Federal Court  Cour fédérale

Date: 20140409

Docket: T-10-13

Citation: 2014 FC 342

Ottawa, Ontario, April 9, 2014

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Plaintiff/Defendant by Counterclaim

And

HOUCHAINE, BOUTROS NAIM;
EL-SKAYER, JACQUELINE MOUSA;
HOCHAIME, LYNN BOUTROS;
HOCHAIME, JENNIFER BOUTROS

Defendants/Plaintiffs by Counterclaim

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Minister of Citizenship and Immigration seeks summary judgment declaring that the four members of the defendant family obtained their Canadian citizenship by false representations or fraud, or by knowingly concealing material circumstances. The Minister also seeks an order dismissing the defendants' Counterclaim, and costs on a solicitor and client basis.

[2] For the reasons that follow, I am satisfied that the defendants have not raised a triable issue as to whether they obtained their Canadian citizenship as a result of false representations

made in their citizenship applications. Consequently the declarations sought by the Minister will issue. I am further satisfied that the defendants' Counterclaim should be summarily dismissed as it too does not raise any triable issues, and that the Minister should have his costs.

I. Background

[3] The defendants are a mother, father and two adult daughters. The family was landed in Canada on August 16, 2004, and citizenship applications were filed by each of the four defendants on varying dates in 2008.

[4] Each defendant declared absences from Canada in his or her citizenship application. None of the declared absences were sufficient to raise any questions as to whether the defendants had met the residency requirements of the *Citizenship Act*, R.S.C., 1985, c. C-29.

[5] The defendants were subsequently granted Canadian citizenship. Jennifer Houchaime became a Canadian citizen on September 25, 2008. Her mother, Jacqueline El-Ksayer and her sister, Lynn Houchaime, became Canadian citizens on December 18, 2008, and Jennifer's father, Boutros Naim Houchaime, became a Canadian citizen on May 11, 2009.

[6] The Minister subsequently came to believe that each of the defendants was in fact resident in Dubai during much of the four year period immediately preceding the granting of their Canadian citizenship. This led the Minister to commence citizenship revocation proceedings.

[7] In accordance with the provisions of the *Citizenship Act*, the revocation process was commenced by the service of a Notice in Respect of Revocation of Citizenship on each of the defendants. This Notice advised the defendants of the Minister's intent to make a report to the

Governor in Council seeking the revocation of each of their citizenship on the grounds that it had been obtained by false representation or fraud or by knowingly concealing material circumstances.

[8] In particular, the Notices assert that each of the defendants "failed to disclose all of [his or her] absences from Canada within the four years immediately preceding [his or her] citizenship application" and that each of the defendants "provided false information on [his or her] application for citizenship with respect to [his or her] residence during the four years immediately preceding [his or her] citizenship application".

[9] After receipt of the Minister's Revocation Notices, the defendants exercised their statutory rights to have the matters referred to the Federal Court. This was done through the issuance of a Statement of Claim by the Minister. The defendants subsequently filed a Statement of Defence and Counterclaim. The parties have since exchanged affidavits of documents, but no examinations for discovery were held prior to the Minister bringing his motion for summary judgment in relation to both the claim and the counterclaim.

II. The Nature of the Proceedings and the Law

[10] In order to situate the arguments of the parties, it is necessary to have an understanding of the citizenship revocation process.

[11] A reference by the Minister under paragraph 18(1)(b) of the *Citizenship Act* is not an action in the conventional sense of the word. Rather, it is "essentially an investigative proceeding used to collect evidence of facts surrounding the acquisition of citizenship, so as to determine

whether it was obtained by fraudulent means": *Canada (Minister of Citizenship and Immigration) v. Obodzinsky*, 2002 FCA 518 at para. 15, [2002] F.C.J. No. 1800.

