Federal Court  Cour fédérale

Date: 20160803

Docket: T-232-16

Citation: 2016 FC 896

Ottawa, Ontario, August 3, 2016

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

NISREEN AHAMED MOHAMED NILAM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] The Applicant seeks an order of *mandamus* to compel the responsible Citizenship Officer to continue to process his citizenship application without regard to the cessation proceedings now underway.

II. BACKGROUND

[2] The Applicant is a citizen of Sri Lanka. He was granted refugee protection in Canada in 2009 based on his alleged fear of persecution by the Liberation Tigers of Tamil Eelam. He became a permanent resident of Canada in January 2011 and currently resides in Vancouver, British Columbia.

[3] After being granted permanent residence in Canada, the Applicant returned to Sri Lanka for extended stays between August 2011 and May 2013. The Applicant renewed his Sri Lankan passport and travelled to Sri Lanka twice for extended periods of time to visit his family and to be married.

[4] The Applicant is the subject of ongoing cessation proceedings pursuant to ss 108(1)(a) and (2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], being heard by the Refugee Protection Division of the Immigration and Refugee Board of Canada [RPD] as a result of his alleged re-availment of Sri Lanka's protection. By a decision dated March 27, 2015, the RPD denied the Minister's application for cessation. The Minister filed an application for judicial review of that decision.

[5] On October 8, 2015, Justice Mactavish of this Court granted the Minister's application for judicial review and found that the RPD's conclusions that the Applicant did not voluntarily return to Sri Lanka and did not intend to re-vail himself of the country's protection to be unreasonable: *Canada (Citizenship and Immigration) v Nilam*, 2015 FC 1154 at paras 13-19. The

Court ordered that the matter be re-determined by the RPD, but a new hearing has not yet been scheduled.

[6] On April 11, 2015, the Applicant applied for Canadian citizenship. On July 15, 2015, the Applicant was invited to appear for an interview, to write his knowledge test and to verify his identity documents in support of his application. On July 30, 2015, the Applicant took his citizenship test and presented his documentation for review. The Applicant passed the knowledge examination, met the language requirements and confirmed his physical presence in Canada for 1130 out of the 1460 days prior to the date of his application.

[7] On December 7, 2015, counsel for the Applicant wrote to Citizenship and Immigration Canada [CIC] requesting an update on the Applicant's citizenship application.

[8] On January 4, 2016, the Applicant was advised by letter sent by a Citizenship Officer that on August 4, 2015, his citizenship application proceeding had been suspended under s 13.1 of the *Citizenship Act*, RSC, 1985, c C-29 [*Citizenship Act*], due to the cessation proceeding scheduled to be re-determined by the RPD as a result of the Federal Court's decision.

III. ISSUE

[9] The only issue to be determined is whether the Applicant has met the requirements for an order of *mandamus*.

IV. STATUTORY PROVISIONS

[10] The following provisions from the *Citizenship Act* are relevant in this proceeding:

Grant of citizenship	**Attribution de la citoyenneté**
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 :
(a) makes application for citizenship;	a) en fait la demande;
(b) is eighteen years of age or over;	b) est âgée d'au moins dix-huit ans;
(c) is a permanent resident within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act, has, subject to the regulations, no unfulfilled conditions under that Act relating to his or her status as a permanent resident and has, since becoming a permanent resident,	c) est un résident permanent au sens du paragraphe 2(1) de la Loi sur l'immigration et la protection des réfugiés, a, sous réserve des règlements, satisfait à toute condition rattachée à son statut de résident permanent en vertu de cette loi et, après être devenue résident permanent :
(i) been physically present in Canada for at least 1,460 days during the six years immediately before the date of his or her application,	(i) a été effectivement présent au Canada pendant au moins mille quatre cent soixante jours au cours des six ans qui ont précédé la date de sa demande,
(ii) been physically present in Canada for at least 183 days during each of four calendar years that are fully or partially within the six years immediately before the date of his or her application, and	(ii) a été effectivement présent au Canada pendant au moins cent quatre-vingt trois jours par année civile au cours de quatre des années complètement ou partiellement comprises dans les six ans qui ont précédé la date de sa demande,
(iii) met any applicable requirement under the Income	(iii) a rempli toute exigence applicable prévue par la Loi de

Tax Act to file a return of income in respect of four taxation years that are fully or partially within the six years immediately before the date of his or her application;

l'impôt sur le revenu de présenter une déclaration de revenu pour quatre des années d'imposition complètement ou partiellement comprises dans les six ans qui ont précédé la date de sa demande;

