT ORDERS that the proceedings be stayed, the whole with costs to the Defendants.

"Danièle Tremblay-Lamer"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Bridget O'Leary Kareena Wilding	FOR THE PLAINTIFF
Lorne Waldman Jacqueline Swaisland	FOR THE DEFENDANTS

SOLICITORS OF RECORD:

Myles Kirvan Deputy Attorney General of Canada	FOR THE PLAINTIFF
Waldman & Associates	FOR THE DEFENDANTS