[12] The task for the Court in a proceeding such as this is to make factual findings as to whether the defendants obtained their Canadian citizenship by false representation or fraud or by knowingly concealing material circumstances. Findings made by this Court under paragraph 18(1)(b) of the *Citizenship Act* are final, and cannot be appealed.

[13] The Court's factual findings are not determinative of any legal rights. That is, the decision does not have the effect of revoking the defendants' Canadian citizenship: *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391 at para. 52, [1997] S.C.J. No. 82, citing *Canada (Secretary of State) v. Luitjens*, [1992] F.C.J. No. 319 at 152, 142 N.R. 173 (FCA).

[14] These findings may, however, form the basis of a report by the Minister to the Governor in Council requesting the revocation of the defendants' citizenship. The ultimate decision with respect to the revocation of citizenship rests with the Governor in Council, which is the only authority empowered to revoke citizenship.

[15] Subsection 10(1) of the *Citizenship Act* allows the Governor in Council to revoke the citizenship of an individual where the Governor in Council is satisfied, on the basis of a report from the Minister, that the person has obtained his or her citizenship "by false representation or fraud or by knowingly concealing material circumstances".

[16] A decision by the Governor in Council to revoke an individual's citizenship may be judicially reviewed in this Court: *Canada (Minister of Citizenship and Immigration) v. Furman*, 2006 FC 993 at para. 15, [2006] F.C.J. No. 1248.

III. The Burden and Standard of Proof

[17] The burden is on the Minister to demonstrate that the defendants obtained their Canadian citizenship by false representation or fraud or by knowingly concealing material circumstances: *Canada (Minister of Citizenship and Immigration) v. Skomatchuk*, 2006 FC 994 at para. 21, [2006] F.C.J. No. 1249.

[18] The standard of proof is that of the balance of probabilities: *Skomatchuk*, above, at para. 23. The balance of probabilities standard will be satisfied if the evidence establishes that it is more probable than not that something occurred. That is, I must be satisfied that an event or fact in dispute is not only possible, but probable: *Skomatchuk*, above, at para. 25.

[19] Before examining whether the Minister has met his burden in this case and whether the defendants have raised a triable issue in this regard, I must first address the defendants' motion to examine a non-party for discovery.

IV. The Defendants' Motion for Discovery of a Non-party

[20] This action was commenced in January of 2013. On August 21, 2013, counsel for the defendants advised the Minister that he was contemplating bringing a motion to examine the immigration consultant who allegedly assisted the defendants with their citizenship applications. Counsel for the defendants further advised that if the Minister proceeded with a motion for summary judgment, he would seek an adjournment of that motion, if necessary, so as to permit

the bringing of a third-party discovery motion. Months passed, and no such motion was ever brought by the defendants.

[21] In January of 2014, counsel for the Minister advised counsel for the defendants that she would be proceeding with her motion for summary judgment. Counsel for the defendants responded that before the motion for summary judgment could be dealt with, his motion for the discovery of a non-party had to be heard. However, no such motion was brought at that time.

[22] The Minister's motion for summary judgment was set down for hearing on March 4, 2014. On the return of the motion, counsel for the defendants sought an adjournment of the Minister's motion so as to allow for the bringing of a motion for the examination of the immigration consultant. Justice Kane agreed to adjourn the Minister's motion to April 1, 2014. However, her March 5, 2014 Order expressly stated that "no further adjournments will be permitted, regardless of the defendants' ability to discover the non-party in the intervening period".

[23] The defendants finally did bring their motion to discover the immigration consultant, making it returnable on April 1, 2014, the date set for the hearing of the Minister's motion for summary judgment. Once again, the defendants sought to have the Minister's motion adjourned so as to permit the examination for discovery to take place.

[24] After hearing the parties in relation to the defendants' request for an adjournment, I ruled that I would not entertain the motion for discovery of the immigration consultant in light of the dilatory conduct on the part of the defendants in pursuing this issue. I further noted that Justice Kane's March 5, 2014 Order was very clear that no further adjournments of the Minister's

motion would be granted to the defendants so as to permit them to pursue the discovery of the immigration consultant. Justice Kane's order was equally clear that the Minister's motion for summary judgment would proceed on April 1, 2014, regardless of whether or not the defendants had been able to discover the non-party in the intervening period.

