Federal Court  Cour fédérale

Date: 20200330

Docket: T-227-19

Citation: 2020 FC 452

Ottawa, Ontario, March 30, 2020

PRESENT: Mr. Justice McHaffie

BETWEEN:

NINO MONGIOVI GENTILE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

I. Overview

[1] Nino Mongiovi Gentile applied for Canadian citizenship over ten years ago. His current application was suspended for more than four years as the Canadian Border Services Agency (CBSA) and Immigration, Refugees and Citizenship Canada (IRCC) conducted investigations into his admissibility. Mr. Gentile brought this application for judicial review seeking an order of *mandamus* requiring the Minister to process his application.

[2] Subsequent to the hearing of this application, the Minister advised the Court that the CBSA had concluded its most recent investigation. As a result, the Minister lifted the suspension and IRCC continued processing Mr. Gentile's application for citizenship. The parties made written representations on whether the application was moot and whether, if so, the Court ought to exercise its discretion to render a decision nonetheless.

[3] For the reasons that follow, I conclude that this application has been rendered largely moot, and I decline to exercise my discretion to render a decision on the reasonableness of the suspension of Mr. Gentile's citizenship application. However, Mr. Gentile's request for an order requiring the Minister to complete processing of his application, and do so within 60 days, is not moot. In the circumstances—which include the Minister's agreement to process Mr. Gentile's file on a priority basis, the fact that certain clearances need to be updated given the passage of time, as well as the potential delays and disruptions to government services being caused by the COVID-19 pandemic—I conclude that the appropriate order is to require the parties to report to the Court on a monthly basis as to the status of the application, so that any outstanding issues or further delays may be addressed promptly.

[4] I reserve the issue of costs to the final disposition of the matter.

II. Mootness

[5] As the parties agree, the applicable framework for addressing concerns of mootness remains that set out in *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342. There, Justice Sopinka for the Supreme Court of Canada set out a two-step analysis: (1) determine

whether the "tangible and concrete dispute has disappeared and the issues have become academic" such that the case has become moot; and (2) if so, decide whether the court should exercise its discretion to hear the case nonetheless: *Borowski* at p 353.

A. *The Application is Largely Moot*

[6] Mr. Gentile's application for judicial review seeks principally an order of *mandamus*, directing IRCC to complete the processing of his citizenship application. It also seeks associated declaratory relief, including declarations that IRCC unduly delayed the processing of his application and acted unfairly in failing to disclose the reasons for the delay. At the time of the application, and the hearing, Mr. Gentile's application for citizenship was suspended under section 13.1 of the *Citizenship Act*, RSC 1985, c C-29. That section gives the Minister the power to suspend the processing of an application for "as long as is necessary" to receive information, evidence, or the results of investigations or determinations regarding eligibility or admissibility:

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	**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

under the *Immigration and Refugee Protection Act* or whether section 20 or 22 applies with respect to the applicant; and	*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.
[Emphasis added.]	[Je souligne.]

[7] The thrust of Mr. Gentile's application as argued was that the Minister's power under section 13.1 to suspend a citizenship application "for as long as is necessary" to receive the results of an investigation does not allow for an unreasonable suspension, and that the four-year suspension in his case was unreasonable.

[8] As IRCC is now processing Mr. Gentile's citizenship application, his request that this Court decide that the delay was unreasonable and order IRCC to process his application is moot. I say this because the finding would change nothing: a conclusion that the delay was unreasonable and an order requiring IRCC to process the application would put Mr. Gentile in the same position he is now, with IRCC processing his application. To this extent, the "tangible and concrete dispute" has disappeared and the issues have become academic. This is so with

respect to both the *mandamus* order requested (subject to the exception discussed below) and to the related declaratory relief: *Ficek v Canada (Attorney General)*, 2013 FC 430 at paras 11–12.