(c.1) intends, if granted citizenship,

c.1) a l'intention, si elle obtient la citoyenneté, selon le cas :

(i) to continue to reside in Canada,

(i) de continuer à résider au Canada,

(ii) to enter into, or continue in, employment outside Canada in or with the Canadian Armed Forces, the federal public administration or the public service of a province, otherwise than as a locally engaged person, or

(ii) d'occuper ou de continuer à occuper un emploi à l'étranger, sans avoir été engagée sur place, au service des Forces armées canadiennes ou de l'administration publique fédérale ou de celle d'une province, son père ou sa mère — qui est citoyen ou résident permanent — et est, sans avoir été engagée sur place, au service, à l'étranger, des Forces armées canadiennes ou de l'administration publique fédérale ou de celle d'une province;

(d) if under 65 years of age at the date of his or her application, has an adequate knowledge of one of the official languages of Canada;

d) si elle a moins de 65 ans à la date de sa demande, a une connaissance suffisante de l'une des langues officielles du Canada;

(e) if under 65 years of age at the date of his or her application, demonstrates in one of the official languages of Canada that he or she has an adequate knowledge of Canada and of the responsibilities and privileges of citizenship; and

e) si elle a moins de 65 ans à la date de sa demande, démontre dans l'une des langues officielles du Canada qu'elle a une connaissance suffisante du Canada et des responsabilités et avantages conférés par la citoyenneté;

(f) is not under a removal order

f) n'est pas sous le coup d'une

and is not the subject of a declaration by the Governor in Council made pursuant to section 20.

mesure de renvoi et n'est pas visée par une déclaration du gouverneur en conseil faite en application de l'article 20.

Suspension of processing

Suspension de la procédure d'examen

13.1 The Minister may suspend the processing of an application for as long as is necessary to receive

13.1 Le ministre peut suspendre, pendant la période nécessaire, la procédure d'examen d'une demande :

(a) any information or evidence or the results of any investigation or inquiry for the purpose of ascertaining whether the applicant meets the requirements under this Act relating to the application, whether the applicant should be the subject of an admissibility hearing or a removal order under the Immigration and Refugee Protection Act or whether section 20 or 22 applies with respect to the applicant; and

a) dans l'attente de renseignements ou d'éléments de preuve ou des résultats d'une enquête, afin d'établir si le demandeur remplit, à l'égard de la demande, les conditions prévues sous le régime de la présente loi, si celui-ci devrait faire l'objet d'une enquête dans le cadre de la Loi sur l'immigration et la protection des réfugiés ou d'une mesure de renvoi au titre de cette loi, ou si les articles 20 ou 22 s'appliquent à l'égard de celui-ci;

(b) in the case of an applicant who is a permanent resident and who is the subject of an admissibility hearing under the Immigration and Refugee Protection Act, the determination as to whether a removal order is to be made against the applicant.

b) dans le cas d'un demandeur qui est un résident permanent qui a fait l'objet d'une enquête dans le cadre de la Loi sur l'immigration et la protection des réfugiés, dans l'attente de la décision sur la question de savoir si une mesure de renvoi devrait être prise contre celui-ci.

[11] The following provisions of the *IRPA* are relevant in this proceeding:

Cessation of refugee protection — foreign national	**Perte de l'asile — étranger**
40.1 (1) A foreign national is inadmissible on a final determination under subsection 108(2) that their refugee protection has ceased.	40.1 (1) La décision prise, en dernier ressort, au titre du paragraphe 108(2) entraînant la perte de l'asile d'un étranger emporte son interdiction de territoire.
(2) A permanent resident is inadmissible on a final determination that their refugee protection has ceased for any of the reasons described in paragraphs 108(1)(a) to (d)	(2) La décision prise, en dernier ressort, au titre du paragraphe 108(2) entrainant, sur constat des fait mentionnes à l'un des alinéas 108(1)(a) à (d), la perte d l'asile d'un résident permanent emporte son interdiction de territoire.
Permanent resident	**Résident permanent**
46 (1) A person loses permanent resident status	46 (1) Emportent perte du statut de résident permanent les faits suivants :
(c.1) on a final determination under subsection 108(2) that their refugee protection has ceased for any of the reasons described in paragraphs 108(1)(a) to (d);	c.1) la décision prise, en dernier ressort, au titre du paragraphe 108(2) entraînant, sur constat des faits mentionnés à l'un des alinéas 108(1)a) à d), la perte de l'asile;
Rejection	**Rejet**
108 (1) A claim for refugee protection shall be rejected, and a person is not a Convention refugee or a person in need of protection, in any of the following circumstances:	108 (1) Est rejetée la demande d'asile et le demandeur n'a pas qualité de réfugié ou de personne à protéger dans tel des cas suivants :
(a) the person has voluntarily	a) il se réclame de nouveau et

reavailed themself of the protection of their country of nationality;

volontairement de la protection du pays dont il a la nationalité;

