Federal Court  Cour fédérale

Date: 20180914

Docket: T-217-18

Citation: 2018 FC 916

Ottawa, Ontario, September 14, 2018

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

KHALED ALI NABOULSI
and
NOUR ALI NABOULSI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

I. Introduction

[1] This matter came before the Court by way of an informal request, pursuant to Rule 35 (2) of the *Federal Courts Rules* SOR/98-106, in a letter received September 6, 2018, to schedule a special hearing in Montreal of a motion for declaratory relief in Court file T-217-18. Respondent's counsel submitted a letter opposing the request on the same date.

[2] Upon determining that file T-217-18 had been closed following the filing of a Notice of Discontinuance by the Applicants on July 31, 2018, the Court issued an oral direction advising the parties that the motion would be considered as a request for leave to reopen the file. The parties' attention was drawn to the principles respecting the resurrection of closed files set out by the Federal Court of Appeal in *Philipos v Canada (Attorney General)*, 2016 FCA 79, [2016] 4 FCR 268 [*Philipos*], and the matter was set down for hearing by teleconference on September 12, 2018.

[3] For the reasons that follow, the Court declines to exercise its jurisdiction to resurrect the proceedings.

II. Background

[4] The underlying controversy concerns the Applicants' applications for Canadian citizenship. Their father was granted citizenship on May 27, 2008. In November 2009, the Applicants applied for citizenship as the minor children of a Canadian citizen (their father). On March 31, 2016, the father's citizenship was revoked on the basis that he had obtained it by false representation or fraud or by knowingly concealing material circumstances. On the same day, the Applicants' applications were refused on the basis they were not minor children of a Canadian citizen.

[5] On May 10, 2017, the Federal Court declared the administrative provisions used to revoke the Applicants' father's citizenship violated the *Canadian Bill of Rights*, SC 1960, c 44, section 2(e): *Hassouna v Canada (Minister of Citizenship and Immigration)*, 2017 FC 473

[*Hassouna*]. On July 10, 2017, the Court quashed the Applicants' father's citizenship revocation on the grounds outlined in *Hassouna*: *Monla v Canada (Citizenship and Immigration)*, 2017 FC 668.

[6] On July 28, 2017, Citizenship and Immigration Canada (CIC) advised the Applicants' father that his revocation was quashed and his citizenship reinstated effective the original date of May 27, 2008.

[7] The Applicants requested that CIC reconsider their applications. CIC refused the request on December 28, 2017. The Citizenship Officer acknowledged that the Applicants' father's citizenship had been restored, but maintained that the applications had been properly refused given the information before CIC when they rendered their decision.

[8] The Applicants filed an Application for Leave and for Judicial Review of the refusal to reconsider. Leave was granted on June 7, 2018, and CIC was ordered to provide the Certified Tribunal Record (CTR) by June 28, 2018. That deadline was not met which led to several motions being filed by the parties. An exchange of correspondence between counsel led to a settlement agreement. There is no dispute that the terms of the settlement were proposed by the Applicants and resulted in this communication from the Respondent dated July 31, 2018:

> I confirm that my client, Citizenship and Immigration Canada, accepts your offer. Upon filing a notice of discontinuance of their judicial review and motion for contempt, your clients' citizenship files will be reopened under s. 5(2) of the *Citizenship Act* and they will be processed as minors based on the application dated 2009/11/09. All efforts will be made to proceed with processing their applications within thirty (30) days of the filing of the notice

> of discontinuance, with the understanding that no specific timeline can be proposed for a decision.

[9] The Applicants' letter of the same date accepting the agreement refers to the same terms and includes this sentence:

> We understand that the present offer is in no way a promise of citizenship but only an offer to reopen the citizenship files received on 2009/11/09.

[10] The Applicants filed a Notice of Discontinuance under Rule 165 of the *Federal Court Rules*, SOR/98-106 on the same date.

[11] On August 20, 2018, CIC contacted the Applicants requesting additional information pursuant to section 23.1 of the *Citizenship Act*, RSC 1985, c C-29. On August 22, 2018, the Applicants responded to CIC and to Respondent's counsel to advise they would not be providing the requested additional information. The Applicants contended that the agreement was to have the applications processed as of November 9, 2009. Since section 23.1 came into force in 2014, the Applicants asserted that they are under no obligation to provide any further information.

[12] Respondent's counsel replied to the Applicants with the following statement: "Our agreement was that your clients' citizenship applications be reopened under s. 5(2) of the Citizenship Act and that they be processed as minors based on their applications dated 2009/11/09." The Respondent directed the Applicants to discuss any processing issues directly with CIC.

[13] In a further communication with CIC on August 30, 2018, the Applicants' counsel was advised by the officer processing the applications that she had made no decision on how they would proceed.

III. Issues

[14] The sole issue for the Court to consider is the following:

> Should the Court exercise its discretion to resurrect file T-217-18 despite the July 31, 2018 Notice of Discontinuance?

IV. Analysis

[15] In *Philipos,* above, the Federal Court of Appeal confirmed that the Federal Courts have jurisdiction to regulate the opening and closing of their own files. As Justice David Stratas stated at paragraph 10, there is no express power to continue a proceeding after discontinuance in the *Federal Courts Act* or the *Federal Courts Rules*. Leave must be sought from the Court to resurrect its file. The jurisdiction to grant leave to a party who seeks to resurrect a discontinued file is founded upon the plenary powers of the courts to regulate the integrity of their own processes, including the right to regulate the opening and closing of their files.

