Federal Court  Cour fédérale

Date: 20160720

Docket: T-957-15

Citation: 2016 FC 827

Ottawa, Ontario, July 20, 2016

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

LUIS ALONSO DIEZ MONTOYA, ALSO KNOWN AS LUIS ALONSO MONTOYA TOBAN, LUIS A. MONTOYA AND LUIS ALONSO MONTOYA TOBAN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This application seeks review of the May 7, 2015 decision of the Governor in Council [GIC], revoking the Applicant's citizenship pursuant to sections 10 and 18 of the *Citizenship Act*, RSC 1985, c C-29, as it appeared on May 13, 2015 [*Citizenship Act*].

[2] On February 9, 2016, Justice Hughes granted the Applicant leave to adduce new evidence within 20 days of the date of that Order, including affidavits containing any new evidence regarding the Applicant's entire immigration file, and tax and disability information. The judicial review scheduled for February 25, 2016, was thus adjourned.

[3] The Applicant requested further adjournment on May 4, 2016, since he had not yet received his entire immigration file from the government. The Respondent objected on the basis that the Applicant has already been provided an opportunity to file further evidence, and has failed to demonstrate the relevance of his entire immigration file to this proceeding, particularly since it would not have been before the decision-maker.

[4] By Order dated June 3, 2016, Justice Noël set down this judicial review to be heard *peremptorily*.

II. Background

[5] The Applicant, Mr. Luis Alonso Diez Montoya (also known as Luis Alonso Montoya Toban, Luis A. Montoya, and Luis Alonso Montoya Tobon), was born in Colombia on November 22, 1950, and became a permanent resident of Canada on May 18, 1973. He first applied for Canadian citizenship in August 1984, which was refused in April 1985, due to non-compliance with the knowledge requirement.

[6] On January 23, 1985, the Applicant, under the name Luis Alonso Montoya, was arrested in Florida, USA, and charged with importation of and possession with the intent to distribute cocaine by US authorities.

[7] The Applicant was tried and convicted for his drug-related crimes in July 1985, and was incarcerated from September 1985 to February 1988. He was subsequently deported to Colombia.

[8] On January 24, 1989, the Applicant returned to Canada after being issued a Canadian returning resident permit. In March 1989, he filed a second citizenship application under the name Luis Alonso Montoya Tobon. Though the application required that he truthfully answer the questions on the form and indicated a warning of possible revocation for failure to do so, his application declared no absences from Canada in the four years preceding the date of his application, and listed one place of residence in Canada during those years.

[9] This application was approved, and the Applicant became a Canadian citizen on November 23, 1989. Two months later, the Applicant applied for a replacement certificate, stating he had legally changed his name to Luis Alonso Diez Montoya.

[10] The Applicant was convicted on April 23, 1992, of further drug-related crimes and received a sentence of three years imprisonment.

[11] In June 1999, the Royal Canadian Mounted Police [RCMP] verified using fingerprint comparison that the Applicant is the same individual as Luis Alonso Montoya – incarcerated in the US in the mid-1980s.

[12] On May 18, 2000, pursuant to section 18(1) of the *Citizenship Act*, Citizenship and Immigration Canada [CIC] served the Applicant a Notice of Intent to Revoke Citizenship, which the Applicant requested be referred to the Federal Court.

[13] The Minister of Citizenship and Immigration [the Minister] commenced an action in July 2004. By Consent Order dated February 14, 2007, the Federal Court declared that the Applicant had obtained Canadian citizenship by false representation or fraud or by knowingly concealing material circumstances. The Applicant consented to judgement and agreed that the Minister may proceed to report to the GIC, recommending revocation of his Canadian citizenship [the Report].

[14] On February 11, 2009, the Minister attempted, unsuccessfully, to serve the Report on the Applicant.

[15] On October 30, 2014, the Minister successfully served a letter with a copy of the Report on the Applicant. The letter requested that the Applicant provide any information he would like to have considered by the Minister and the GIC within 30 days, which would be attached to the Report before being presented to the GIC. The Applicant provided no submissions.

[16] The Report sets out the facts as above described. It cites sections 10(1) and 18 of the *Citizenship Act*, as amended, as statutory basis for the recommendation, and after a "careful and thorough consideration of all the facts of the case and the legislative requirements for revocation of citizenship", recommends that the Applicant's Canadian citizenship be revoked. The result being that the Applicant's status would revert to that of a permanent resident, and he would be subject to the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] (per subsection 46(2) of the *IRPA*).