(b) the person has voluntarily reacquired their nationality;

b) il recouvre volontairement sa nationalité;

(c) the person has acquired a new nationality and enjoys the protection of the country of that new nationality;

c) il acquiert une nouvelle nationalité et jouit de la protection du pays de sa nouvelle nationalité;

(d) the person has voluntarily become re-established in the country that the person left or remained outside of and in respect of which the person claimed refugee protection in Canada; or

d) il retourne volontairement s'établir dans le pays qu'il a quitté ou hors duquel il est demeuré et en raison duquel il a demandé l'asile au Canada;

(e) the reasons for which the person sought refugee protection have ceased to exist.

e) les raisons qui lui ont fait demander l'asile n'existent plus.

Cessation of refugee protection

Perte de l'asile

(2) On application by the Minister, the Refugee Protection Division may determine that refugee protection referred to in subsection 95(1) has ceased for any of the reasons described in subsection (1).

(2) L'asile visé au paragraphe 95(1) est perdu, à la demande du ministre, sur constat par la Section de protection des réfugiés, de tels des faits mentionnés au paragraphe (1).

Effect of decision

Effet de la décision

(3) If the application is allowed, the claim of the person is deemed to be rejected.

(3) Le constat est assimilé au rejet de la demande d'asile.

V. ARGUMENTS

A. *Applicant*

[12] The Applicant submits that by meeting all conditions for Canadian citizenship, he has acquired a right to Canadian citizenship.

[13] The test for *mandamus* was set out in *Dragan v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 211 at para 39 [*Dragan*]:

> (1) There must be a public legal duty to act.
>
> (2) The duty must be owed to the applicant.
>
> (3) There is a clear right to the 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 will be of some practical value or effect.
>
> (6) The Court in the exercise of discretion finds no equitable bar to the relief sought.
>
> (7) On a "balance of convenience" an order in the nature of *mandamus* should issue.

[14] The language of s 5 of the *Citizenship Act* is mandatory, and says that an applicant "shall" be granted citizenship where he or she meets all of the necessary requirements. There is

therefore a duty to act owed to the Applicant and the suspension of the process is unauthorized. The Applicant argues that the first two conditions of the test for *mandamus* (1 and 2) have therefore been met.

[15] The Applicant notes that in the recent decision of *Godinez Ovalle v Canada (Citizenship and Immigration)*, 2015 FC 935 [*Godinez Ovalle*], I stated the following:

> [64] …The purpose of the suspension in this case is to allow CBSA to conduct cessation proceedings that may result in the Applicant losing permanent residence status at some time in the future. I do not think that either the old s 17 or the present s 13.1 authorize suspension for that reason …The Minister has suspended the citizenship application to give CBSA time to, possibly, strip the Applicant of his permanent residence status at some time in the future so that he will no longer be eligible for citizenship. In my view, that is a misplaced and abusive use of s 13.1.
>
> [65] I say this because under s 13.1 those specific instances where this provision can be used to suspend the processing of an application, and that are contingent upon something that could happen in the future, are clearly set out. They deal with admissibility and security issues. Re-availment, and cessation proceedings based upon re-availment, are not admissibility or security issues. Even if cessation proceedings before the RPD could be called an investigation or an inquiry, they are not an investigation or inquiry into whether the Applicant meets the requirements under the Act; they are an investigation or an inquiry into whether the Applicant should be stripped of a qualification and a requirement (permanent residence) that CIC knows full-well he holds because CIC has granted and confirmed that requirement.

[16] The Applicant also says that the third criteria for *mandamus* (3(a) and 3(b)) are also fulfilled in this case. He says he has met all of the requirements for citizenship (including age, status as a permanent resident, and knowledge of an official language). The delay in the processing of his application is unnecessary, unreasonable and done for an improper purpose. The Respondent informed the Applicant of the status of his application only after his counsel

requested an explanation as to what else was required, or notice of when the citizenship oath would be scheduled.

