Federal Court  Cour fédérale

Date: 20141010

Docket: T-1871-13

Citation: 2014 FC 966

Ottawa, Ontario, October 10, 2014

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

ODILON MAGALONG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Mr. Odilon Magalong seeks equitable relief in the nature of a writ of *mandamus* under subsection 18(1)(3)(*a*) of the *Federal Courts Act*, RSC, 1985, c F-7 [Act], ordering the Minister of Citizenship and Immigration [Minister] to allow the applicant to swear his citizenship oath, notwithstanding his ineligibility resulting from his conviction for certain indictable criminal offences pursuant to section 22 of the *Citizenship Act*, RSC, 1985, c C-29 [*Citizenship Act*]. In the alternative, he seeks an order quashing or staying the removal and admissibility proceedings

at the Immigration Division of the Immigration and Refugee Board [ID] until such time the applicant has completed his probation and is again entitled to swear the oath of citizenship.

[2] An exceptional factual situation lies before us. After his application for Canadian citizenship was approved by a Citizenship Judge and granted by the Minister, but before he swore his oath, the applicant was arrested but not yet charged under certain provisions of the *Criminal Code*, RSC 1985, c C-46 [Criminal Code]. Citizenship and Immigration Canada [CIC] put a "hold" on his approved citizenship application. Criminal charges were then laid five months later. CIC never informed the applicant that his application had been approved and granted or that it had been put on "hold." Had he been made aware of these facts at the time, so the applicant argues, he could have sought relief from this Court to expedite his grant of citizenship. Instead, he now faces inadmissibility and removal proceedings at the ID.

[3] For the reasons discussed below and although some remedy is offered to the applicant, no equitable relief in the nature of a writ of *mandamus* will be granted.

Background

[4] The applicant is a citizen of the Philippines and a permanent resident of Canada who made an application for citizenship in December 2008. His wife and three children are Canadian citizens.

[5] On November 25, 2009, he wrote the citizenship test which he passed.

[6] On December 23, 2009, a Citizenship Judge approved the applicant's application.

[7] During the processing of his citizenship application, the applicant committed various sexual offences against three underage complainants. The allegations came to the attention of the complainants' parents and, on December 19, 2009, the applicant was confronted by these parents on complainant's allegations (*R v Magalong*, 2013 BCCA 478 at para 11 [*Magalong*]).

[8] On or about January 2, 2010, theses incidents were reported by the applicant's pastor to the Royal Canadian Mounted Police [RCMP] (*Magalong* at para 12). The applicant was arrested that same day. He was subsequently released on bail.

[9] On January 4, 2010, supervisors at CIC were advised by email from Canada Border Services Agency [CBSA] that the RCMP had arrested and fingerprinted the applicant for sexual interference.

[10] On January 5, 2010, a CIC supervisor indicated that CIC will place the applicant's file on hold pending further information from the RCMP relating to the swearing of charges. CIC was fully aware at the time of the hold that no charges had been sworn. CIC noted to follow-up on the applicant's file in 60 days.

[11] That same day, the applicant's citizenship was granted by a citizenship officier pursuant to subsection 5(1) of the *Citizenship Act*.

[12] The applicant was never informed by CIC that his citizenship application had been approved by a Citizenship Judge or granted by an officier. The applicant was also never informed by CIC that his citizenship had been unilaterally suspended or put on hold. He only became aware of these facts following the results of an access to information by counsel.

[13] Charges against the applicant were not laid until June 8, 2010, more than five months later.

[14] On September 10 and 29, November 19, and December 10, 2010, CIC sent letters to the applicant requesting information, fingerprints and documentation relating to his criminal charges in order to evaluate whether he could take the oath of citizenship. The applicant failed to respond.

[15] On July 7, 2011, CIC received the applicant's fingerprints from the RCMP.