[25] I further advised the parties that having heard from them with respect to the merits of the defendants' motion, I would not have granted the motion in any event. The defendants' allegations as to the potential relevance of the immigration consultant's evidence were vague and non-specific, and counsel for the defendants was unable to articulate what the immigration consultant could possibly say that would assist the defendants in their defence of the Minister's action.

V. Principles Governing Summary Judgment

[26] Before turning to consider the evidence in this matter, I would first note that in deciding whether summary judgment should issue, the Court must determine whether there is a genuine issue for trial with respect to either a claim or a defence. The purpose of summary judgment is to allow the Court to summarily dispense with actions that ought not to proceed to trial because they do not raise a genuine issue to be tried.

[27] The test on a motion for summary judgment "is not whether a party cannot possibly succeed at trial; rather, it is whether the case is so doubtful that it does not deserve consideration by the trier of fact at a future trial". As a consequence, "summary judgment is not restricted to the clearest of cases": all quotes from *Canada (Minister of Citizenship and Immigration) v. Campbell*, 2014 FC 40 at para. 14, [2014] F.C.J. No. 30, citing *ITV Technologies Inc v. WIC Television Ltd.*, 2001 FCA 11 at paras 4-6, 199 F.T.R. 319; *Premakumaran v. Canada*, 2006

FCA 213 at paras 9-11, [2007] 2 F.C.R. 191; *Canada (Minister of Citizenship and Immigration) v. Schneeberger,* 2003 FC 970 at para. 17, [2004] 1 F.C.R. 280.

VI. Should Summary Judgment be Granted in Relation to the Minister's Action?

[28] In addressing the question of whether summary judgment should be granted in relation to the Minister's action, I must first address the defendants' contention that the Minister's action is statute-barred.

A. *Is the Minister's Action Statute-Barred?*

[29] In their statement of defence, the defendants plead that the Minister's action is statute-barred as a result of the combined effect of section 32 of the federal *Crown Liability and Proceedings Act*, R.S.C., 1985, c. C-50 and sections 4 and 5 of the Ontario *Limitations Act*, 2002, S.O. 2002, c. 24, Sch. B.

[30] Section 32 of the federal *Crown Liability and Proceedings Act* provides that, subject to certain exceptions, "the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings by or against the Crown in respect of any cause of action arising in that province…".

[31] Section 4 of the Ontario *Limitations Act* creates a general two-year limitation period for "claims". Section 5 deals with the issue of discoverability. According to the defendants, because the Minister did not commence revocation proceedings within two years of the defendants receiving Canadian citizenship, the combined effect of these legislative provisions is that the Minister's action is now statute-barred.

[32] There are several problems with the defendants' arguments. The first is that it does not appear that an action such as this meets the statutory definition of a "claim" as contemplated by section 4 of the Ontario *Limitations Act*. A "claim" is defined in the Act as meaning "a claim to remedy an injury, loss or damage that occurred as a result of an act or omission".

[33] The second problem is that having denied having that they made any false representations in connection with their citizenship applications, the defendants have not indicated how any such representations on their part could have been discovered any earlier by the Minister.

[34] Thirdly, paragraph 16(1)(a) of the Ontario *Limitations Act* provides that there is no limitation period in relation to "a proceeding for a declaration if no consequential relief is sought".

[35] Finally, as the Federal Court of Appeal observed in *Obodzinsky*, above, it is illogical for defendants to ask for the termination of a reference that they themselves have requested for their own benefit on the grounds of prescription: at para. 48.

[36] As a consequence, the defendants have not raised a triable issue with respect to the limitations question.