[16] Justice Stratas set out the following principles for determining whether a closed file could be resurrected.

[17] First, a file can only be resurrected in the case of "some fundamental event that strikes at the root of the decision to discontinue." As an example, Justice Stratas referenced "repudiation of a settlement agreement that required a proceeding to be discontinued": *Philipos*, above, para 20.

[18] Second, the discontinued proceedings must have some reasonable prospect of success: *Philipos*, above, para 21.

[19] Third, the Court must consider the prejudice that may result if the proceeding is resurrected. Justice Stratas provides as examples a party taking significant steps relying on the discontinuance, the destruction of files, the cessation of evidence collection, and the disappearance of witnesses. Other forms of prejudice may warrant refusing to resurrect a proceeding: *Philipos*, above, para 22.

[20] Finally, Justice Stratas noted that other considerations may warrant refusing to resurrect a proceeding. This would include the Courts' power to manage practices and procedures, police the conduct of proceedings, and prevent abuses of process: *Philipos*, above, para 23.

[21] In this instance, the Applicants have taken CIC's request for additional information as a complete repudiation of the settlement agreement. The Applicants argue that the settlement requires CIC to consider the applications as they were on November 9, 2009. Specifically, they insist, the agreement prevents CIC from applying any law or considering any information that is subsequent to the November 9, 2009 date. This was their intention in settling the application, they argue, and must be inferred from the terms of the agreement accepted by CIC.

[22] The Applicants rely on a CIC Operational Guide pertaining to the processing of applications following the coming into force of the amendments to the *Citizenship Act* on June 11, 2015. As the *Citizenship Act* and the *Citizenship Regulations* do not define what constitutes a filing date and decisions of this Court have emphasized the necessity of a clear "lock-in date", the Guide defines it as "the date on which an application was received which is when it is determined to be complete."

[23] While operational guides, such as the one cited by the Applicants, are helpful to applicants to know in general terms what the policy and practice of the Respondent will be, it is well established that they are not legally binding: *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 32, [2015] 3 SCR 909.

[24] The Respondent's position is that they did not repudiate the terms of the settlement but rather respected them. The Respondent filed the affidavit of the counsel who negotiated the settlement agreement for CIC. She states that the agreement expressed in the exchange of letters on July 31, 2018 was to fix the "lock-in date" for the consideration of the applications. The intent was to treat the Applicants as minors as they were when the applications were filed in November 2009. She further states that the question of what law would be applicable to the applications was never raised and was not part of the agreement.

[25] In my view, it is not necessary for the Court on this motion to resolve the controversy between the parties regarding the settlement agreement as I am satisfied that the motion is premature and has no reasonable chance of success.

[26] The general rule is that "absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted": *Canada (Border Services Agency) v CB Powell Ltd*, 2010 FCA 61 at paras 31-33, [2011] 2 FCR 332.

[27] In the present matter, the CIC officer processing the applications forwarded requests for supplementary evidence pertaining to the presence of the Applicants in Canada from August 9, 2003 until September 21, 2009 and any passports or travel documents that were valid during the same period.

[28] Counsel for the Applicants state that the officer "was unable to confirm her intention to apply the 2009 version of the Citizenship Act or the current version containing s 23.1" during a telephone conversation on August 30, 2018. Furthermore, there is no indication in the record that the officer has made a decision regarding any action that she may take should the Applicants continue to refuse to provide the requested information. Consequently, there is no decision to review. As the original proceedings sought reconsideration, and as reconsideration was granted, it would be inappropriate to resurrect those proceedings to challenge an ongoing administrative process.

[29] Even if the officer were to confirm her intention to apply the current version of the Act, it would be inappropriate for the Court to judicially review that interlocutory decision at this time as the Respondent's final decision could still be in the Applicants' favour. If it is not in the

Applicants' favour, they would have the opportunity to initiate a new application to seek leave for judicial review of that decision.

[30] I note that Justice Michel Shore reached a similar conclusion in an application for a writ of prohibition and a writ of mandamus arising from the request of a citizenship officer under section 23.1 of the *Citizenship Act*: *Almuhaidib v Canada (Citizenship and Immigration)*, 2018 FC 615.

V. Conclusion

[31] The Court has full power to manage its practices and procedures. Resurrecting closed proceedings is a discretionary procedure reserved for the most exceptional of cases. In the present matter, the Applicants have no reasonable prospect of success if the closed proceeding were to be resurrected. Their request for declaratory relief is premature and will be moot if the Respondent accepts their applications for citizenship. In the event that they are not successful, they may bring a fresh application for leave and for judicial review of the decision.

[32] Accordingly, the motion will be dismissed. There are no special reasons to award costs.

ORDER

THIS COURT ORDERS that the motion is dismissed.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-217-18
STYLE OF CAUSE:	KHALED ALI NABOULSI ET AL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	SEPTEMBER 12, 2018
ORDER AND REASONS:	MOSLEY J.
DATED:	SEPTEMBER 14, 2018

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