

Federal Court of Appeal



Cour d'appel fédérale

Date: 20180119

Docket: A-394-15

Citation: 2018 FCA 19

Present: WEBB J.A.

BETWEEN:

ALEXANDER VAVILOV

Appellant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on January 19, 2018.

REASONS FOR ORDER BY:

WEBB J.A.

Federal Court of Appeal



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REASONS FOR ORDER

WEBB J.A.

[1] The Minister of Citizenship and Immigration (Minister) has brought a motion for an Order staying the Judgment of this Court dated June 21, 2017 (2017 FCA 132) pending disposition of the Minister's application for leave to appeal to the Supreme Court of Canada and, if leave is granted, the determination of the appeal.

[2] Alexander Vavilov was born in Canada on June 3, 1994. When he was born his family name was stated to be Foley. His parents were Russian citizens who were then living in Canada under assumed identities. When Mr. Vavilov was one year old, he moved with his parents to France and then later to the United States. Mr. Vavilov did not know that his parents were living under false identities until they were arrested in the United States in 2010. Mr. Vavilov then travelled to Russia using his Canadian passport and his family name was changed to Vavilov, to reflect the true identity of his parents. His parents were sent to Russia in exchange for certain individuals who were sent to the United States.

[3] Mr. Vavilov applied to the Minister for a certificate of citizenship sometime after he went to Russia in 2010. A certificate of citizenship was first issued and then revoked by the Registrar of Citizenship on the basis that he was not a Canadian citizen. Mr. Vavilov sought judicial review of the decision that he is not a Canadian citizen. His application for judicial review was dismissed by the Federal Court. He appealed to this Court and two Judges of this Court agreed that his appeal should be allowed and that he is a Canadian citizen. The Minister has applied for leave to appeal this decision to the Supreme Court of Canada. To date, no decision has been made on the leave application.

[4] The Supreme Court of Canada in *RJR-MacDonald v. Canada*, [1994] 1 S.C.R. 311 set out a three part test to determine whether a stay of a judgment should be granted at page 334:

Metropolitan Stores [1987] 1 S.C.R. 110] adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties

would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits. [...]

I. Serious Question

[5] In paragraph 44 of *RJR MacDonald*, the Supreme Court noted at page 335 that:

Prior to the decision of the House of Lords in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396, an applicant for interlocutory relief was required to demonstrate a "strong prima facie case" on the merits in order to satisfy the first test. In *American Cyanamid*, however, Lord Diplock stated that an applicant need no longer demonstrate a strong prima facie case. Rather it would suffice if he or she could satisfy the court that "the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried". The *American Cyanamid* standard is now generally accepted by the Canadian courts, subject to the occasional reversion to a stricter standard: see Robert J. Sharpe, *Injunctions and Specific Performance* (2nd ed. 1992), at pp. 2-13 to 2-20.

[6] In relation to an application for a stay pending an application for leave to appeal to the Supreme Court of Canada, Evans, J.A. in *Via Rail Canada Inc. v. Cairns*, 2004 FCA 297, 327 N.R. 221 noted that:

19 Thus, VIA must establish that it is reasonably arguable that the Supreme Court may conclude that "any question involved therein [that is, in the case sought to be appealed] is, by reason of its public importance or the importance of any issue of law or any issue of mixed fact and law involved in that question one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it".

[7] Since the threshold for the first part of the test is low, I am satisfied that the Minister has satisfied this low threshold of establishing that there is a serious question to be tried.

II. Irreparable Harm to the Minister

[8] The second stage of the test only focuses on irreparable harm to the Minister (who is seeking leave to appeal the decision of this Court) if the stay is not granted and the Minister is ultimately successful on appeal. Any harm to Mr. Vavilov is not considered at this stage of the analysis but rather as part of the third segment of the test.

[9] As noted by the Supreme Court of Canada in *RJR-MacDonald*, at page 341, “[a]ny alleged harm to the public interest should also be considered at [the third] stage”. Therefore the submissions related to the “significant and irreparable harm to the public interest” identified by the Minister in paragraph 34 of his submissions in this motion will be considered below as part of the third stage.