[37] I will next review the evidence regarding each of the defendants in order to determine whether any of the defendants have raised a triable issue as to the truth of the representations made in their citizenship applications.

B. *Boutros Naim Houchaime*

[38] Boutros Naim Houchaime stated in his citizenship application that he was present in Canada for 1,153 days during the relevant period. He also stated that he was absent from Canada on fifteen occasions totalling 307 days during the four year period immediately preceding his application for citizenship in October of 2008.

[39] As a result of a request made through diplomatic channels, the Minister subsequently obtained a copy of Mr. Houchaime's travel history from the Ministry of the Interior for the United Arab Emirates (UAE), along with travel histories for the other three members of the family.

[40] The Minister has provided an affidavit from a Liaison Officer with the Canada Border Services Agency office in Dubai, who deposes that the UAE maintains strict entry and exit controls over the travel of persons residing in the UAE on residency permits. The CBSA Officer further deposes that these controls exist at all ports of entry and exit from the UAE. It is uncontroverted that the applicants, who were citizens of Lebanon, were in the UAE on residency permits during the relevant period.

[41] The travel history for Mr. Houchaime reveals that, contrary to the information provided to the Government of Canada in his citizenship application, Mr. Houchaime was in fact spending the vast majority of his time living in Dubai during the relevant period, leaving the UAE only periodically for short trips abroad. Moreover, publicly available information suggests that Mr. Houchaime was working as the Managing Director of Mechwatt Electromechanical Works LLC in Dubai, an assertion that he has not denied in his affidavit.

[42] The accuracy and reliability of the travel histories provided by the UAE has not been questioned by the defendants. Moreover, counsel for the defendants has acknowledged that there is no evidence before me from Mr. Houchaime to contradict the travel history reflected in the UAE's records relating to him. Indeed, Mr. Houchaime has not denied that his citizenship application did not accurately reflect his periods of residence in Canada.

[43] Mr. Houchaime's only defence is his vague assertion that he relied on his Canadian immigration consultant to prepare his citizenship application, suggesting in his affidavit that any material misstatements in the applications were the responsibility of the consultant. Mr. Houchaime further asserts that the defendants "did not have detailed knowledge of the contents of the citizenship applications filed notwithstanding that they signed said applications as filed on the advice and encouragement of [the consultant]".: Houchaime affidavit at para. 11

[44] Mr. Houchaime has, however, provided no evidence as to what information he provided to the consultant with respect to his periods of residency in Canada, nor has he explained how patently false information came to be included in his application.

[45] In accordance with Rule 214 of the *Federal Courts Rules*, S.O.R./98-106, a response to a motion for summary judgment cannot be based upon what might be adduced as evidence at a later stage in the proceeding. Rather, respondents are required to "set out specific facts and adduce the evidence showing that there is a genuine issue for trial". Mr. Houchaime's evidence as to the role of the immigration consultant is entirely unsatisfactory and does not come close to meeting the threshold contemplated by Rule 214

[46] It is also noteworthy that passport applications completed by the family after they obtained Canadian citizenship also contain material misinformation as to where they had been living during the time periods in issue. There is no suggestion in Mr. Houchaime's affidavit that the immigration consultant had any involvement in the completion of the family's passport applications.

[47] Given that the family's passport applications were prepared after they obtained their Canadian citizenship, they are not directly relevant to the question of whether they obtained their citizenship as a result of false representations. However, the inaccuracies in the passport applications, each of which was signed by the defendants who solemnly declared that the statements made in the applications were true, are evidence of additional attempts by the family to mislead Canadian immigration authorities as to their whereabouts during the relevant periods.

[48] In the circumstances, Mr. Houchaime has not persuaded me that there exists a genuine issue for trial in relation to the Minister's action. I am satisfied that he obtained his Canadian citizenship as a result of false information in his citizenship application and summary judgment will be granted declaring this to be the case.