[16] On May 5, 2012, the applicant was convicted of certain indictable offences. On October 18, 2012, he was sentenced to 22 months' imprisonment (concurrent) on each charge, to be followed by three years of probation. His appeal of his conviction was dismissed by the British Columbia Court of Appeal.

[17] Following the applicant's conviction, the Minister referred the applicant under subsection 44(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], for inadmissibility and removal proceedings at the ID. The report was based on the applicant's serious criminality,

pursuant to paragraph 36(1)(*a*) of IRPA. Following submissions by counsel regarding the applicant's prior grant of citizenship, the member of the ID agreed to stay the removal proceedings pending the outcome of this application.

[18] On November 20, 2013, CIC advised the applicant that his application had been closed and that he was prohibited from taking the oath of citizenship under section 22 of the *Citizenship Act*, as he had been convicted of an indictable offence.

[19] On January 7, 2014, the applicant was released from custody on probation and rejoined his wife, daughter and son after having served his time. He currently works the night shift for his family's cleaning company.

Issues and Standard of Review

[20] The issue raised by this application is whether the applicant satisfied all of the elements of the test for the issuance of an order of *mandamus*.

Submissions of the parties

[21] The writ of *mandamus* is a discretionary equitable remedy. It "lies to compel the performance of a public legal duty which a public authority refuses or neglects to perform although duly called upon to do so" (*Dragan v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 211, [2003] 4 FC 189 at para 38).

[22] The parties agree that the following criteria must be satisfied, as set forth in *Apotex Inc v Canada (Attorney General)*, [1994] 1 FC 742, aff'd [1994] 3 SCR 1100 at para 45, before the Court can issue a writ of *mandamus*:

1. there must be a public duty to act under the circumstances;
2. the duty must be owed to the applicant;
3. there must be a clear right to performance of that duty, in particular:
    (a) the applicant has satisfied all conditions precedent giving rise to the duty;
    (b) there was (i) a prior demand for performance of the duty; (ii) a reasonable time to comply with the demand unless refused outright; and (iii) a subsequent refusal which can be either expressed or implied, e.g. unreasonable delay;
4. no other adequate remedy is available to the applicant;
5. the order sought must have some practical effect;
6. in the exercise of its discretion, the Court must find no equitable bar to the relief sought; and,
7. on a balance of convenience, an order of *mandamus* should issue.

[23] The applicant argues that the test for *mandamus* is satisfied in the case at bar. The respondent has a clear legal duty owed to the applicant. Once an application for citizenship has been approved, the Minister has no further discretion to suspend, "hold" or delay notifying the applicant of his right to swear the oath in order to effectuate his citizenship. As such, the Minister acted *ultra vires* the scope of his authority and in so doing, denied the applicant's right to citizenship.

[24] The language of the *Citizenship Act* is mandatory, not permissive. Subsection 5(1) states: The "Minister shall grant citizenship to any person" who meets the conditions. Section 12(2) further provides: "When an application under section 5 or 5.1 or subsection 11(1) is approved, the Minister shall issue a certificate of citizenship to the applicant." Moreover, subsection 22(1) of the *Citizenship Regulations*, SOR/93-246 requires that the "Registrar shall make all necessary arrangements for the purpose of administering the oath."

[25] The irrevocable nature of the grant of citizenship is confirmed by the jurisprudence of this Court. In *Stanizai v Canada (Minister of Citizenship and Immigration)*, 2014 FC 74 [*Stanizai*], Justice Mactavish held:

> [31] The jurisprudence of this Court is clear: "unless there is an appeal, the approval or refusal by a citizenship judge, is a final matter as to the applicant's Canadian citizenship. The Minister has no further function to perform or other remedy other than an appeal": *Canada (Minister of Citizenship and Immigration) v. Mahmoud*, 2009 FC 57 (CanLII), 2009 FC 57, 339 F.T.R. 273, at para. 6. See also *Canada (Minister of Citizenship and Immigration) v. Abou-Zahra*, 2010 FC 1073 (CanLII), 2010 FC 1073, [2010] F.C.J. No. 1326; *Canada (Minister of Citizenship and Immigration) v. Farooq*, 2009 FC 1080 (CanLII), 2009 FC 1080, 84 Imm. L.R. (3d) 64; *Canada (Minister of Citizenship and Immigration) v. Jeizan*, 2010 FC 323 (CanLII), 2010 FC 323, 386 F.T.R. 1; *Canada (Minister of Citizenship and Immigration) v. Wong*, 2009 FC 1085 (CanLII), 2009 FC 1085, 84 Imm. L.R. (3d) 89; *Canada (Minister of Citizenship and Immigration) v. Wang*, 2009 FC 1290 (CanLII), 2009 FC 1290, 360 F.T.R. 1.

[26] As such, the Minister does not have the authority to "hold off on granting citizenship to an applicant whose application for citizenship has been approved by a citizenship judge" (*Stanizai* at para 29).

[27] Justice Mactavish did, however, find that there was a "limited exception to this rule": Citing *Khalil v Canada (Secretary of State)*, [1999] 4 FC 661 [*Khalil*], she notes, at para 32 that "the Minister retains a residual discretion to withhold citizenship from a person who meets the requirements of citizenship if he discovers misrepresentations after the citizenship judge has submitted his report."

[28] In the case at bar then, the Minister was entitled to perform no other function and had no other remedy than to appeal the decision within 60 days. The Minister did not appeal. In fact, on January 5, 2010, the Minister signed off and "granted" the citizenship.

[29] Moreover the *Khalil* exception does not apply. In that case, the judge was unaware of serious misrepresentations that had been made in the application for permanent residence regarding the husband's involvement in terrorist acts. In the immediate case, the applicant has never made any misrepresentations or been accused of such.

[30] Having satisfied all conditions precedent for citizenship under the Act, the respondent unjustly delayed and refused to perform his duty.

[31] The applicant further agues that there was no statutory bar to the applicant's citizenship during the five months before the charges were sworn. None of the prohibitions listed at section 22 of the *Citizenship Act* apply to an investigation undertaken by the RCMP for offences other than war crimes and crimes against humanity prior to the laying of charges. The legislature could have chosen to prohibit those under investigation for indictable offences, but did not.

[32] As a matter of fundamental justice, and under the doctrine of abuse of process, the applicant argues that he should now be granted citizenship, as he was previously entitled to, notwithstanding the fact he is currently on probation and prohibited from taking the oath under subparagraph 22(1)(*a*)(i) of the *Citizenship Act*.

[33] This Court has previously held that it does not matter what happens after a *mandamus* application has been filed and by implication after the right to citizenship has been vested. The relevant time of reference is when the applicant was fully eligible for citizenship (*Murad v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1089 [*Murad*] at para 61). The sole difference with *Murad* is that the applicant did not file his *mandamus* application prior to the charges leading to inadmissibility; however, he could not have done so as the Minister failed to inform him that his application had been approved.

[34] This argument can also be framed in the context of an abuse of process by the Minister, as there has been an affront to fair play and decency, and so there is harm to the public interest if this abuse of process is permitted to continue. The abuse should not be allowed to continue by further denying the applicant's citizenship, or by allowing the Minister to proceed with an application to remove the applicant from Canada. Without a *mandamus* granted by this Court, the applicant will suffer irreparable harm as he will be deported from Canada away from his family and home.

[35] Meanwhile, the respondent argues that both *Stanizai* and *Murad* do not apply to the case at bar. Neither applicant in these two cases was prohibited by statute from becoming Canadian

citizen. Considering the applicant is statute-barred from swearing the oath and ineligible to become a citizen on account of his conviction, there is no present duty owed by the Minister to the applicant, and so this Court cannot compel the authority to perform it (*Vaziri v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1159 [*Vaziri*]).

