Date: 20060929

Docket: T-234-04

Citation: 2006 FC 1161

Ottawa, Ontario, September 29, 2006

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Plaintiff

and

YURI DINABURGSKY

Defendant

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] Mr. Yuri Dinaburgsky, the defendant, is 51 years old. He was born on February 3, 1955 in Bobruisk, Belarus, formerly known as the Belorussian Soviet Socialist Republic (Belorussian SSR). Mr. Dinaburgsky is Jewish, and fled the Belorussian SSR because of discrimination and persecution against Jews. He came to Canada as a permanent resident on March 21, 1989 with his wife and two year old daughter. He became a Canadian citizen on November 9, 1994. He has resided in Canada for the past 17 years.

[2] The plaintiff seeks a declaration that:

1. the defendant obtained his Canadian citizenship by false representation or fraud or by knowingly concealing material circumstances because he failed to disclose his past criminal convictions outside of Canada when he applied for permanent residence in Canada; and
2. the defendant was lawfully admitted to Canada for permanent residence by false representation or fraud or by knowingly concealing material circumstances and, because of that admission, he subsequently obtained citizenship, thereby engaging the deeming provision of subsection 10(2) of the *Citizenship Act*, R.S.C. 1985, c. C-29.

[3] Subsections10(1) and (2) of the *Citizenship Act* read as follows:

PART II LOSS OF CITIZENSHIP
[…]

Order in cases of fraud
10. (1) Subject to section 18 but notwithstanding any other section of this Act, where the Governor in Council, on a report from the Minister, is satisfied that any person has obtained, retained, renounced or resumed citizenship under this Act by false representation or fraud or by knowingly concealing material circumstances,

(a) the person ceases to be a citizen, or

(b) the renunciation of citizenship by the person shall be deemed to have had no effect,

as of such date as may be fixed by order of the Governor in Council with respect thereto.
Presumption

(2) A person shall be deemed to have obtained citizenship by false representation or fraud or by knowingly concealing material circumstances if the person was lawfully admitted to Canada for permanent residence by false representation or fraud or by knowingly concealing material circumstances and, because of that admission, the person subsequently obtained citizenship.

PARTIE II PERTE DE LA CITOYENNETÉ
[…]

Décret en cas de fraude
10. (1) Sous réserve du seul article 18, le gouverneur en conseil peut, lorsqu'il est convaincu, sur rapport du ministre, que l'acquisition, la conservation ou la répudiation de la citoyenneté, ou la réintégration dans celle-ci, est intervenue sous le régime de la présente loi par fraude ou au moyen d'une fausse déclaration ou de la dissimulation intentionnelle de faits essentiels, prendre un décret aux termes duquel l'intéressé, à compter de la date qui y est fixée:

a) soit perd sa citoyenneté;

b) soit est réputé ne pas avoir répudié sa citoyenneté.

Présomption

(2) Est réputée avoir acquis la citoyenneté par fraude, fausse déclaration ou dissimulation intentionnelle de faits essentiels la personne qui l'a acquise à raison d'une admission légale au Canada à titre de résident permanent obtenue par l'un de ces trois moyens.

BACKGROUND

Past criminal convictions outside of Canada

[4] Mr. Dinaburgsky admits that he was convicted of crimes in the Belorussian SSR before he was granted permanent residence or citizenship in Canada. Specifically, the defendant was convicted under the Criminal Code of the Belorussian SSR (Belorussian Code):

(i) on September 11, 1973, of the attempted rape of a minor, the gang rape of a minor, theft and attempted theft. The Mogilev Oblast Court sentenced him to 10 years of imprisonment in accordance with Articles 15(2), 39, 115(3), 141(1) and (2) of the Belorussian Code;

(ii) on March 13,1975, of escaping from a correctional facility. The People's Court of the City of Grodno sentenced him to 3 more years of imprisonment in accordance with Article 15, Part II, and Article 184, Part I of the Belorussian Code; and

(iii) on April 10, 1986, for violating an administrative supervisory order made on February 10, 1985. The Lenin District People's Court of the City of Bobruisk sentenced him to 6 months of imprisonment in accordance with Article 194-1, Part I of the Belorussian Code.