[17] Pursuant to the Minister's Report, the GIC issued an Order in Council (P.C. 2015-572), fixing May 7, 2015, as the date on which the Applicant ceased to be a Canadian citizen. The Report of the Minister forms part of the reasons of the GIC, and together they constitute the decision under review [the Decision] (*Oberlander v Canada (Attorney General)*, 2004 FCA 213 at para 36 [*Oberlander (FCA)*]).

[18] For the duration of this above period, the Applicant had steady employment in Canada for approximately 19 years, and contributed to a Canadian pension during that time. He currently receives Canadian Disability Benefits, as he suffers various medical conditions which have left him unfit for employment.

III. Issues

[19] The issues are:

A. Was there was an unreasonable and unjustified delay, and if so, did it directly cause significant prejudice amounting to an abuse of process?

B. Was the Decision of the GIC reasonable?

IV. Standard of Review

[20] Issues of procedural fairness are reviewed on a correctness standard.

[21] The GIC has broad discretion at the stage of citizenship revocation – a decision that involves a delicate balancing of policy, personal interests and the public interest – and the Decision is reviewed on the standard of reasonableness (*Oberlander (FCA)*, above, at para 12).

V. Analysis

A. *Was there was an unreasonable and unjustified delay, and if so, did it directly cause significant prejudice amounting to an abuse of process?*

[22] The Applicant submits that the delay of 15 years from when he was first informed of the Minister's intent to revoke his citizenship (May 18, 2000) to its revocation by Order of the GIC (May 7, 2015) is unreasonable, amounts to an abuse of process, and is a violation of section 11(b) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [the *Charter*] and of subsection 173(b) of *IRPA*.

[23] Neither subsection 11(b) of the *Charter* nor subsection 173(b) of the *IRPA* are applicable, and thus violated in these circumstances. Subsection 11(b) applies to the right of "any person *charged with an offence*" to be tried within a reasonable time. Subsection 173(b) of the *IRPA*

requires the *Immigration Division* – not the Minister or the GIC – to hear a matter without delay. The only visible arguments of procedural unfairness are thus those concerning abuse of process.

[24] The Applicant analogises the present case to *Canada (Minister of Citizenship & Immigration) v Parekh*, 2010 FC 692 [*Parekh*], wherein Justice Danièle Tremblay-Lamer granted a stay on the basis of inordinate delay amounting to an abuse of process, despite her finding that the defendants had obtained their citizenship by misrepresentation, fraud, or concealing material circumstances.

[25] In *Parekh*, above, CIC had become aware of the defendants' convictions and misrepresentation in May 2003, yet the Minister only provided them notices it would be revoking citizenship in January 2007.

[26] Similarly, the Applicant proposes that all information necessary to proceed with revocation of his citizenship was available to CIC in 2000. He argues there is no reasonable explanation for the delay: the issues at hand are not complex, the delay was not a consequence of the complexity of the case or any action or inaction of the Applicant, and there is nothing inherent to the administrative process that requires several years for a decision.

[27] Citing *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 [*Blencoe*] – a leading case on abuse of process amounting from delay in the administrative context – the Applicant argues that the delay amounts to an abuse of process, particularly given the importance of the Decision. Canadian citizenship is a significant interest that is fundamental to full

membership in Canadian society (*Parekh*, at para 52; *Benner v Canada (Secretary of State)*, [1997] 1 SCR 358). Moreover, the Applicant suffers from serious medical conditions and an inability to support himself or to receive appropriate treatment in Colombia, should he be deported.

[28] State-caused delay, without more, will not warrant a stay of proceedings as an abuse of process.

[29] The delay must be unreasonable or inordinate – the assessment of which is contextual and will depend upon the nature and complexity of the case, the facts and issues, the purpose of the proceedings, and whether the party contributed to the delay (*Blencoe*, above, at paras 101, 120-122, 160).