B. *Respondent*

[17] The Respondent says that the Applicant has not demonstrated that an order of *mandamus* is warranted in the present case. The Applicant has not established the presence of a public duty to act, unreasonable delay, or that the balance of convenience is in his favour: *Apotex Inc v Canada (Attorney General)*, [1994] 1 FC 742 (CA); aff'd [1994] 3 SCR 1100.

[18] The Court has recognized that an applicant's immigration status should be conclusively settled, including by the RPD in cessation proceedings, prior to the determination of his or her citizenship application: *Jaber v Canada (Citizenship and Immigration)*, 2013 FC 1185 at para 32; *Tapie v Canada (Citizenship and Immigration)*, 2007 FC 1048 at paras 9-12; *Seyoboka v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1290 at para 10.

[19] The Respondent says that for an order for *mandamus* to issue, an applicant must show that officials have been unresponsive, slow or have otherwise not dealt with the issue in a reasonable manner: *Tumarkin v Canada (Citizenship and Immigration)*, 2014 FC 915 at paras 17-18. Since being received, the Applicant's citizenship application has been processed towards a determination, including the current suspension. The Respondent notes that the RPD may very well reject the Minister's cessation application and the citizenship application may ultimately be approved, but until such a determination is made, the Minister is authorized to suspend the application.

[20] The Applicant has candidly admitted that he is applying for citizenship in order to forestall an RPD decision that could result in his losing refugee protection and permanent residence status in Canada. The Respondent submits that an order of *mandamus* would perpetuate an unseemly race between the process being followed by the Minister and that being pursued by the Applicant.

[21] The Respondent takes particular issue with the Applicant's reliance on *Godinez Ovalle*, above. The Respondent notes that, in that case, the applicant's citizenship application was suspended four months prior to s 13.1 of the *Citizenship Act* coming into force. Here, the section was already in force before the Applicant applied for citizenship and his application was suspended immediately once it was determined that the cessation proceeding were still ongoing. The Respondent goes on to assert that not only are the present facts distinguishable from those of *Godinez Ovalle*, but the decision was also wrong in law as it overlooked *IRPA* provisions with respect to cessation of refugee protection and the conditional nature of permanent resident status. Better parallels can be found in Justice O'Keefe's decision in *Valverde v Canada (Citizenship and Immigration)*, 2015 FC 1111 [*Valverde*] which found that s 13.1 did not apply where the Minister had purported to suspend the applicant's citizenship application before s 13.1 came into force. The Respondent also notes similarities between this case and *Khalifa v Canada (Citizenship and Immigration)*, 2016 FC 119, wherein Justice Mosley observed that a citizenship application does not shield an applicant from an investigation into his refugee status.

[22] Finally, as regards the balance of convenience, the Minister submits that it favours completion of the process initiated under s 108 of the *IRPA* which will determine whether the

Applicant has met a fundamental requirement for Canadian citizenship. The Applicant has not demonstrated that the delay has caused significant prejudice. He remains in Canada as a permanent resident and is authorized to work: *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at para 101; *Vaziri v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1159 at para 52. The Court must consider which of the two parties will suffer the greater harm from a refusal or granting of the order requested. The Respondent says that here, the order would do harm to the public interest by interfering with the administration of Canada's citizenship program.

VI. ANALYSIS

A. *Section 13.1 of the Citizenship Act*

[23] The Minister has suspended the processing of the Applicant's application for citizenship relying upon s 13.1 of the *Citizenship Act* which reads as follows:

13.1 The Minister may suspend the processing of an application for as long as is necessary to receive	13.1 Le ministre peut suspendre, pendant la période nécessaire, la procédure d'examen d'une demande :
(a) any information or evidence or the results of any investigation or inquiry for the purpose of ascertaining whether the applicant meets the requirements under this Act relating to the application, whether the applicant should be the subject of an admissibility hearing or a removal order under the Immigration and Refugee Protection Act or whether	a) dans l'attente de renseignements ou d'éléments de preuve ou des résultats d'une enquête, afin d'établir si le demandeur remplit, à l'égard de la demande, les conditions prévues sous le régime de la présente loi, si celui-ci devrait faire l'objet d'une enquête dans le cadre de la Loi sur l'immigration et la protection des réfugiés ou d'une mesure de renvoi au titre de cette loi,

section 20 or 22 applies with respect to the applicant; and	ou si les articles 20 ou 22 s'appliquent à l'égard de celui-ci;
(b) in the case of an applicant who is a permanent resident and who is the subject of an admissibility hearing under the Immigration and Refugee Protection Act, the determination as to whether a removal order is to be made against the applicant.	b) dans le cas d'un demandeur qui est un résident permanent qui a fait l'objet d'une enquête dans le cadre de la Loi sur l'immigration et la protection des réfugiés, dans l'attente de la décision sur la question de savoir si une mesure de renvoi devrait être prise contre celui-ci.