Permanent residence application

[5] On December 6, 1988, the defendant applied for permanent resident status at the Canadian Embassy in Rome, Italy, where he was interviewed by a visa officer on January 23, 1989. The defendant was granted permanent resident status on March 21, 1989 when he arrived in Canada.

[6] The defendant was originally denied citizenship on July 12, 1993 because he did not meet the language and knowledge requirements under section 5 of the *Citizenship Act*, R.S.C. 1985, c. C-29, as amended.

[7] The defendant was charged with use of a stolen credit card, contrary to s. 342(1) of the *Criminal Code*, theft under $1,000 contrary to s. 334(b) of the *Criminal Code*, and one count of personation contrary to s. 403(b) of the *Criminal Code*, on or before March 16, 1992 in Guelph, Ontario together with two co-accused, which charges were not withdrawn against the defendant until after the application for citizenship was made. He did not disclose these criminal charges as required on his citizenship application.

[8] The defendant reapplied for citizenship on October 26, 1993. The application was approved on October 24, 1994, and the defendant took the oath of citizenship on November 9, 1994.

Canadian authorities discover defendant's past criminal convictions in Belarus

[9] In 1999, the RCMP learned of Mr. Dinaburgsky's past criminal convictions in the Belorussian SSR. At that time the defendant was charged under the *Criminal Code* with conspiracy to commit fraud, contrary to subsection 465(1) of the *Criminal Code*, for participation in a criminal organization, contrary to subsection 467.1(1), and with conspiracy to traffic in a controlled substance, contrary to paragraph 465(1)(c). On July 7, 2000, the defendant pleaded guilty to conspiring to commit fraud and was sentenced to 15 months of imprisonment in Canada. The other charges were withdrawn.

Notice in respect of revocation

[10] On February 5, 2002, the Minister served Mr. Dinaburgsky with a Notice in respect of revocation of citizenship dated January 14, 2002, alleging that the defendant failed to disclose his past criminal convictions outside of Canada when he applied for permanent resident status.

Referral to the Federal Court

[11] In answer to the defendant's request for referral on February 13, 2002, the Minister referred this matter to the Federal Court by filing a statement of claim on January 30, 2004.

Statement of Claim

[12] By statement of claim filed January 30, 2004, the plaintiff seeks a declaration that the defendant has obtained Canadian citizenship by false representation or fraud or by knowingly concealing material circumstances.

RELEVANT LEGISLATION

[13] The legislation relevant to this case is:

1. the *Citizenship Act*, R.S.C. 1985, c. C-29;
2. the *Immigration Act*, R.S.C. 1985, c. I-2; and
3. the *Criminal Code*, R.S.C. 1985, c. C-46.

The relevant excerpts of these statutes are set out in Appendix "A" to these Reasons.

LEGAL FRAMEWORK FOR CITIZENSHIP REVOCATION

[14] In *Canada (Minister of Citizenship and Immigration) v. Skomatchuk*, 2006 FC 994, [2006] F.C.J. No. 1249 (QL), my colleague Madam Justice Judith Snider considered the legislation governing citizenship revocation proceedings. In brief, the relevant law is:

i. under subsection 10(2) of the *Citizenship Act*, R.S.C. 1985, a person is deemed to have obtained his citizenship by fraud or by knowingly concealing material circumstances if he was "lawfully admitted to Canada for permanent residence by false representation or fraud or by knowingly concealing material circumstances" and, because of that admission, subsequently obtained his citizenship;

ii. the Minister may make a report to the Governor in Council that the defendant has obtained his citizenship by false representation or fraud or by knowingly concealing material circumstances. The Minister has the discretion whether or not to make a report in such circumstances. If the Minister makes the report, and if Governor in Council is then satisfied that the defendant obtained his citizenship in such a manner, the defendant ceases to be a citizen;

iii. a decision made by this Court under section 18 of the *Citizenship Act*, R.S.C. 1985 is final and cannot be appealed; a decision of the Governor in Council may be judicially reviewed;

iv. a defendant's substantive rights are governed by the legislation in force at the time citizenship was acquired; and

v. the burden of proof lies on the plaintiff Minister to establish on the civil standard of a balance of probabilities that a defendant obtained Canadian citizenship by false representation or fraud or by knowingly concealing material circumstances.

[15] I adopt the reasons of Snider J. in *Skomatchuk, supra*, and, in particular, the paragraphs set out in Appendix "B" in which she more fully explains the legislation governing citizenship revocation proceedings.

