Federal Court of Appeal  Cour d'appel fédérale

Date: 20170307

Docket: A-283-16

Citation: 2017 FCA 44

CORAM: **NEAR J.A.**
BOIVIN J.A.
RENNIE J.A.

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellant

and

Nisreen Ahamed MOHAMED NILAM

Respondent

Heard at Vancouver, British Columbia, on February 2, 2017.

Judgment delivered at Ottawa, Ontario, on March 7, 2017.

REASONS FOR JUDGMENT BY: BOIVIN J.A.

CONCURRED IN BY: NEAR J.A.
RENNIE J.A.

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REASONS FOR JUDGMENT

BOIVIN J.A.

[1] The Minister of Citizenship and Immigration (the Minister or the appellant) appeals a decision of a judge of the Federal Court of Canada (the Judge) rendered on August 3, 2016 (indexed as 2016 FC 896 (the Decision)). In his Decision, the Judge allowed the application for a *mandamus* order against the Minister brought by Mr. Nisreen Ahamed Mohamed Nilam (Mr. Nilam or the respondent). The Judge found that the ongoing cessation proceedings against

the respondent were not a valid ground for which the Minister might suspend processing of the respondent's citizenship application under section 13.1 of the *Citizenship Act*, R.S.C. 1985, c. C-29 (*Citizenship Act*).

[2] This appeal is brought by the Minister and comes to our Court by way of subsection 74(*d*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA). In rendering judgment, the Judge certified a serious question of general importance; the question is a proper one in that it is dispositive of this appeal and transcends the interests of the immediate parties to the litigation due to its broad significance (*Canada (Minister of Citizenship and Immigration) v. Liyanagamage*, [1994] F.C.J. No. 1637, 176 N.R. 4 (C.A.) (QL) at paragraph 4; *Zhang v. Canada (Citizenship and Immigration)*, 2013 FCA 168, [2013] F.C.J. No. 764 (QL) at paragraph 9). The certified question reads as follows:

> Can the Minister suspend the processing of an application for citizenship pursuant to his authority under s. 13.1 of the *Citizenship Act*, to await the results of cessation proceedings in respect of the applicant under s. 108(2) of the *Immigration and Refugee Protection Act*?

[3] For the reasons that follow, I would allow the appeal without costs and answer the certified question in the affirmative.

I. Facts

[4] Mr. Nilam arrived in Canada on July 18, 2008 as a refugee claimant from Sri Lanka. He was granted refugee status on December 16, 2009 and became a permanent resident on January 24, 2011.

[5] On August 3, 2011, the respondent travelled back to Sri Lanka using his Sri Lankan passport, which he had renewed before leaving Canada. He travelled both because of his mother's failing health and in order to get married. He remained in Sri Lanka until December 2, 2011.

[6] He returned to Sri Lanka on his Sri Lankan passport a year later, on December 3, 2012. This time his reason for travelling was his wedding reception, which had been delayed because of the passing of his wife's father.

[7] A few days after the respondent left Canada on his second trip, on December 15, 2012, IRPA was amended. The amendments notably established a legislative regime governing permanent resident status and included criteria and processes with respect to inadmissibility to Canada, loss of permanent resident status, and removal.

[8] When the respondent returned to Canada on May 1, 2013, Canadian immigration officials questioned him regarding the reason for his visit to Sri Lanka. Shortly thereafter, the Minister commenced cessation proceedings pursuant to paragraph 108(1)(*a*) and subsection 108(2) of IRPA, of which the respondent was notified on September 25, 2013.

[9] On August 1, 2014, section 13.1 of the *Citizenship Act* came into force, providing that citizenship processing may be suspended by the Minister:

13.1 The Minister may suspend the processing of an application for as long as is necessary to receive	**13.1** Le ministre peut suspendre, pendant la période nécessaire, la procédure d'examen d'une demande :