[30] There must also be proof of significant prejudice resulting from the unacceptable delay. Though the Applicant has not alleged that the delay has compromised the fairness of any hearing, as the Supreme Court stated at paragraph 115 of *Blencoe*:

> …[t]he doctrine of abuse of process is not limited to acts giving rise to an unfair hearing; there may be cases of abuse of process for other than evidentiary reasons brought about by delay. It must however be emphasized that <u>few lengthy delays will meet this threshold</u>. I caution that in cases where there is no prejudice to hearing fairness, the delay must be clearly unacceptable and <u>have directly caused a significant prejudice to amount to an abuse of process</u>
>
> [Emphasis added]

[31] To find an abuse of process, the Court must be satisfied that the damage to the public interest in the fairness of the administrative process should the matter proceed exceeds the harm to the public interest in the enforcement of the legislation if the proceedings were halted. Such cases will be "extremely rare", as the proceedings must be "unfair to the point that they are contrary to the interests of justice" (*Blencoe*, at para 120).

[32] It is thus necessary to consider both (i) whether there was an inordinate delay, and (ii) whether the Applicant suffered significant prejudice directly stemming from such delay.

[33] The relevant timeline of events is as follows:

a. June 1999 – the RCMP verified that the Applicant was Luis Alonso Montoya;
b. May 18, 2000 – the Minister served the Applicant a Notice of Intent to Revoke Citizenship, which the Applicant requested be referred to the Federal Court;
c. July 2004 – the Minister commenced an action seeking a declaration the Applicant had obtained Canadian citizenship by false representation or fraud or by knowingly concealing material circumstances;
d. February 2007 – the Federal Court issued the above-requested Order, on consent;
e. February 2009 – the Minister attempted, unsuccessfully, to serve the Report to the Applicant;
f. October 30, 2014 – the Minister successfully served a letter with a copy of the Report to the Applicant; and
g. May 7, 2015 – the GIC issued an Order in Council revoking the Applicant's citizenship.

[34] In the immigration and citizenship context, this Court has considered three main factors, stemming from *Blencoe*, in assessing the reasonableness of the delay: (1) the time taken compared to the inherent time requirements of the matter; (2) the causes of delay; and (3) the impact of the delay (*Parekh*, at paras 30-55; *Canada (Minister of Citizenship and Immigration) v Bilalov*, 2013 FC 887 at paras 21-24 [*Bilalov*]; *Canada (Minister of Citizenship and Immigration) v Ekwi*, 2015 FC 305 at paras 28, 29).

[35] In considering the time taken compared to the inherent time requirements of the matter, I disagree with the Applicant that the delay is 15 years, as various interim proceedings and events break up that time period.

[36] The first period of delay ran from May 18, 2000, when the Applicant was given notice of the Minister's intentions and requested that it be referred to the Federal Court, and February 2004, when the Minister filed an action in Court. Though the Minister has provided no explanation for this four year delay, any delay stemming from that period should have been raised at that stage of the proceedings, as it was in *Parekh*; *Canada (Minister of Citizenship and Immigration) v Modaresi*, 2016 FC 185; *Monla v Canada (Minister of Citizenship and Immigration)*, 2016 FC 44 and *Bilalov*.

[37] Contrary to the Respondent's arguments however, the relevant period for assessing the delay in this instance does not only cover the period between the deadline for the Applicant to provide submissions regarding the Report, and the date when the Applicant ceased to be a Canadian citizen (*Khan v Attorney General of Canada*, T-1029-14). Only assessing delay over

that period could result in the passage of an inordinate and prejudicial period of time between when the affected individual becomes aware of the Minister's intent to revoke citizenship, and when their citizenship is actually revoked.

[38] I find that the period of the delay subsequent to the first period of delay discussed above should commence following a determination that the Applicant had obtained his citizenship through false representation or fraud or by knowingly concealing material circumstances, which in this case occurred on February 14, 2007. At this point, the facts required to support revocation of the Applicant's citizenship had been admitted. A period of seven years and eight months passed from that date until the Applicant was served with a copy of the Minister's Report on October 30, 2014. The Report indicates that the Minister attempted, unsuccessfully, to serve the Applicant in February of 2009; however, there is no explanation for why it took a further five years to again attempt service in 2014.

[39] This was not a complex case, nor one requiring further investigation. Quite clearly, this appears to be a case that "was not given the priority it deserved", particularly in light of the interest at stake (*Parekh*, at para 42 citing *R v Sadiq*, [1991] 1 FC 757 at para 31).