THE ISSUE

[16] Did the defendant obtain lawful admission to Canada for permanent residence in 1989 by false representation or fraud or by knowingly concealing material circumstances? If the answer is yes, subsection 10(2) of the *Citizenship Act* deems the defendant to have obtained citizenship by false representation or fraud by knowingly concealing material circumstances.

THE EVIDENCE

[17] The evidence at this trial included facts and documents admitted in advance with respect to:

i. the defendant's criminal convictions in the Belorussian SSR;
ii. the authenticity of Court documents related to the convictions and sentences in the Belorussian SSR; and
iii. the defendant's application for permanent residence dated January 23, 1989 , in which he indicated that he had not ever been convicted of any crime or offence.

[18] Three witnesses testified at trial:

1. Ms. Diane Burrows, a visa officer;
2. the defendant, Mr. Yuri Dinaburgsky; and
3. the defendant's wife, Mrs. Svetlana Dinaburgsky,.

<u>Evidence of Ms. Diane Burrows, the Visa Officer in Rome who interviewed the defendant</u>

[19] Ms. Burrows, the plaintiff's only witness, was the visa officer in Rome who interviewed the defendant on January 23, 1989 concerning his application for permanent residence in Canada under

the Eastern European “Self-Exiled Class” Program. This class is for self-exiled persons (mostly Jews) from communist regimes in Europe and the USSR.

[20] Ms. Burrows, now a senior officer with the Department of Citizenship and Immigration, has been an immigration officer for 20 years. Ms. Burrows testified that her usual practice when recording applicants’ answers is to put a “check-mark” in the appropriate “Yes” or “No” box that corresponded to the question on the application form. Ms. Burrows would then sign her initials “DB” and the date of the interview next to the “check-mark”. As an evidentiary issue, testimony concerning one’s usual practice is admissible and corroborative of evidence of conduct in a specific case: see, for example, *Savoie v. Bouchard*, [1983] N.B.J. No. 66; (1983), 49 N.B.R. (2d) 424 at paragraphs 27-37 (N.B.C.A.).

[21] Ms. Burrows appeared to the Court to be a highly conscientious, thorough and dedicated public servant. The Court finds, on the balance of probabilities, that her evidence is probably true. I find as fact that Ms. Burrows had established a consistent practice of recording applicants’ answers in the manner in which she testified and that Ms. Burrows followed this practice when recording the defendant’s answers during his interview in 1989.

[22] Ms. Burrows testified that she asked the defendant, “Have you ever been convicted of any crime or offence?” and that the defendant replied, “No”. Ms. Burrows put a “check-mark”, her initials “DB” and the date of the interview “23/1/89” next to the corresponding field on the defendant’s application form. Ms. Burrows testified that she put this “check-mark” with her initials and date to confirm that she had asked the defendant this question and received the answer shown

on the application form. The defendant's completed application was an admitted document before the Court.

[23] Ms. Burrows testified that the Canadian government did not seek security clearance certificates for persons applying for permanent residence under the "Self-Exiled Class" Program. The Canadian Government did not contact the police in the defendant's country of origin because doing so could jeopardize the well-being of his remaining family members.

[24] Ms. Burrows asked the applicant "Have you ever been convicted of any crime or offence" and the applicant answered, "No". That is an important question because if the answer was "Yes", the applicant may not have been admissible to Canada.

[25] Ms. Burrows testified that if the defendant had answered that "he had troubles with the law when he was young", Ms. Burrows would not have "check-marked" the "No" box in answer to the question, "Have you ever been convicted of any crime or offence." Rather, Ms. Burrows would have circled the answer to that question and indicated that further investigation was needed to decide the issue. From the evidence, it is clear to the Court that if the defendant had answered the question truthfully, the visa officer would have asked other questions and investigated whether these criminal convictions would make the defendant inadmissible. The issue would have been whether the defendant's status as a minor could overcome criminal inadmissibility. This would have been explored by the visa officer. There were other factors which could have been considered under Canada's immigration laws, but none of these were considered because the defendant answered "No" to the question. Similarly, if the defendant had reported that he had been wrongly convicted

because of discrimination against Jews in the Belorussian SSR, Ms. Burrows would have noted this on the application form as requiring further investigation, and would not have "check-marked" the answer "No" and put her initials and date next to that answer.