[24] At the hearing before me, Minister's counsel clarified that the Minister had suspended the citizenship application to receive any information or evidence or the results of any investigation or inquiry "for the purpose of ascertaining whether the application meets the requirements under this Act relating to the application…." The Minister is not concerned about an admissibility hearing or a removal order under *IRPA* or whether ss 20 or 22 apply with respect to the Applicant. Nor does the Minister rely upon s 13.1(b).

[25] The Minister has done this because cessation proceedings are underway so that the Applicant could, at some time in the future (no one knows when), lose his permanent resident status because he has ceased to be a refugee, and under s 5 of the *Citizenship Act* permanent residence is a prerequisite for citizenship.

[26] My review of the record leads me to conclude that the Applicant has satisfied all other requirements for citizenship and that, if it were not for the suspension of the citizenship

application to await the outcome of the cessation proceedings, he would have been granted citizenship some time ago.

[27] So the central issue in this application is whether s 13.1 authorizes the Minister to suspend the processing of the Applicant's citizenship application pending the final outcome of the cessation proceedings.

[28] This issue has previously come before me in *Godinez Ovalle*, above. I decided that s 13.1 did not give the Minister the power to suspend a citizenship application in these circumstances:

> [63] Clearly, the wording of this new provision allows suspension beyond the narrow security and admissibility context and permits it "for as long as necessary" to receive "any information or evidence or the results of any investigation or inquiry for the purpose of ascertaining whether the applicant meets the requirements under the Act relating to the application…." The issue for me is whether these words authorize the Minister to suspend a citizenship application in order to allow CBSA to conduct cessation proceedings before the RPD.
>
> [64] As the Applicant points out, he is currently a permanent resident and will remain one until such time as that status is removed, which may never happen. So he does meet the permanent residence requirement under the Act. No inquiry is needed to establish that fact. The purpose of the suspension in this case is to allow CBSA to conduct cessation proceedings that may result in the Applicant losing permanent residence status at some time in the future. I do not think that either the old s 17 or the present s 13.1 authorize suspension for that reason. The Minister has suspended the application not because the Applicant does not meet the permanent residence requirement (it was reconfirmed in 2011 after the Applicant's final visit to Guatemala with a full knowledge of the Applicant's comings and goings). The Minister has suspended the citizenship application to give CBSA time to, possibly, strip the Applicant of his permanent residence status at some time in the future so that he will no longer be eligible for citizenship. In my view, that is a misplaced and abusive use of s 13.1.

[65] I say this because under s 13.1 those specific instances where this provision can be used to suspend the processing of an application, and that are contingent upon something that could happen in the future, are clearly set out. They deal with admissibility and security issues. Re-availment, and cessation proceedings based upon re-availment, are not admissibility or security issues. Even if cessation proceedings before the RPD could be called an investigation or an inquiry, they are not an investigation or inquiry into whether the Applicant meets the requirements under the Act; they are an investigation or an inquiry into whether the Applicant should be stripped of a qualification and a requirement (permanent residence) that CIC knows full-well he holds because CIC has granted and confirmed that requirement.

…

[73] In my view, there is also no statutory authority for what CIC has done in the present case. As I have already said, I do not think that s 17 of the old *Citizenship Act* or s 13.1 of the present *Citizenship Act* address the Applicant's situation. This is because the Applicant clearly met all of the requirements of the *Citizenship Act* when he was interviewed on February 14, 2014. He had received immigration clearance on May 28, 2013 and this was on his application file. Neither s 17 nor s 13.1 say that the Minister can or should suspend an application to investigate the cessation process though CBSA. Maybe s 13.1 should allow for that to occur, but, in my view, it does not. And just as judges cannot make law by attempting to fill in gaps in legislation, nor can public servants give themselves powers by filling gaps through the use of policy directives. It seems to me that this is such an important and far-reaching issue that only Parliament can address and legislate what is to happen if residency concerns arise when someone, such as the Applicant, has permanent residence that has been cleared by CBSA with a full knowledge of the Applicant's visits to Guatemala, and where CBSA has both endorsed his permanent residency card and provided immigration clearance. And it really does seem unfair to me that CIC and/or CBSA should take the steps they did here without alerting the Applicant of the perceived problem. The Respondent says this process should not be a race, but clearly that is what CIC and CBSA have decided it is because, by not alerting the Applicant to the fact that his permanent residency and his chance at citizenship were at stake, they gave themselves the head start they felt they needed to investigate and complete the cessation process before the Applicant could take any action (including a *mandamus* application) to protect his rights. As things stand, this is a race, but it is a race in which people like the Applicant may not even know they are running because of lack of