[36] Furthermore, the Minister is not under any statutory duty to administer the oath to any candidate for citizenship within a prescribed period of time, and so did not err in not immediately administering the oath to the applicant subsequent to the granting of citizenship.

[37] Moreover, the applicant was aware of his criminal activities well before he was granted Canadian citizenship. He ought to have come forward and disclosed them to the RCMP and CIC, as opposed to waiting for his pastor to bring the applicant's criminality to the attention of the police. The applicant should not be able to take advantage of the time that it took the RCMP to properly investigate the crimes that he had committed. Had he been upfront about his criminal activities, he would never have been granted Canadian citizenship in the first place.

[38] The respondent also argues that this Court cannot order for the stay or suspension of the admissibility proceedings currently before the ID. In *Fox v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 346, the Federal Court of Appeal allowed a judicial review of an ID decision to grant an adjournment of an admissibility hearing to avoid or circumvent the consequences of the prohibitions under the *Citizenship Act*, as it lacked jurisdiction to grant it. The ID is bound by law to hear and determine the applicant's matter without delay.

[39] Finally, the respondent argues that the applicant does not come before this Court with clean hands, and cannot benefit from abuse of process. The applicant has no right to Canadian citizenship; he is statutorily prohibited from becoming a citizen because he was formally charged and convicted of indictable offences, but did not alert CIC as to this turn of events. He should not benefit from the time it took the RCMP to lay the charges.

Analysis

[40] I will first deal with the applicant's argument that there was an abuse of process on the part of the Minister. While it is true that the Minister new that all prerequisites for the swearing in ceremony of the applicant as a Canadian citizen were complied with on January 5, 2013, and that he could have been sworn in during the following 5 months, it is also true that as the applicant was processing his application for citizenship, he was engaged into a behaviour that he knew or should have known was criminal and that if the ongoing investigation resulted in charges being pressed before he was granted citizenship, he would simply not be granted citizenship and he would be found inadmissible. Paragraphs 22(1)(*b*) and 22(1)(*c*) of the *Citizenship Act* make it clear that a person is prevented from being granted citizenship if he or she is under investigation for a crime against humanity or a war crime but for any other indictable offences, charges have to be pressed for the applicant to be refused citizenship. Under these circumstances, it can not be said that the respondent acted in an abusive way.

[41] That being said, the applicant does not point us to a positive duty on the part of the Minister to advise him that his application had been granted and to invite him to a swearing in

ceremony within a specific amount of time. I am unable to find one in the legislation, the Citizenship Policy Manual 15 [CP] or the jurisprudence.

[42] However, I agree with the applicant that the Minister had no right to put on "hold" his granted citizenship application. The *Khalil* exception does not apply, as the Minister cannot point this Court to any misrepresentations the applicant had made in his application for Canadian citizenship. As such, the Minister had an unequivocal duty to grant the applicant citizenship during that time period. The applicant satisfied the conditions precedent giving rise to the duty. Section 5 of the Act uses mandatory language, and so creates an obligation on the part of the Minister to grant citizenship when those conditions precedent are met:

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 : […]

[43] Section 11 of the *Interpretation Act*, RSC 1985, c I-21 confirms the imperative nature of the word "shall":

11. The expression "shall" is to be construed as imperative and the expression "may" as permissive.	**11.** L'obligation s'exprime essentiellement par l'indicatif présent du verbe porteur de sens principal et, à l'occasion, par des verbes ou expressions comportant cette notion. L'octroi de pouvoirs, de droits, d'autorisations ou de facultés s'exprime essentiellement par le verbe « pouvoir » et, à l'occasion, par des expressions comportant ces notions.

[44] The issue then lies as to whether this Court can issue a *mandamus*, ordering the Minister to allow the applicant to swear his citizenship oath, despite not having a "present" duty to do so.