[26] In the cross-examination of Ms. Burrows, counsel for the defendant tried to attribute this error to the Hebrew Immigration Aid Society (HIAS) in Rome, because they were rushed in assisting people like the defendant, and because they were processing 15,000 families annually from the Soviet Union and Eastern Europe for immigration to the United States and Canada. The Court is satisfied that this error cannot be attributed to the HIAS because there are so many other responses on the defendant's application form that are untrue. The defendant provided false information with regard to his addresses, his employment, and his education. During the material times, the defendant was not studying or permanently residing at these addresses; rather, he was in prison.

Evidence of the Defendant, Mr. Dinaburgsky

[27] The defendant testified in the Russian language with the aid of an excellent interpreter.

[28] Mr. Dinabursgsky testified that when he told HIAS that he had problems with the law under the age of 18, HIAS told him that there was no need to mention this because he was a minor at the time. When he was interviewed by the visa officer, he testified that he told her that he had convictions when he was young, and that the visa officer said she would clarify if these convictions were necessary to pursue. He testified that the visa officer said "if necessary, we will call you back".

[29] Under cross-examination, the defendant testified that he was released from prison in August 1986. A few months later, he applied for permanent residence, and was interviewed by HIAS on December 1, 1988. He had just served six months in prison. Before that, he was in prison from 1973 to 1985. There is no mention of these prison terms on the application form. He agreed under cross examination that large parts of his application for permanent residency were untrue, particularly with respect to his addresses for the previous ten years, his education, his employment history, and his criminal convictions. He said that he had "no choice" but to provide these untrue answers. The Court is satisfied that the visa application, on a number of important questions, is untrue, and that the defendant admitted that he had "no choice" because if he completed the questions truthfully he would not have been able to immigrate to Canada.

[30] The defendant says that HIAS completed the application form without asking him any questions, in particular, HIAS did not ask him whether he had ever been convicted of a criminal offence. The defendant testified that the only question HIAS asked him was where was it that he wanted to go: USA, Canada, or Israel. This answer is inconsistent with the answer he gave at his examination of discovery on December 14, 2004. According to p. 67, question 304 in the transcript, the defendant testified as follows:

> Q. Thank you. Now, as I understand your evidence from last time, you were asked whether you had a – you were asked by the HIAS interpreter whether you had a criminal offence?
>
> A. He asked me questions which were contained [in??] the application form. If that question was there, that's the question he asked."

[31] Under cross-examination before the Court, Mr. Dinaburgsky admitted that some of his answers on his application for permanent residence were lies. In his *viva voce* evidence, he changed

his excuse for the lies from the excuse given at the examination for discovery. It is clear to the Court that material information in his application was false, and that he provided false information to the visa officer, Ms. Burrows.

[32] Mr. Dinaburgsky said that he told the visa officer that he had "some trouble with the law when he was young". As discussed above, it is clear to the Court that the visa officer, Ms. Burrows, would have noted this type of response and investigated further. Accordingly, the Court finds this evidence of Mr. Dinaburgsky not credible. The logical conclusion is that Mr. Dinaburgsky intentionally lied about his places of residence, his employment, his education and his previous criminal convictions. The Court is satisfied that Mr. Dinaburgsky did not advise the visa officer that he had "some trouble with the law when he was young" or that he was falsely charged and convicted because he was Jewish.

[33] In re-examination, Mr. Dinaburgsky admitted that he did not "advertise" that he had been convicted and incarcerated. He testified that he was hiding his conviction and running away from his country. He also testified in re-examination that he had consensual group sex with the person whom he allegedly raped, that he was wrongly charged and convicted, and that many Jews are wrongly charged and convicted of rape.

Evidence of Mrs. Svetlana Dinaburgsky

[34] The other witness for the defendant was the defendant's wife, Mrs. Svetlana Dinaburgsky. Her evidence was in the English language. She testified that the HIAS sponsored Jewish immigrants and paid for their food and apartments while fleeing.

[35] The Court was impressed with Mrs. Dinaburgsky. She is an optician and has an excellent command of English. She introduced into evidence a newspaper article from Minsk written about Mr. Dinaburgsky's allegedly wrongful conviction. This article is referred to below.