[10] The Minister submitted that the “reputation of Canadian citizenship” and the “integrity of Canadian citizenship” are at risk if a stay is not granted (paras. 37 and 38 of the Minister’s submissions). In my view, any harm to the reputation or integrity of “Canadian citizenship” that would arise as a result of a passport and certificate of citizenship being issued to Mr. Vavilov who was born in Canada and who, through no fault of his own, could lose his citizenship if the Supreme Court of Canada should overturn the decision of this Court, would be minimal.

[11] I accept that there may be some harm to the Minister in having to revoke a certificate of citizenship and a passport if the Minister is successful in having the decision of this Court

overturned. The weighing of this harm against the harm that would be suffered by Mr. Vavilov is considered as part of the third part of the analysis.

[12] The Minister has also submitted that he will suffer irreparable harm if the stay is not granted because Timothy Vavilov's case is still pending before the Federal Court. Both Alexander Vavilov and his brother, Timothy Vavilov, were denied Canadian passports after their parents were arrested in the United States. Timothy Vavilov's application for judicial review of the decision that he is not a Canadian citizen has not yet been heard by the Federal Court.

[13] The Minister has indicated that he has filed a motion in Federal Court to have Timothy Vavilov's case adjourned pending the resolution of the application for leave to appeal to the Supreme Court of Canada in this matter and, if leave is granted, the final resolution of this appeal. If this adjournment request is granted then there would be no harm arising in relation to Timothy Vavilov's matter. Since this adjournment request is still outstanding the potential harm that could arise if the adjournment request is denied is only speculative at this time.

III. Balance of Inconvenience

[14] As part of the third step in the analysis, the relative harm that would be suffered if the stay is granted or not granted is weighed. The Supreme Court of Canada in *RJR-MacDonald* stated at page 342 that "[t]he factors which must be considered in assessing the "balance of inconvenience" are numerous and will vary in each individual case".

[15] The “significant and irreparable harm to the public interest” identified by the Minister in paragraph 34 of his submissions in this motion is that the Minister will be obligated to issue a certificate of citizenship and passport to Mr. Vavilov without knowing whether the Supreme Court of Canada will overturn the decision of this Court. However, this is one passport and one citizenship certificate to one person. It is difficult to accept that issuing these documents to this one person will cause significant and irreparable harm to the public interest since, as demonstrated in this case, a citizenship certificate that is issued can be revoked. As well, under the *Canadian Passport Order*, SI/81-86, the passport of a person who has ceased to be a Canadian citizen can be revoked (para. 10(2)(e)).

[16] If the stay is not granted and the Minister is ultimately successful in overturning the decision of this Court, the potential harm is that the Minister will have issued a certificate of citizenship and passport to Mr. Vavilov and then have to revoke them. This is to be compared to the relative harm to Mr. Vavilov who will be denied his rights as a Canadian citizen from the date the stay is issued until the date the matter is resolved by the Supreme Court of Canada when this should not have occurred, if Mr. Vavilov is successful.

[17] In my view, in weighing the relative harm, Mr. Vavilov would suffer the more significant harm. As noted above, the harm to the Minister would be issuing one certificate of citizenship and one passport to one person who was born in Canada. There is no allegation that Mr. Vavilov did anything wrong and therefore any harm to the integrity or reputation of Canadian citizenship that would arise as a result of the Supreme Court of Canada overturning the decision of this Court would be minimal. However, if the stay is granted and Mr. Vavilov is ultimately

successful, he will suffer harm as a result of his rights as a Canadian citizen (which would include the right to enter Canada to work or study) being denied during the period the stay is in place.

[18] In the affidavit of Elizabeth Lynch, filed by Mr. Vavilov in relation to this motion, she indicated that Mr. Vavilov had been admitted to and planned to attend the University of Toronto in 2012. However, he was not permitted to travel to Canada without a passport and a visitor visa request was denied. Although the Minister submits that Mr, Vavilov can still travel internationally with a Russian passport, the Minister does not address the harm that would arise from not being able to enter Canada to work or study without a Canadian passport.

[19] As a result, the motion for a stay of the judgment of this Court is dismissed. Since Mr. Vavilov did not ask for costs, no costs will be awarded.

"Wyman W. Webb"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-394-15

STYLE OF CAUSE: ALEXANDER VAVILOV v. THE
MINISTER OF CITIZENSHIP
AND IMMIGRATION

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY: WEBB J.A.

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