> notification and strenuous resistance to disclosure by a powerful state apparatus. In my view, only Parliament can address this problem if it is considered to be one. However, it is noteworthy that when Parliament amended the *Citizenship Act* and brought the present s 13.1 into being, it did not extend the Minster's suspension powers to include "immigration clearance," so that, for the time being at least, I think it has to be assumed that what Justice Mactavish said about this issue generally in *Stanizai* – decided before the new *Citizenship Act* came into force – reflects Parliament's present intentions on this issue. As the Applicant points out, the RPD itself has found that bringing cessation proceedings to vitiate permanent residence after years of delay is contrary to Canada's obligations under both the *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137 and the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. See *Re X* (7 October 2014), Vancouver VB4-01572 (RPD) at para 35. In addition, in reviewing a decision to bring an application for cessation before the RPD, Justice Mosley commented on the fact that long-time permanent residents' travel was always within the knowledge of the Minister which suggested that the Minister "had been lying in the weeds waiting for the legislative change to pursue permanent residents" (*Bermudez*, above, at para 28). The Minister may have received the legislative change necessary to pursue permanent residents, but, in my view, the Minister did not receive the legislative change necessary to suspend citizenship applications to pursue permanent residents in this manner.
>
> [74] If the suspension is not supported by either s 17 of the old *Citizenship Act* or s 13.1 of the new *Citizenship Act* as discussed above, then the Minister is bound by s 5(1) to continue processing the Applicant's application. I note that s 11(5) of the *Citizenship Regulations*, which made it mandatory to forward the file to a citizenship judge for consideration, has been repealed. But, in my view, the repeal of s 11(5) of the *Citizenship Regulations* does not affect the Minister's obligation under s 5(1) to grant the Applicant citizenship if he fulfills the statutory requirements. In this case the Applicant's citizenship application was improperly suspended four months before s 13.1 came into force and the Minister seems to have made no effort to invoke and rely upon s 13.1 until after this *mandamus* application was filed on October 23, 2014.

[29] The Minister did not seek to certify a question or to appeal my decision in *Godinez Ovalle*. There are different facts in the present case from what came before me in *Godinez*

Ovalle, but they do not affect the basic issue of whether the Minister can use s 13.1 to suspend a citizenship application if cessation proceedings are underway.

[30] As justification for disregarding my decision in *Godinez Ovalle*, the Minister relies upon *Valverde*, above, which was decided by Justice O'Keefe on September 15, 2015, a month and a half after my decision dated July 30, 2015. The Respondent relies upon paragraph 52 of Justice O'Keefe's decision which reads as follows:

> [52] On August 1, 2014, section 13.1 of the *Citizenship Act* came into force, providing explicit authority for the Minister to suspend processing the citizenship application for as long as is necessary to receive the results of any inquiry that would implicate the applicant's qualification for citizenship. However, on August 15, 2013, section 13.1 of the *Citizenship Act* had not yet come into force. At that time and prior to this amendment, the Minister could only put an application on hold pursuant to the prohibitions listed under the *Citizenship Act*. Here, the applicant did not fall under any of these prohibitions.

[31] This, of course, does not address the issue that was before me in *Godinez Ovalle*. Justice O'Keefe was not required to interpret the scope of s 13.1 because it had not come into force at the material time, and Justice O'Keefe granted *mandamus* in *Valverde* on the basis, *inter alia*, that "CIC put a hold on the applicant's citizenship application without any statutory authority" (para 63). So Justice O'Keefe did not have to decide whether s 13.1 provided authority to suspend the citizenship process on the grounds that have been used to justify suspension in this case, or that were advanced in *Godinez Ovalle*. When Justice O'Keefe says in para 52 of *Valverde* that "[o]n August 1, 2014, section 13.1 of the *Citizenship Act* came into force, providing explicit authority for the Minister to suspend processing the citizenship application for as long as is necessary to receive the results of any inquiry that would implicate

the applicant's qualification for citizenship," he was giving a rough summary of what s 13.1 says; he was not deciding whether s 13.1 gave the Minister authority to suspend a citizenship application that was otherwise complete pending the outcome of cessation proceedings.