[36] Mr. and Mrs. Dinaburgsky have three daughters, a daughter born in Belarus on October 2, 1986 who came to Canada with Mr. and Mrs. Dinaburgsky, and twin daughters who were born in Canada on May 25, 1990.

[37] Mrs. Dinaburgsky testified that she was eager to leave the Belorussian SSR because she experienced anti-Semitism. She had been called a "dirty Jew" and felt like a second class citizen in Belarus. She met Mr. Dinaburgsky after he was released from prison in 1986. She fell in love with him and became pregnant. Mr. Dinaburgsky was then sentenced to prison for six months for administrative violations of his parole. She went to the attorney for the city of the Bobruisk, said that she wanted to marry Mr. Dinaburgsky, and asked why he was in jail. The attorney said that he was going to be in jail for the rest of his life and that she should get an abortion and say that Mr. Dinaburgsky raped her. Instead, she married Mr. Dinaburgsky while he was in jail because she was in love and pregnant with his child.

[38] Mrs. Dinaburgsky testified that her older sister was the same age as Mr. Dinaburgsky. Her sister and her mother knew Mr. Dinaburgsky and had assured her that five Jews were falsely charged with rape because they were Jews, and that the Jewish people in Bobruisk knew this at the time. She testified that Mr. Dinaburgsky has been a great husband, good father and good friend with Mrs. Dinaburgsky's mother, who lived with them in Canada for 13 years. She said that Mr. Dinaburgsky has never been abusive to her or demonstrated any improper conduct toward her. Mrs. Dinaburgsky said that the RCMP had a "vendetta" against her husband. Mrs. Dinaburgsky knew that her husband had been charged and convicted of rape, but she knew that the charges and convictions were false and wrongful.

[39] She testified that the HIAS interview in Rome was disorganized. The Russian interpreter was poorly skilled. The Russian interpreter said at the interview with HIAS that they were told not to worry about a criminal record at 17 years of age, and that Mr. Dinaburgsky need not disclose his convictions as a minor.

[40] The RCMP investigation which led to the uncovering of these criminal convictions against Mr. Dinaburgsky in Belarus emanated from criminal charges against Mr. Dinaburgsky. In 1999, three charges under the *Criminal Code* were laid against Mr. Dinaburgsky, two of which were withdrawn. Mr. Dinaburgsky pleaded guilty to one charge and served 15 months in a Canadian prison.

The Newspaper Article

[41] Mrs. Dinabursky introduced into evidence an undated article from a newspaper entitled "The Week" from the city of Minsk, the capital of Belarus. She testified that she had the newspaper article before she came to Canada. Accordingly, the article must be dated prior to 1989, and probably coincided with a time when the defendant was incarcerated. The article is entitled "White Threads on a Black Background". The plaintiff did not object to its authenticity. An original of the article was produced for the Court. The Court is satisfied that this article was actually written and did appear in this newspaper.

[42] The article states that the criminal rape charges against the defendant, his brother and others were based on fabricated evidence by "an investigating agency of Bobruisk", the city in which the defendant and his brother lived. The article states that the alleged attempted rape victim did not report this attempted rape until three years after the incident. The article rhetorically questions "did she forget?", and then answers the rhetorical question, "now she has remembered or actually it was not she who remembered, but one Detective Posdnyak who actually called and reminded her".

[43] The article sarcastically continues, "recollection is a contagious thing". The rape victim also remembered that approximately one year before the trial she had been raped by friends and relatives of the Dinaburgskys, and at one time she had been raped by all of them together.

[44] The article reports that the victim confused names and details of the events, that the Court noted falsehoods in her testimony, and that the Court accepted testimony of other people about the victim's promiscuous lifestyle.

[45] The article continues about the defendant's brother, an adult, and how the defendant, then an adolescent, was brought to his brother's cell and beaten "so hard that it caused internal injuries and his teeth were knocked out". The defendant's brother wrote numerous requests and protests to organizations such as The Kremlin, human rights organizations, and Amnesty International, but they all said they had no jurisdiction.

[46] This newspaper article corroborates the stated belief of Mrs. Dinaburgsky that the allegations of attempted rape and gang rape against the defendant were based on fabricated evidence and are not true.