[9] Mr. Gentile argues that since the Minister could re-suspend his application at any time, the issue continues to "potentially affect" his rights and falls outside the language of *Borowski* describing an issue as moot "when a decision will not have the effect of resolving some controversy affecting or potentially affecting the rights of the parties" [Mr. Gentile's emphasis]: *Borowski* at p 344. I cannot accept this argument.

[10] I note that the "potentially affecting" language cited by Mr. Gentile appears in the headnote of *Borowski* rather than in Justice Sopinka's reasons, which describe a matter as moot "when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties" [emphasis added]: *Borowski* at p 353. Whether using the "potentially affecting" or "may affect" language, *Borowski* does appear to provide some scope to recognize that an issue may not be moot even if its impact on the parties is not certain. However, I do not read it as going so far as to cover any issue that might possibly or speculatively arise or re-arise again in future. In the present case, while I appreciate Mr. Gentile's concern about possible further suspensions given the multiple investigations to date, the potential for a future re-suspension does not rise above mere speculative possibility. Nor would such a re-suspension—if based, for example, on new and relevant information—necessarily even raise the same issues of reasonableness that were raised on this application.

[11] Mr. Gentile also argues that the question is not moot since this Court's guidance is needed to clarify the reasonable limits of section 13.1 of the *Citizenship Act*. However, the fact that Mr. Gentile may disagree with the Minister's approach to section 13.1 does not make the matter one of "live controversy" where the disagreement does not affect Mr. Gentile's situation. In other words, this argument does not go to the question of mootness, but to the question of the Court's discretion under the second branch of the *Borowski* test. I will consider it there.

[12] Similarly, Mr. Gentile's argument that the Minister should not be able to avoid a pending decision by unsuspending the application after the matter has been heard is an issue going to the exercise of discretion, rather than the issue of mootness: *Ficek* at paras 13–15.

[13] I therefore conclude that Mr. Gentile's application is moot, with one exception. Mr. Gentile asks for an order that IRCC "complete" the processing of his application, and that the processing be completed within 60 days. As Mr. Gentile's application has not been completed, this aspect of Mr. Gentile's application is not moot. I will address below whether it is appropriate in the current circumstances to issue an order as sought by Mr. Gentile.

B. *The Court will not Exercise its Discretion*

[14] Justice Sopinka in *Borowski* described three non-exhaustive factors for the Court's exercise of discretion to depart from the usual practice of declining to hear moot cases: (1) the existence of an adversarial context; (2) the concern for judicial economy; and (3) sensitivity to the court's proper law-making role as the adjudicative branch in the Canadian political framework: *Borowski* at pp 358–363; *Sandpiper Distributing Inc v Ringas*, 2019 FC 1264 at

paras 34-35. I am satisfied, as was the Court in *Borowski*, that there is no concern regarding an adversarial context given that the matter has been argued with "much zeal and dedication on both sides": *Borowski* at p 363. The other factors require greater consideration.

[15] Mr. Gentile asks the Court to exercise its discretion to decide the matter, since (i) there is a need to clarify the reasonable limits of the Minister's authority to suspend under section 13.1, particularly in the context of the multiple investigations by IRCC and the CBSA that underlay the suspension in his case; (ii) it is in the public interest because it would resolve the ongoing uncertainty in the law, and facilitate the expeditious resolution of similar cases in future; (iii) Court resources have already been allocated to hearing the matter; and (iv) the Minister should not be able to simply end a suspension to avoid a decision regarding the reasonableness of its conduct.

[16] The third of these arguments can be quickly addressed. The fact that a matter has already been heard does not itself address the concern about judicial economy. Indeed, in *Borowski* itself, the parties argued the matter on its merits, but the Supreme Court still declined to decide the merits on the basis of mootness. The Court noted that "the fact that this Court reserved on the preliminary points and heard the appeal [cannot] be weighed in favour of" hearing the case: *Borowski* at p 363; see also *Nemsila v Canada (Minister of Citizenship and Immigration)*, 1997 CanLII 5160, [1997] FCJ No 630 (CA) at para 16; but see, *contra*, *Canada (Information Commissioner) v Canada (National Defence)*, 2014 FC 205 at para 49, rev'd on other grounds, 2015 FCA 56 [*ICC v DND*]. In the current circumstances, I do not believe that the interests of judicial economy weigh strongly in favour of or against the exercise of discretion.