(a) 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, whether the applicant should be the subject of an admissibility hearing or a removal order under the *Immigration and Refugee Protection Act* or whether section 20 or 22 applies with respect to the applicant; and	**a)** dans l'attente de renseignements ou d'éléments de preuve ou des résultats d'une enquête, afin d'établir si le demandeur remplit, à l'égard de la demande, les conditions prévues sous le régime de la présente loi, si celui-ci devrait faire l'objet d'une enquête dans le cadre de la *Loi sur l'immigration et la protection des réfugiés* ou d'une mesure de renvoi au titre de cette loi, ou si les articles 20 ou 22 s'appliquent à l'égard de celui-ci;
(b) in the case of an applicant who is a permanent resident and who is the subject of an admissibility hearing under the *Immigration and Refugee Protection Act*, the determination as to whether a removal order is to be made against the applicant.	**b)** dans le cas d'un demandeur qui est un résident permanent qui a fait l'objet d'une enquête dans le cadre de la *Loi sur l'immigration et la protection des réfugiés*, dans l'attente de la décision sur la question de savoir si une mesure de renvoi devrait être prise contre celui-ci.

[10] On March 27, 2015, the Refugee Protection Division (RPD) denied the Minister's application for cessation against the respondent. The Minister applied to the Federal Court for judicial review of the RPD's decision on April 9, 2015.

[11] Two days later, on April 11, 2015, the respondent applied for Canadian citizenship. In mid-July, he was invited to an interview with the Department of Citizenship and Immigration Canada (CIC). The CIC's notes from this interview indicate that the respondent had "passed the knowledge examination, had provided evidence of meeting the language requirements, and had provided evidence of being physically present in Canada for 1130 days out of the 1460 days prior to the date of his application". On September 8, 2015, the Royal Canadian Mounted Police verified that the respondent has no criminal record.

[12] On October 8, 2015, another judge of the Federal Court reached the conclusion that there was evidence that the respondent intended to re-avail himself of the state protection of Sri Lanka and that the RPD, in its decision dated April 9, 2015, had failed to "come to grips" with the evidence before it (*Canada (Citizenship and Immigration) v. Nilam*, 2015 FC 1154, [2015] F.C.J. No. 1194 (QL) at paragraph 36). She thus allowed the Minister's application for judicial review of the RPD decision regarding the cessation of the respondent's refugee status and sent the decision back to the RPD for redetermination. The hearing before the RPD is yet to be fixed.

[13] On December 3 and December 7, 2015, the respondent's solicitor wrote to the Minister asking for an update on the respondent's citizenship application. The Minister responded on January 4, 2016, informing the respondent that his citizenship application had been suspended due to ongoing cessation proceedings pursuant to section 13.1 of the *Citizenship Act*.

[14] On February 5, 2016, the respondent filed an application for judicial review seeking a *mandamus* order to compel the Minister to continue processing his citizenship application. On August 3, 2016, the Judge allowed the respondent's application for a *mandamus* order against the Minister and ordered the Minister to pay costs to the respondent on a solicitor-client basis. It is this decision that is under appeal.

II. Decision under Appeal

[15] In his decision, the Judge reasoned that the respondent had demonstrably met all of the criteria required in order for the Minister to grant citizenship. He also found at paragraph 24 of

his reasons that the part of subsection 13.1(*a*) of the *Citizenship Act* relied on by the Minister does not permit a suspension because of ongoing cessation proceedings:

> At the hearing before me, Minister's counsel clarified that the Minister had suspended the citizenship application to receive any information or evidence or the results of any investigation or inquiry "for the purpose of ascertaining whether the application meets the requirements under this Act relating to the application…." The Minister is not concerned about an admissibility hearing or a removal order under IRPA or whether ss [subsections] 20 or 22 apply with respect to the Applicant [respondent]. Nor does the Minister rely upon s [subsection] 13.1(*b*).

In finding that section 13.1 does not permit suspension awaiting the outcome of cessation proceedings, the Judge relied on one of his previous decisions, *Godinez Ovalle v. Canada (Citizenship and Immigration)*, 2015 FC 935, [2015] F.C.J. No. 927 (QL) [*Godinez Ovalle*], rendered July 30, 2015 (paragraphs 28 and 35 of the Decision).

[16] Having come to the conclusion that section 13.1 of the *Citizenship Act* does not allow the Minister to suspend processing of the respondent's application for citizenship, the Judge granted *mandamus*.

[17] The Judge also issued an order for solicitor-client costs against the Minister, finding that the Minister's servants acted in bad faith by suspending the respondent's application without notice and "simply ignoring the Court's clear decision in *Godinez Ovalle*" (paragraph 49 of the Decision).