[49] Before turning to review the evidence regarding the other three members of the family, I would note that no evidence has been provided by any of them with respect to the truth of the contents of each of their citizenship applications. The onus on a party to "put their best foot forward" in response to a motion for summary judgment: *F. Von Langsdorff Licensing Ltd. v. S.F. Concrete Technology, Inc.*, 165 F.T.R. 74 at paras. 12 and 27, [1999] F.C.J. No. 526. However, the three other defendants rely only on Mr. Houchaime's affidavit, and, in particular, his vague and unsupported assertion of reliance on the immigration consultant.

C. *Jacqueline El-Ksayer*

[50] Jacqueline El-Ksayer is Mr. Houchaime's wife. Her citizenship application states that she was resident in Canada for 1,176 days during the relevant period, and that she was absent from Canada on only seven occasions totalling 133 days during the four year period immediately prior to her application for citizenship in December of 2008.

[51] However, the UAE travel history for Ms. El-Ksayer reveals that after landing in Canada in August of 2004, Ms. El-Ksayer then returned to Dubai on September 7, 2004. The record further reveals that she remained in the UAE for most of the next four years, interrupted only by several short absences, particularly in the summer months. Once again, Ms. El-Ksayer's travel history bears no relationship to the Canadian residence declared in her citizenship application.

[52] Ms. El-Ksayer has not denied that her citizenship application contains false representations and she has not persuaded me that there exists a genuine issue for trial in relation to the Minister's claim for a declaration to that effect. I am satisfied that she obtained her Canadian citizenship as a result of false information in her citizenship application and summary judgment will be granted against her declaring that to be the case.

D. *Jennifer Hochaime*

[53] Jennifer Hochaime is one of Mr. Houchaime and Ms. El-Ksayer's daughters. Although she was a child when she was landed in Canada, she had attained the age of majority by the time that she signed her application for Canadian citizenship on September 25, 2008.

[54] Jennifer's citizenship application states that she was resident in Canada for 1,126 days during the relevant period, and that she was only absent from Canada on three occasions for a total of 134 days during the four year period immediately prior to her citizenship application.

[55] However, Jennifer's UAE travel history reveals that after landing in Canada in August of 2004, she promptly returned to Dubai on September 7, 2004, remaining there until July 16, 2005. She left Dubai for a couple of weeks in the summer of 2005, returning on August 13, 2005. The pattern then repeated itself, with Jennifer remaining in Dubai between August of 2005 and July of 2006, and a similar travel pattern is demonstrated in 2007.

[56] Jennifer's travel pattern is thus consistent with someone attending school in Dubai. This is not a mere suspicion on my part, however. The uncontroverted evidence adduced by the Minister demonstrates that Jennifer was in fact attending the Emirates Academy of Hospitality Management from October of 2004 to July of 2008. As part of her studies at the Emirates Academy, Jennifer spent the period from January of 2007 to November of 2007 participating in an exchange program at the École hotelière de Lausanne in Switzerland, following which she once again returned to Dubai.

[57] The Minister has produced written confirmation from both of these institutions confirming that Jennifer was physically present at each institution during the periods in question. These are periods when, according to her citizenship application, Jennifer was supposed to be residing in Canada.

[58] Once again, Jennifer has not challenged this evidence in any meaningful way. As a consequence, she has not persuaded me that there exists a genuine issue for trial in relation to the

Minister's action. I am satisfied that Jennifer Hochaime obtained her Canadian citizenship as a result of false information in her citizenship application and summary judgment will be granted against her declaring that to be the case.

E. *Lynn Hochaime*

[59] Lynn Hochaime is Mr. Houchaime and Ms. El-Ksayer's other daughter. Like her sister Jennifer, Lynn was a child at the time that she was landed in Canada, although she too had attained the age of majority by the time that she signed her application for Canadian citizenship on March 18, 2008.