[17] With respect to the fourth argument, this Court has recognized in some circumstances that a government actor should not be permitted to "rectify a breach" either before a hearing or before a court decision, and thereby avoid a decision by arguing mootness: *Ficek* at paras 13, 24; *ICC v DND* at paras 36–37, 45–48. While I agree that this is a potential risk, it does not necessarily apply in every case where a government decision is made or action taken after an application for judicial review is commenced. Indeed, where an applicant complains of delay and seeks to force the government to act, it could be counterproductive to resolution of the matter if it had to proceed to determination even after the government takes the requested action. In the present case, I am not willing to attribute a motivation of seeking to avoid a determination to either the CBSA or IRCC in respect of Mr. Gentile's application, and believe that the concern expressed in *Ficek* and *ICC v DND* is not material in the present case.

[18] That leaves us with the first two arguments described above, which are closely related. These arguments must be considered in the context of what is and is not in dispute between the parties.

[19] The Minister agrees with Mr. Gentile that the validity of a section 13.1 suspension is susceptible to judicial review, and that "the Court will necessarily look at the reasonableness of the suspension and whether the suspension has been in effect for a longer time than is necessary." As both parties note, this is consistent with the comments of Justice Grammond at paragraph 14 of *Niu v Canada (Citizenship and Immigration)*, 2018 FC 520:

> As any governmental power, the power granted by section 13.1 remains subject to judicial review. The principles of administrative law remain applicable. If, for example, an investigation bears no relationship with a person's entitlement to citizenship, a

> suspension based on section 13.1 might be substantively unreasonable. Likewise, if the suspension remains in effect for a longer time than "is necessary," to use the wording of section 13.1, it might also become unreasonable. I would only add that in those cases, the burden of proving the relevant facts lies on the applicant.
>
> [Emphasis added.]

[20] To similar effect, Justice Manson recently recognized a reasonableness limitation on section 13.1, noting that "it is not for this Court to dictate the length of such an investigation, within reasonable bounds" [emphasis added]: *Zhang v Canada (Citizenship and Immigration)*, 2019 FC 938 at para 38; see also *Nada v Canada (Citizenship and Immigration)*, 2019 FC 590 at para 25. The material question becomes what those "reasonable bounds" are, or how the Court is to assess when a suspension has become unreasonable as being in effect for longer than "is necessary."

[21] In essence, Mr. Gentile argues that a decision on his case would clarify the scope of what constitutes a reasonable suspension under section 13.1 and resolve uncertainty in the law with respect to the section. I believe Mr. Gentile overestimates the power of the Court's potential decision in his case. Given the nature of a suspension under section 13.1, which is made to allow an investigation or inquiry into matters of eligibility, admissibility or security, the assessment of whether a suspension is reasonable or not will be highly fact-specific. While a determination of whether the suspension in Mr. Gentile's case was reasonable would provide an example for consideration of the subject and may be helpful for reference, it would be unlikely to resolve all uncertainties or provide any hard-and-fast rules.

[22] Nor do I believe that I ought to attempt to enter into an analysis of the applicable framework for assessment of reasonableness in a context where that assessment is moot on the facts before me. Mr. Gentile had proposed a modified version of the tripartite test set out in *Conille v Canada (Minister of Citizenship and Immigration)*, [1999] 2 FC 33 (TD). That test is no longer applicable since the enactment of section 13.1, which removed the time limits on suspension previously found in section 17 of the *Citizenship Act*: *Niu* at para 13. Mr. Gentile recognizes this and suggests that to assess whether a suspension under section 13.1 is unreasonably long, the Court should use a variation of the *Conille* test that asks the following questions: (i) is the delay in question longer than the nature of the investigation requires; (ii) is the applicant or their counsel responsible for the delay; and (iii) has the authority responsible for the delay provided a satisfactory justification?