[32] In fact, Justice O'Keefe makes specific reference to *Godinez Ovalle* and its inapplicability to the facts before him:

> [61] The parties also made submissions with respect to Mr. Justice James Russell's decision in *Godinez Ovalle v Canada (Minister of Citizenship and Immigration)*, 2015 FC 935. I am of the view that this decision does not assist the respondent. In that case, an order for *mandamus* was granted after the respondent suspended the processing of the applicant's citizenship application pursuant to section 13.1 of the Act.
>
> [62] Had the CIC reversed the applicant's immigration clearance on August 15, 2013 pending inquiries, subsection 11(1) of the Regulations would not have been satisfied and accordingly, the Registrar's duty to forward the application to a citizenship judge pursuant to subsection 11(5) of the Regulations would not have been required.
>
> [63] But this was not what happened. In my view, what happened was that CIC put a hold on the applicant's citizenship application without any statutory authority.

[33] Had Justice O'Keefe felt that he had to deviate from my conclusions about s 13.1 in *Godinez Ovalle*, he would have done so in accordance with the rules of judicial comity.

[34] So I cannot accept that the Minister had any justification or authority to suggest that the Court's position on whether s 13.1 could be used in these circumstances was unclear. The Minister declined to pursue an appeal of *Godinez Ovalle* and then looked for a way to ignore the decision.

[35] That being the case, I see no reason to differ in the present case from my reasons in *Godinez Ovalle* as regards the interpretation of s 13.1. In my view, it does not provide the Minister with the statutory authority to suspend the processing of a citizenship application pending the final outcome of cessation proceedings. The Minister complains that this places him in a difficult situation when it comes to coordinating citizenship applications and cessation proceedings. However, as I pointed out in *Godinez Ovalle*, the obvious solution to such a problem is to appeal and seek the guidance of the Federal Court of Appeal or to pursue a legislative amendment to allow the Minister to do what he thinks is necessary in such circumstances. To simply ignore the Court's decision and proceed as though *Godinez Ovalle* had never been decided is neither legal or conducive to a fair and efficient system. It would appear that the Minister has come around to this way of thinking because he is now, as part of this application, requesting that the issue be placed before the Federal Court of Appeal by way of a certified question.

B. *Mandamus*

[36] The criteria for a grant of *mandamus* are not in dispute in this application. In *Dragan*, above, at para 39, Justice Kelen reiterated the seven elements established by the Federal Court of Appeal for the issuance of a writ of *mandamus*:

> (1) There must be a public legal duty to act.
>
> (2) The duty must be owed to the applicant.
>
> (3) There is a clear right to the 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 will be of some practical value or effect.
>
> (6) The Court in the exercise of discretion finds no equitable bar to the relief sought.
>
> (7) On a "balance of convenience" an order in the nature of *mandamus* should issue.

[37] On the record before me, I find that the Applicant has met all of these criteria.

[38] The Applicant has met all of the requirements for citizenship. Other than the possible loss of permanent residence status as a result of the cessation proceedings, the Respondent does not dispute this, but has asked for some flexibility in any order I make to bring the Applicant's file up to date, if necessary.

[39] The Minister has a mandatory public duty under s 5(1) of the *Citizenship Act* to grant citizenship to the Applicant who has met the requirements and the Applicant has a clear right to the performance of that duty.

[40] The Applicant's counsel has requested that the application process proceed to completion and the Respondent has refused by letter dated January 4, 2016 to process the application.

[41] No other adequate remedy is available to the Applicant and the order will obviously be of some practical value and effect to him.

[42] No equitable bar to relief has been raised and I can see none on the record.

[43] The balance of convenience favours the Applicant. The Respondent has no legal authority to suspend the application process and, but for the suspension and refusal to process, the Applicant would, in all likelihood, be a Canadian citizen by now.

C. *Certification*

[44] The Respondent has raised the following question for certification:

> Can the Minister suspend the processing of an application for citizenship pursuant to his authority under s. 13.1 of the *Citizenship Act*, to await the results of cessation proceedings in respect of the applicant under s 108(2) of the *Immigration and Refugee Protection Act*?