The Belorussian SSR Court Documents

1. The Reasons for Verdict of the Judicial Board on Criminal Cases of the Mogilev Oblast Court dated September 11, 1973

[47] This 17-page "Verdict" sets out the evidence and findings of guilt against five persons accused of gang rape, including the defendant. I have reviewed this document and find that it is reasonably comprehensive, clear and credible. It reflects the foreign court's consideration and rendition of the evidence against the defendant.

[48] The defendant's first crime of the defendant took place on April 26, 1970. It was an attempted rape. The defendant was 15 years old at the time.

[49] The second crime took place on December 2, 1972 and the third crime on the day after, December 3, 1972. The defendant was found guilty of gang rape. The defendant was 17 years old at that time. The defendant pleaded not guilty to these charges. He said that he had only wanted to kiss the lady whom he was accused of attempting to rape, and that he had engaged in consensual group sex with the person against whom he was alleged to have committed gang rape.

[50] The court recited the evidence upon which it concluded that the defendant was guilty of these crimes. The defendant was also found guilty of theft of a watch and the attempted theft of a wallet.

[51] The defendant was sentenced to ten years in prison. He was not tried as a juvenile. There was no evidence led with respect to whether there was a juvenile court in the Belorussian SSR at that time, or, if there was, what were the circumstances leading to the defendant being tried in adult court.

2. The second Verdict in 1975

[52] The second "Verdict" was registered against the defendant on March 13, 1975 for the crime of attempting to escape from prison on December 10, 1974. At that time, the defendant was 19 years old. For this crime he was sentenced to three years in prison, in addition to his ten year sentence.

3. The third conviction in 1986

[53] The defendant was released from prison on February 9, 1985 after serving 12 years of his 13 year sentence. He was released upon 12 months of administrative supervision. He was twice found guilty of breaching the terms of his conditional release, and on the third breach he was sentenced to six months of imprisonment. That sentence began on February 28, 1986. The defendant was released from prison on or about August 28, 1986.

CRIMINAL INADMISSIBILITY

[54] The defendant was first convicted in Belarus for crimes which he committed, as a minor, at the ages of 15 and 17. Mr. Justice Muldoon in *De Freitas v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1611 at paragraph 2, referring to the situation involving a minor under the former *Immigration Act*, said:

> …However, a youth convicted in adult court does have a conviction within the meaning of the *Immigration Act*.

[55] In the case at bar, the defendant was convicted in adult court. When an order is made in Canada transferring charges from youth court to ordinary court in Canada, the youth is not being tried for offences under the *Young Offenders' Act*. A conviction in adult court in Canada is a conviction with the meaning of the inadmissibility provisions of the former *Immigration Act*, even if the convicted person was a minor.

[56] Under subsection 19(1)(c) of the *Immigration Act*, no person shall be granted admission to Canada who has been convicted of an offence that if committed in Canada constitutes an offence that may be punishable under any Act of Parliament and for which a maximum term of imprisonment of ten years or more may be imposed.

[57] Under the *Criminal Code*, R.S.C. 1985, subsection 271(1)(a) provides that every person who commits a sexual assault is guilty of an indictable offence and is liable to imprisonment for a term not exceeding ten years. Accordingly, the defendant, having been convicted of attempted rape and gang rape in Belarus, had been convicted of an offence that if committed in Canada may be punishable with a maximum of imprisonment of ten years. This means that the defendant was *prima facie* inadmissible to Canada as a permanent resident in 1989.

[58] Canada does not allow persons convicted of serious criminal offences to become permanent residents. It is not the role of the Court to condone or forgive persons who misrepresent or conceal material facts about their past serious criminality. That is a decision for only the Minister of Citizenship and Immigration and the Governor in Council. Nor is it the Court's role to determine whether, as a matter of policy, it is appropriate to render stateless citizens of Canada who choose not to disclose criminal convictions pre-dating their admission to Canada. That is a decision left to Parliament acting through the Governor in Council.