[23] I agree with Mr. Gentile that there is not a significant body of jurisprudence addressing when a suspension will be found unreasonably long. Most of the cases cited by the Minister regarding section 13.1 deal primarily with whether the suspension power applies in particular circumstances, rather than when a suspension will be considered unreasonable: see, *e.g.*, *Canada (Citizenship and Immigration) v Nilam*, 2017 FCA 44 at paras 27, 30 and *Tayeb Ali v Canada (Citizenship and Immigration)*, 2016 FC 1051 at paras 11, 21–24 (applies to awaiting results of cessation proceedings); *GPP v Canada (Citizenship and Immigration)*, 2018 FC 562 at para 34, aff'd 2019 CAF 71 and *Lezama Cerna v Canada (Citizenship and Immigration)*, 2019 FC 756 at paras 17–19 (applies to applications made before August 1, 2014); *Niu* at para 5 and *Nada* at paras 23–26 (applies to investigations of others that are relevant to an applicant's entitlement to citizenship).

[24] Nevertheless, I do not believe that I should attempt to define an analytical framework for assessment of reasonableness such as that proposed by Mr. Gentile, when not required to do so in light of the mootness of the issue. Indeed, even if I were to make a determination on the reasonableness of the suspension of Mr. Gentile's application, it might not be possible or appropriate to try to set out a general test applicable to all situations. The factors relevant to an assessment of whether an application has been suspended for longer than "is necessary" to receive that information may be varied and will depend on the particular context.

[25] In this regard, it is important to consider the third factor identified in *Borowski*, namely the proper role of the Court. In *Borowski*, the Court considered the respective roles of the adjudicative and legislative branches of government; in this case, the issue is as between the adjudicative and executive branches. Mr. Gentile is correct that this Court's judicial review jurisdiction provides it with an important role with respect to determining the legal limits of section 13.1. At the same time, section 13.1 leaves it to the executive branch to assess what is "necessary" in a particular case, subject to the limits of reasonableness. I consider that the third *Borowski* factor speaks in favour of declining to review that assessment when not required to do so.

[26] I therefore decline to exercise my discretion to determine whether the suspension of Mr. Gentile's citizenship application was unreasonably long, in the sense of being longer than reasonably necessary to receive the results of the investigation into his admissibility.

[27] That said, I will comment on one aspect of the evidence put forward by the Minister to justify the ongoing suspension of Mr. Gentile's citizenship application. At the time of the hearing of this application for judicial review, IRCC had completed its own investigation into Mr. Gentile's admissibility. However, IRCC kept the suspension in place to await the results of the CBSA's separate admissibility investigation.

[28] Although IRCC occasionally asked the CBSA for updates, the CBSA simply advised that its investigation was ongoing, and IRCC maintained the suspension in consequence. IRCC did not request or obtain any further information regarding the status of the CBSA's investigation, or any explanation as to why it was taking as long as it was. The result is that although the Minister recognized that this Court could review the reasonableness of a suspension under section 13.1, including as to whether it was unreasonably long in the circumstances, the Minister filed little information that would permit the Court to undertake such an assessment.

[29] The Minister took the position that IRCC was not privy to the details of the CBSA investigation, and therefore could not file evidence regarding the conduct of that investigation. The Minister argued that since the *mandamus* application was directed to IRCC, the Court could only review IRCC's conduct, which suspended the citizenship application based on the CBSA's ongoing investigation. The Minister suggested that at some point, IRCC might decide that the CBSA investigation had taken too long, and either require a determination from the CBSA or decide that IRCC would proceed with the citizenship application, but that IRCC had not yet done so. In the interim, the Minister argued, the Court could assess the reasonableness of the suspension based on assumptions about what might transpire during an investigation of concerns

as serious as those raised in Mr. Gentile's case (given the potential reputational impact and the fact that the investigations have been completed without further steps apparently being taken, I decline to specify what the concerns were).