As the respondent correctly notes, the Minister no longer as the statutory power to grant the applicant citizenship, as subparagraph 22(1) (*a*)(i) of the *Citizenship Act* acts as a legal prohibition to the granting of citizenship to a person under a probation order.

[45] For this temporality argument, the respondent points us to *Vaziri*, albeit with no paragraph cite. In that case, Justice Snider did not need to deal with this issue, nor did she address it directly. I suspect though that it can be inferred from the following excerpt:

> [38] The equitable remedy of *mandamus* lies to compel the performance of a public legal duty that a public authority refuses or neglects to carry out when called upon to do so. […]

[46] The applicant concedes that his conviction makes him currently ineligible for citizenship. As a result, he asks this Court for a directed verdict effectuating his previous grant of citizenship notwithstanding this fact. He would not now be prohibited had he been allowed to take the oath during the five months when he was fully eligible.

[47] Moreover, he analogizes his situation with that of the applicant in *Murad*. I cite Justice Roy on this issue:

> [61] What has taken place after the application for *mandamus* was filed is not relevant to this application. The respondent argued that Rule 302 of the *Federal Courts Rules* prevents a consideration of any further decision. I agree. At the same time, had citizenship been granted when it should have been, whatever travel done by the applicant would have been of no moment given that the Constitution guarantees the right to enter and leave Canada (subsection 6(1) of the Charter). I note that an inadmissibility report, pursuant to section 44 of the IRPA, can only be made about "a permanent resident or a foreign national who is in Canada". It cannot be made about a citizen of this country. [Emphasis added]

[48] I agree with the respondent that the case at bar is distinguishable. In *Murad*, the Court could issue a *mandamus* ordering the CIC to grant the applicant citizenship, as the applicant still maintained his eligibility for citizenship. Unlike the applicant in the present case, Mr. Murad had not been convicted of an indictable offence and been sent a notwithstanding letter from CIC in consequence. While an inadmissibility report had been rendered against Mr. Murad by a CIC officer pursuant to subsection 44(1) of the IRPA, it had yet to have been confirmed by a decision of the ID. No removal order had been issued.

[49] Similar logic distinguishes *Stanizai*, as the applicant there was not subject to any statutory bars.

[50] Since the respondent was not under a statutory duty to take the applicant's oath within a specific timeframe and since he is not under a public duty to act at the present time and under the present circumstances, the main remedy sought by the applicant will not be granted.

[51] The applicant alternatively asks that I stay the removal proceedings at the ID until such time as he has completed his probation and is again entitled to take his oath and effectuate his citizenship grant, and that I quash the November 20, 2013 decision by CIC to close his citizenship application.

[52] Although I find that I have the power to quash the November 20, 2013 decision, I do not think that I should issue an order to stay the removal proceedings at the ID as they are already stayed by a decision of that tribunal.

[53] The fact that the applicant is presently barred from taking the oath has no impact on the fact that he was, for all intent and purposes, granted Canadian citizenship. Although I can refuse to exercise my discretion to issue a *mandamus* order based on that fact alone, it will not prevent the applicant to seek from the ID a new stay of that hearing until he is no longer on probation, just as it will not prevent him to simply argue that he is not inadmissible as he was granted citizenship. Decisions of the ID on both these issues could be reviewed by this Court at the request of the loosing party.

[54] In addition, I find that it would not be wise on my part to order the respondent to administer oath to the applicant at the end of his probation period, as this would be to assume that the applicant's situation will not change meanwhile.

Conclusion

[55] For the reasons provided herein, this application for judicial review will be granted, solely for the purpose of quashing the November 20, 2013 decision by CIC to close the applicant's citizenship application. Considering the mitigated outcome of this application, no costs will be granted.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted in part;
2. The decision of Citizenship and Immigration Canada, dated November 20, 2013, to close the applicant's citizenship application, is quashed;
3. The application for an equitable relief in the nature of a writ of *mandamus* is dismissed; and
4. No costs are granted.

"Jocelyne Gagné"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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