[40] On the second of the above issues to consider – the causes of the delay – I note that the Minister has offered no explanation for the delay in preparing the Report and serving it upon the Applicant.

[41] In the absence of any reasons which might justify the delay, I find that the delay of seven years and eight months or even of five years (if calculated from the date of first attempted service to actual service) is inordinate. The case was not complex, the necessary facts were admitted, the purpose of the proceedings involves revocation of an important right, and there is no evidence that the Applicant contributed to the delay.

[42] The third of the above enumerated factors considers the impact of the delay. Evidence must show that the delay "directly caused a significant prejudice to amount to an abuse of process" (*Blencoe*, at para 115).

[43] The Applicant has presented evidence that he had steady employment in Canada for approximately 19 years, and that he suffers from various medical conditions which have left him unfit for employment. He claims that the delay in revocation deprived his ability to obtain a pension in Colombia, and that his medical conditions make him unable to work or receive appropriate treatment there. The Applicant alleges he has established a life in Canada with family and friends, and that he has not been similarly able to do so in Colombia.

[44] I find that this is evidence of potential prejudice to the Applicant is not directly caused by the delay, and is either not "significant prejudice" or is only applicable should he ultimately be deported. Given the reason the Applicant's citizenship is being revoked, he may face deportation in the future. However, it is not for the Court to speculate or make a determination on the harm that might cause at the present time.

[45] In my view, the delay, though undoubtedly inordinate, did not cause the Applicant actual prejudice of such a magnitude that the public's sense of decency and fairness would be offended by the delay (*Blencoe*, at paras 33, 121-122). This is not a situation like *Parekh*, where the affected parties were denied passport issuance and an ability to sponsor their daughter for many years due to administrative inattention. Nor is it a case where the Applicant's right to procedural fairness in the hearing context has been affected by the delay (*Beltran v Canada (Minister of Citizenship & Immigration)*, 2011 FC 516).

[46] Delay only amounts to abuse of process in the clearest of cases (*Blencoe*, at para 120), and in my opinion, this is not such a case.

B. *Was the Decision of the GIC reasonable?*

[47] The Applicant argues that the Decision is unreasonable because the GIC did not consider his humanitarian and compassionate grounds, including the hardship the Applicant would suffer if returned to Colombia.

[48] Judicial review should proceed on the basis of the evidence that was before the decision-maker, and the GIC cannot be faulted for not having considered information that was not before him. Though such evidence might have had some relevance to the GIC's Decision, the Applicant was provided the opportunity to provide any information he wished to have considered by the Minister and the GIC within 30 days of receiving the October 14, 2015 letter. He did not do so. Further, though the Applicant was granted leave to introduce new evidence in this judicial

review, the admission of such evidence was intended to support his allegations of prejudice and abuse of process, and cannot be used to challenge the reasonableness of the GIC's Decision.

[49] The Applicant also alleges that his misrepresentation in obtaining citizenship was neither intentional, nor a misrepresentation. Not only is this irrelevant to the judicial review, but the denial directly contradicts the Minutes of Settlement pursuant to the Court's February 2007 Consent Order (T-1369-04) that states "the Defendant [Applicant herein] concedes that he knew that he didn't have all the requirements for citizenship stated on his application form" and "admits that he falsely declared on his application for Canadian citizenship … no absences from Canada". The Consent Order declared that the Applicant obtained citizenship by false misrepresentation, fraud or knowingly concealing material circumstances. That determination is final and the Applicant cannot now argue it was erroneously arrived at in this proceeding.

[50] The Applicant further argues that his deportation will violate section 7 of the Charter. This judicial review does not directly involve issues of deportation, and there is no evidence of deportation proceedings, or of its inevitability. Revocation of the Applicant's citizenship renders him a permanent resident, pursuant to subsection 46(2) of the *IRPA*, as indicated in the Minister's Report. Though the Applicant may ultimately be subject to removal from Canada, I agree with the Respondent that the Applicant has failed to demonstrate how, at this juncture, revocation of his citizenship constitutes a deprivation of his life, liberty or security of his person.

[51] This application is thus dismissed, as the Applicant has not demonstrated that the inordinate delay leading to his citizenship revocation amounted to an abuse of process, or that the decision of the GIC was unreasonable.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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