FINDINGS OF THIS COURT

[59] I find, on the balance of probabilities that:

1. The 17-page verdict against the defendant dated September 11, 1973 is a comprehensive, clear court document which reflects a trial, a verdict based on evidence, the participation of defence attorneys for the defendant and the other accused, and the examination of the evidence in an "*in camera* court session" from August 29 to September 11, 1973;

2. The undated newspaper article corroborates the version of the defendant's wife that the verdict against the defendant was based on fabricated evidence and that his conviction was wrongful. However, the allegations of the defendant's wife and this newspaper article are not more credible than the detailed verdict of the foreign court. I cannot re-try the defendant based on self-serving allegations and a newspaper article;

3. The appropriate time for the defendant and his wife to have explained that these convictions were wrongful convictions based on allegedly fabricated evidence, and motivated by anti-Semitism, was when the defendant and his wife were interviewed by the visa officer in Rome. I cannot re-try the defendant for these crimes 33 years after the verdict of the foreign court;

4. The evidence is clear that the defendant was 15 and 17 years old at the time he committed the offences of which he was originally convicted. This might have been a factor which the

visa officer considered at the time of the interview in January 1989 if the defendant had disclosed the convictions and that he was a minor at the material time;

5. The defendant when asked by the visa officer in Rome whether he had ever been convicted of any crime or offence answered “no”. Moreover, the Court finds that the defendant did not respond that “he had troubles with the law when he was young”. If he had, the Court is satisfied, on the balance of probabilities, that the visa officer would have circled the answer to that question and indicated that further investigation was needed. The Court is satisfied that the visa officer would have asked a number of other questions and undertaken further investigations to determine whether these criminal convictions would or would not make the defendant inadmissible; and

6. The defendant lied and concealed material information when interviewed by the visa officer who approved him for entry into Canada. The defendant gained admission to Canada for permanent residence by false representation or fraud or by concealing material circumstances. Accordingly, the defendant was not lawfully admitted to Canada, and pursuant to subsection 10(2) of the *Citizenship Act*, the defendant is deemed to have obtained citizenship by false representation or fraud or by knowingly concealing material circumstances.

COSTS

[60] The parties made no oral submissions at the trial with respect to costs. If the plaintiff seeks costs, the plaintiff shall have three days to file submissions regarding costs, the defendant shall have three days thereafter to respond, and the plaintiff shall have three days thereafter to reply. If necessary, the Court will issue a further Judgment with respect to costs.

JUDGMENT

THIS COURT ADJUDGES AND DECLARES that:

1. The defendant was lawfully admitted to Canada for permanent residence by false representation or fraud or by knowingly concealing material circumstances; and

2. The defendant obtained Canadian citizenship by false representation or fraud or by knowingly concealing material circumstances, within the meaning of subsection 10(2) and paragraph 18(1)(b) of the *Citizenship Act*, R.S.C. 1985, c. C-29.

"Michael A. Kelen"
Judge

APPENDIX "A"

1. *Citizenship Act*, R.S.C. 1985, c. C-29

PART II LOSS OF CITIZENSHIP
[…]

Order in cases of fraud

10. (1) Subject to section 18 but notwithstanding any other section of this Act, where the Governor in Council, on a report from the Minister, is satisfied that any person has obtained, retained, renounced or resumed citizenship under this Act by false representation or fraud or by knowingly concealing material circumstances,

(a) the person ceases to be a citizen, or

(b) the renunciation of citizenship by the person shall be deemed to have had no effect,

as of such date as may be fixed by order of the Governor in Council with respect thereto.

Presumption

(2) A person shall be deemed to have obtained citizenship by false representation or fraud or by knowingly concealing material circumstances if the person was lawfully admitted to Canada for permanent residence by false representation or fraud or by knowingly concealing material circumstances and, because of that admission, the person subsequently obtained citizenship.

[…]

PART V PROCEDURE
[…]

Notice to person in respect of revocation

PARTIE II PERTE DE LA CITOYENNETÉ
[…]

Décret en cas de fraude

10. (1) Sous réserve du seul article 18, le gouverneur en conseil peut, lorsqu'il est convaincu, sur rapport du ministre, que l'acquisition, la conservation ou la répudiation de la citoyenneté, ou la réintégration dans celle-ci, est intervenue sous le régime de la présente loi par fraude ou au moyen d'une fausse déclaration ou de la dissimulation intentionnelle de faits essentiels, prendre un décret aux termes duquel l'intéressé, à compter de la date qui y est fixée:

a) soit perd sa citoyenneté;

b) soit est réputé ne pas avoir répudié sa citoyenneté.

Présomption

(2) Est réputée avoir acquis la citoyenneté par fraude, fausse déclaration ou dissimulation intentionnelle de faits essentiels la personne qui l'a acquise à raison d'une admission légale au Canada à titre de résident permanent obtenue par l'un de ces trois moyens.