III. Analysis

A. *The standard of review*

[18] This is an appeal of a decision of the Federal Court that granted an application for judicial review and ordered *mandamus* on the basis that the Minister's interpretation of section 13.1 of the *Citizenship Act* was incorrect. Before inquiring whether the order for *mandamus* was correct, a review of the Minister's decision is required. In order to conduct this review, this Court must step into the shoes of the Federal Court (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paragraphs 45-47; *Canada (Citizenship and Immigration) v. Bermudez*, 2016 FCA 131, [2016] F.C.J. No. 468 (QL) at paragraph 20).

[19] When an administrative decision-maker interprets their home statute, this interpretation is due deference by a reviewing Court (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraph 54; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 at paragraphs 30 and 34). In the case at bar, the Minister's interpretation of his powers under the *Citizenship Act* is reasonable and ought to be upheld.

B. *The Minister's interpretation of section 13.1 of the Citizenship Act is reasonable*

[20] In order to assess why the Minister's interpretation of section 13.1 is reasonable, a review of the relevant provisions of the *Citizenship Act* and the IRPA and their interplay is required.

[21] Statutes enacted by Parliament are presumed to be coherent and consistent. As recalled in: Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (LexisNexis, 2006) at 416, §13.26, "[s]tatutes enacted by a legislature that deal with the same subject are presumed to be drafted with one another in mind, so as to offer a coherent and consistent treatment of the subject.".

[22] Under subsection 5(1) of the *Citizenship Act*, a person who resides in Canada may apply for and be granted Canadian citizenship if it is established that, among other things, this person is a valid permanent resident pursuant to subsection 2(1) of IRPA. Subsection 5(1) of the *Citizenship Act* reads as follows:

5 (1) The Minister shall grant citizenship to any person who	**5 (1)** Le ministre attribue la citoyenneté à toute personne qui, à la fois :
(a) makes application for citizenship;	**a)** en fait la demande;
(b) is eighteen years of age or over;	**b)** est âgée d'au moins dix-huit ans;
(c) is a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*, has, subject to the regulations, no unfulfilled conditions under that Act relating to his or her status as a permanent resident and has, since becoming a permanent resident,	**c)** est un résident permanent au sens du paragraphe 2(1) de la *Loi sur l'immigration et la protection des réfugiés*, a, sous réserve des règlements, satisfait à toute condition rattachée à son statut de résident permanent en vertu de cette loi et, après être devenue résident permanent :
(i) been physically present in Canada for at least 1,460 days during the six years immediately before the date of his or her application,	**(i)** a été effectivement présent au Canada pendant au moins mille quatre cent soixante jours au cours des six ans qui ont précédé la date de sa demande,

(ii) been physically present in Canada for at least 183 days during each of four calendar years that are fully or partially within the six years immediately before the date of his or her application, and	**(ii)** a été effectivement présent au Canada pendant au moins cent quatre-vingt-trois jours par année civile au cours de quatre des années complètement ou partiellement comprises dans les six ans qui ont précédé la date de sa demande,
(iii) met any applicable requirement under the *Income Tax Act* to file a return of income in respect of four taxation years that are fully or partially within the six years immediately before the date of his or her application;	**(iii)** a rempli toute exigence applicable prévue par la *Loi de l'impôt sur le revenu* de présenter une déclaration de revenu pour quatre des années d'imposition complètement ou partiellement comprises dans les six ans qui ont précédé la date de sa demande;
…	[…]
[emphasis added]	[soulignement ajouté]

[23] Subsection 2(1) of IRPA referred to in subsection 5(1) of the *Citizenship Act* defines permanent resident as follows:

permanent resident means a person who has acquired permanent resident status and has not subsequently lost that status under section 46.	**résident permanent** Personne qui a le statut de résident permanent et n'a pas perdu ce statut au titre de l'article 46.