[45] The Applicant agrees to the question but has suggested some variations for purposes of clarification:

> Does s 13.1 of the *Citizenship Act* authorize the Minister of Immigration, Refugees and Citizenship Canada to suspend for as long as necessary the processing of an application for a grant of citizenship pursuant to s 5(1) of the *Citizenship Act*, to receive any information or evidence or the results of any investigation or inquiry regarding whether a permanent resident should be the subject of a cessation proceeding pursuant to s 108(2) of *IRPA* or, if such a proceedings has already been initiated by the Minister, the results of such proceeding, when the person has otherwise already met all the requirements for a grant of citizenship?

[46] I note that a similar question was proposed by the Minister before Justice Bell in *Mokhtar Tayeb Ali v Canada (Citizenship and Immigration*), T-1799-15, heard on June 2, 2016 but Justice Bell has not yet issued his decision.

[47] It would appear that the Respondent is now of the view that this issue needs to be addressed by the Federal Court of Appeal, and the Applicant has not seriously opposed the Respondent's position. In view of some of the arguments raised in this application (and which were not made in *Godinez Ovalle*), I am now of the view that the Federal Court of Appeal's authoritative guidance is required and that the criteria for certification are satisfied. The threshold for certifying a question is whether it is a serious question of general importance that would be dispositive of the appeal. I think that threshold is established in this case.

D. *Costs*

[48] In my view, special reasons for costs arise on the present facts. As *Huot v Canada (Public Safety and Emergency Preparedness)*, 2009 FC 917, makes clear, special costs under Rule 22 are warranted where there is evidence of bad faith, or where a party has acted in a manner that may be characterized as unfair, oppressive or improper.

[49] In the present case, I find that:

(a) The Minister's servants have acted in bad faith and in an improper manner by simply ignoring the Court's clear decision in *Godinez Ovalle*, above, a decision which they could have sought to appeal but did not. For reasons given, I do not accept that Justice O'Keefe's decision in *Valverde*, above, provides any kind of justification for ignoring *Godinez Ovalle*;

(b) As a result of the conduct of the Minister's servants in ignoring *Godinez Ovalle*, the Applicant has been put to the expense of litigating the s 13.1 issue again and was forced to bring this *mandamus* application before the Court;

(c) The Applicant's conduct throughout has been blameless. He acquired his permanent residence status honestly and in accordance with Canadian law. He has also satisfied the conditions for citizenship but has been deprived of that status by the improper conduct of the Minister's servants as set out above;

(d) There is also a distinct element of unfairness and subterfuge evident in the conduct of the Minister's servants. As was the case in *Godinez Ovalle*, the Minister suspended the Applicant's citizenship application without notification that there was any problem and left the Applicant to resort to legal means to find out what had occurred. Given the decision in *Godinez Ovalle*, it could hardly have been apparent to the Applicant that the Minister would again have resorted to s 13.1 as a justification for such action. This resulted in further delay and unnecessary anxiety to the Applicant;

(e) The Respondent also ignored the decision of the RPD which dismissed the cessation application and proceeded as though that decision had no legal effect.

[50] Given the above, it is my view that the Minister's servants have behaved in a reprehensible manner that warrants solicitor and client costs. The Respondent has deliberately chosen to ignore a clear Court decision on the scope of s 13.1 without seeking to appeal that decision, and has put the Applicant to the trouble of having to litigate the issue again.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The suspension of the Applicant's citizenship application is vacated and the Respondent shall promptly re-assess the Applicant's citizenship application and shall promptly notify the Applicant of any deficiencies that may have developed since it was last assessed;
2. If there are any deficiencies, then the Applicant shall be allowed a reasonable time and opportunity to remedy them;
3. If there are no deficiencies, or once the deficiencies are remedied, the Applicant's oath ceremony shall be promptly scheduled no later than 15 days after the determination that there are no deficiencies or that any deficiencies have been remedied;
4. The following question is certified:

> Can the Minister suspend the processing of an application for citizenship pursuant to his authority under s. 13.1 of the *Citizenship Act*, to await the results of cessation proceedings in respect of the applicant under s 108(2) of the *Immigration and Refugee Protection Act*?

5. A copy of this decision shall be provided to the RPD so that my findings and conclusions can be taken into account in so far as they are relevant in the cessation proceedings presently underway, and so that the RPD can decide how best to coordinate its proceedings with my findings and judgment in a way that is fair to both parties;

6. The Applicant shall have his costs of this *mandamus* application on a solicitor and client basis.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	NISREEN AHAMED MOHAMED NILAM v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
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JUDGMENT AND REASONS:	RUSSELL J.
DATED:	AUGUST 3, 2016

APPEARANCES:

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