[30] In my view, the Minister's position puts both citizenship applicants and this Court in an untenable position. The Minister cannot shield a suspension under section 13.1 from substantive review of its reasonableness on the basis that the investigation in question is being conducted by another department of the federal government. To do so would leave both the affected party and the Court in the dark about the reasons for the length of the suspension, a state of affairs incompatible with assessing whether the suspension has been in effect for a longer time than "is necessary" in the circumstances, or whether it remains within "reasonable bounds": *Niu* at para 14; *Zhang* at para 38.

[31] This is not to say that evidence filed in response to a *mandamus* application must or even should set out each aspect of an investigation in detail. Potential concerns regarding the integrity of the investigation, and even privilege, may limit what can be disclosed in a given case. The Court's role in assessing the reasonableness of a suspension does not involve back seat driving of the conduct of an investigation. To the contrary, this Court has made clear that it will not dictate the length of investigations, provided they are within reasonable bounds or do not result in unreasonable delay: *Nada* at para 25; *Zhang* at para 38.

[32] But the Court must have some information on which to assess the reasonableness of a suspension. It cannot simply base its assessment on unsupported assumptions about how long an

investigation of a particular type of matter might be expected to take. If IRCC is not itself conducting the investigation, it must obtain adequate information from the federal government department conducting it to allow the Court to assess the reasonableness of the suspension, or explain why such information cannot be obtained, or risk the Court finding the suspension unreasonable for want of reasonable justification.

[33] I make no comment in this regard with respect to cases in which a foreign government is conducting the relevant investigation, as was the case in *Zhang*. Such a situation may raise additional considerations that will have to be considered in the appropriate case in assessing the reasonableness of a suspension.

III. Order to Complete Processing within 60 Days

[34] As indicated above, Mr. Gentile's application includes a request that the Court order the Minister to complete processing his citizenship application within 60 days. As the Minister has not completed processing of the citizenship application, this aspect of Mr. Gentile's judicial review application is not moot.

[35] In its correspondence advising the Court that the suspension had been lifted, the Minister advised that "IRCC has agreed to process that Mr. Gentile's file on a priority basis to the extent that they can." This requires updating expired clearances, after which an interview with a Citizenship Judge will be scheduled "on a priority basis."

[36] In the circumstances, I do not consider it appropriate to order a particular time frame to complete the processing of Mr. Gentile's application. I do not have information regarding the time needed for the steps above, which may require updated information from Mr. Gentile. I also do not know the extent to which the timing of any of these steps may be impacted by the COVID-19 pandemic, the management of which is requiring extraordinary steps to minimize transmission. At the same time, I am cognizant of the time it has taken to get Mr. Gentile's application to this stage, and of Mr. Gentile's concern regarding the potential resuspension of his application.

[37] In these circumstances, I will issue an order requiring the Minister to report to the Court on the status of Mr. Gentile's application within 30 days and every 30 days thereafter until processing is completed or until further order of the Court. The parties are encouraged to consult prior to filing such report to identify any concerns regarding the status of the processing and draw them to the Court's attention, so that they may be dealt with on an expedited basis.

IV. Costs

[38] Mr. Gentile's application for judicial review seeks costs pursuant to Rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, on the basis that the significant delay in the processing of his citizenship application constitutes "special reasons" within the meaning of the Rule, warranting an extraordinary award of costs.

[39] I will reserve my decision with respect to this request to the final disposition of this matter.

ORDER IN T-227-19

THIS COURT ORDERS that

1. The Respondent shall report to the Court on the status of Mr. Gentile's application for citizenship within 30 days from the date of this Order, and every 30 days thereafter until processing of that application is completed or until further order of the Court.
2. The undersigned remains seized of the matter.
3. Costs of this application are reserved until final disposition.

"Nicholas McHaffie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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