[24] Paragraph 46(1)(*c*.1) of IRPA states that permanent residency is lost "on a final determination under subsection 108(2) that their refugee protection has ceased for any of the reasons described in paragraphs 108(1)(*a*) to (*d*)". Also, consistent with Canada's international obligations (UN Convention and Protocol Relating to the Status of Refugees, Joint Book of Authorities, Vol. III, Tab 50, pp. 14-15), paragraph 108(1)(*a*) of IRPA states that a person's

refugee status is deemed to have ceased where that person has "voluntarily reavailed themself of the protection of their country of nationality". The process for a determination as to whether refugee protection has ceased is an application by the Minister to the RPD (subsection 108(2) of IRPA).

[25] The loss of both refugee and permanent residency status has consequences for an individual's admissibility to Canada and may result in their removal from the country. More particularly, subsection 40.1(2) of IRPA states that a permanent resident whose refugee status is found to have ceased on a final determination under subsection 108(2) of IRPA becomes inadmissible to Canada. Furthermore, section 44 of IRPA and paragraph 228(1)(*b*.1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 authorize removal proceedings against an individual who is inadmissible to Canada pursuant to section 40.1 of IRPA.

[26] Finally, section 13.1 of the *Citizenship Act* allows the Minister to suspend the processing of an application for citizenship "for as long as necessary". Specifically, the Minister has the power to place a hold on citizenship applications where there are admissibility concerns under IRPA. Sections 40.1 and 44 of IRPA label cessation as an admissibility issue, and one that may result in removal from Canada. In the present case, the Minister's actions were thus permitted in at least two ways by the language of subsection 13.1(*a*) of the *Citizenship Act*: as awaiting "the results of any investigation or inquiry for the purpose of ascertaining … whether the applicant should be the subject of an admissibility hearing or a removal order under the *Immigration and Refugee Protection Act* …" [emphasis added]. As such, it follows that the Minister's interpretation to the effect that section 13.1 of the *Citizenship Act* allows him to suspend the

processing of an application of citizenship for permanent residents whose refugee status has been challenged for cessation is reasonable and reflects Parliament's intention.

[27] Given this conclusion, it further follows that the Minister does not have a public legal duty to continue processing the respondent's application notwithstanding that the RPD cessation proceedings have yet to be determined. Because having a "public legal duty" is the first part of the test for *mandamus* as set out by this Court in *Apotex Inc. v. Canada (Attorney General)*, [1994] 1 F.C. 742, [1993] F.C.J. No. 1098 (C.A.) (QL), the test for *mandamus* is not met. The Judge's order for *mandamus* cannot stand.

[28] I am cognizant of the respondent's argument that allowing this appeal may have consequences for the respondent's future in Canada. Despite the able arguments of the respondent's counsel, I find that this Court cannot in law grant the respondent the remedy he requests.

C. *The Federal Court erred in awarding solicitor-client costs*

[29] Costs awards are highly discretionary decisions with which a reviewing court ought not to interfere lightly. In the case at bar, however, I find that the intervention of this Court is warranted. The appellant correctly points out that conflicting jurisprudence from the Federal Court existed at the time the decision to suspend the respondent's application was made, a fact that undermines the Judge's finding that the appellant had acted in bad faith. This finding is especially vulnerable given that no question of general importance was certified in *Godinez Ovalle*. The Judge may not have approved of the Minister's treatment of the respondent on the

basis of his decision in *Godinez Ovalle*, but the Minister acted legally. There is no basis in the record for a finding of bad faith or subterfuge.

IV. Conclusions

[30] I would answer the certified question as follows:

> Question: Can the Minister suspend the processing of an application for citizenship pursuant to his authority under s. 13.1 of the *Citizenship Act*, to await the results of cessation proceedings in respect of the applicant under s. 108(2) of the *Immigration and Refugee Protection Act*?
>
> Answer: Yes.

[31] For these reasons, I would allow the appeal without costs and set aside the decision of the Federal Court of Canada indexed as 2016 FC 896. Pronouncing the judgment that ought to have been given, I would dismiss the respondent's application for judicial review without costs.

"Richard Boivin"
J.A.

""I agree
Near J.A."

"I agree
Rennie J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-283-16
STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION v. Nisreen Ahamed MOHAMED NILAM
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	FEBRUARY 2, 2017
REASONS FOR JUDGMENT BY:	BOIVIN J.A.
CONCURRED IN BY:	NEAR J.A. RENNIE J.A.
DATED:	MARCH 7, 2017

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