[60] Lynn's citizenship application states that she was resident in Canada for 1,222 days during the relevant period, and that she was only absent from Canada on three occasions totalling 87 days during the four year period immediately prior to signing her citizenship application.

[61] However, Jennifer's UAE travel history reveals that after landing in Canada in August of 2004, she returned to Dubai on September 7, 2004 – the same day that her sister and mother returned to the UAE. Lynn remained in Dubai for most of the next four years, with short trips out of the country, particularly in the summer months.

[62] Once again, Lynn's travel pattern is consistent with someone attending school in the UAE. Indeed, the Minister has obtained evidence that she was in fact attending high school at the Al Mawakeb School in Dubai until her graduation from that institution in 2007.

[63] Lynn's citizenship application indicates that she began attending McMaster University in Hamilton, Ontario in September of 2006. However, information obtained from the University by

the Minister reveals that she did not start at McMaster until September of 2008, a fact that is confirmed by Lynn's own online "LinkedIn" profile.

[64] As was the case with the other members of her family, Lynn has not challenged the evidence against her in any meaningful way. As a consequence, she has not persuaded me that there exists a genuine issue for trial in relation to the Minister's action. I am satisfied that Lynn Hochaime obtained her Canadian citizenship as a result of false information in her citizenship application and summary judgment will be granted against her declaring that to be the case.

VII. Should Summary Judgment be Granted in Relation to the Defendants' Counterclaim?

[65] The Minister also seeks summary judgment dismissing the defendants' counter-claim. As will be explained below, I am satisfied that summary judgment should also issue with respect to the Counterclaim as none of the defendants have demonstrated the existence of a triable issue in this regard.

[66] In their Counterclaim, the defendants assert that sections 10, paragraph 18(1)(b) and subsection 18(3) of the *Citizenship Act* are inconsistent with section 7 of the *Canadian Charter of Rights and Freedoms* and violate their liberty interests.

[67] Canadian citizenship is a valuable privilege (*Benner v. Canada (Secretary of State*), [1997] 1 S.C.R. 358 at para. 72, [1997] S.C.J. No. 26), and the stakes are undoubtedly high for the defendants. Nevertheless, it must be kept in mind that the Minister is trying to deprive the defendants of their citizenship through this proceeding, and *not* their liberty. Indeed, the defendants have not explained how their liberty interests have been engaged by this proceeding.

[68] The defendants have, moreover, acknowledged that the Federal Court of Appeal "has consistently ruled that section 7 [of] the Charter [does] not apply to revocation proceedings in the Federal Court", suggesting that this Court should, however, "revisit these issues in light of the facts and arguments" advanced by the defendants: Defendants' Memorandum of Fact and Law at para. 17.

[69] The Federal Court of Appeal has indeed been clear that citizenship revocation proceedings do not engage section 7 of the Charter: see, for example, *Luitjens*, above.

[70] Clearly, it is not open to this Court to "revisit" the binding rulings of the Federal Court of Appeal. Moreover, even if the Court were able to do so, in the absence of any explanation as to how the defendants' section 7 interests have been engaged by the revocation process in this case, the defendants have simply not established *any* basis for their section 7 Charter claim, and no triable issue has been raised in this regard.

[71] Consequently, an order will issue dismissing the defendants' Counterclaim.

VIII. Costs

[72] The nature and extent of the defendants' false representations are such that the Minister should be entitled to his solicitor and client costs of these proceedings.

JUDGMENT

THIS COURT DECLARES that:

1. Each of the defendants Boutros Naim Houchaime, Jacqueline El-Ksayer, Jennifer Hochaime and Lynn Hochaime obtained their Canadian citizenship by false representation or fraud and by knowingly concealing material circumstances within the meaning of paragraph 18(1)(b) of the *Citizenship Act*, R.S.C. 1985, c. C-29;

2. The defendants' Counterclaim is dismissed; and

3. The Minister shall have his solicitor and client costs of these proceedings.

"Anne L. Mactavish"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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