[…]

PARTIE V PROCÉDURE
[…]

Avis préalable à l'annulation

18. (1) Le ministre ne peut procéder à l'établissement du rapport mentionné à l'article 10 sans avoir auparavant avisé l'intéressé de son intention en ce sens et sans que l'une ou l'autre des conditions suivantes ne se soit réalisée:

18. (1) The Minister shall not make a report under section 10 unless the Minister has given notice of his intention to do so to the person in respect of whom the report is to be made and

(a) that person does not, within thirty days after the day on which the notice is sent, request that the Minister refer the case to the Court; or

(b) that person does so request and the Court decides that the person has obtained, retained, renounced or resumed citizenship by false representation or fraud or by knowingly concealing material circumstances.

Nature of notice

(2) The notice referred to in subsection (1) shall state that the person in respect of whom the report is to be made may, within thirty days after the day on which the notice is sent to him, request that the Minister refer the case to the Court, and such notice is sufficient if it is sent by registered mail to the person at his latest known address.

Decision final

(3) A decision of the Court made under subsection (1) is final and, notwithstanding any other Act of Parliament, no appeal lies therefrom.

[…]

Prohibition

22. (1) Notwithstanding anything in this Act, a person shall not be granted citizenship under section 5 or subsection 11(1) or take the oath of citizenship

[…]

a) l'intéressé n'a pas, dans les trente jours suivant la date d'expédition de l'avis, demandé le renvoi de l'affaire devant la Cour;

b) la Cour, saisie de l'affaire, a décidé qu'il y avait eu fraude, fausse déclaration ou dissimulation intentionnelle de faits essentiels.

Nature de l'avis

(2) L'avis prévu au paragraphe (1) doit spécifier la faculté qu'a l'intéressé, dans les trente jours suivant sa date d'expédition, de demander au ministre le renvoi de l'affaire devant la Cour. La communication de l'avis peut se faire par courrier recommandé envoyé à la dernière adresse connue de l'intéressé.

Caractère définitif de la décision

(3) La décision de la Cour visée au paragraphe (1) est définitive et, par dérogation à toute autre loi fédérale, non susceptible d'appel.

[…]

Interdiction

22. (1) Malgré les autres dispositions de la présente loi, nul ne peut recevoir la citoyenneté au titre de l'article 5 ou du paragraphe 11(1) ni prêter le serment de citoyenneté:

[…]

b) tant qu'il est inculpé pour une infraction prévue aux paragraphes 29(2) ou (3) ou pour un acte criminel prévu par une loi fédérale, autre qu'une infraction qualifiée de contravention en vertu de la Loi sur les contraventions, et ce, jusqu'à la date d'épuisement des voies de recours;

[…]

(b) while the person is charged with, on trial for or subject to or a party to an appeal relating to an offence under subsection 29(2) or (3) or an indictable offence under any Act of Parliament, other than an offence that is designated as a contravention under the Contraventions Act;

[…]

2. *Immigration Act*, R.S.C. 1985, c. I-2

Inadmissible persons

19. (1) No person shall be granted admission who is a member of any of the following classes:

[…]

(c) persons who have been convicted in Canada of an offence that may be punishable under any Act of Parliament by a maximum term of imprisonment of ten years or more;

Personnes non admissibles

19. (1) Les personnes suivantes appartiennent à une catégorie non admissible:

[…]

c) celles qui ont été déclarées coupables, au Canada, d'une infraction qui peut être punissable, aux termes d'une loi fédérale, d'un emprisonnement maximal égal ou supérieur à dix ans;

3. *Criminal Code*, R.S.C. 1985, c. C-46 [eff November 9, 1994]

PART VIII
OFFENCES AGAINST THE PERSON AND REPUTATION

Assaults
Sexual assault

271. (1) Every one who commits a sexual assault is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding ten years; or
(b) an offence punishable on summary conviction.

[…]

PARTIE VIII INFRACTIONS CONTRE LA PERSONNE ET LA RÉPUTATION

Voies de fait
Agression sexuelle

271. (1) Quiconque commet une agression sexuelle est coupable:

a) soit d'un acte criminel et passible d'un emprisonnement maximal de dix ans;

b) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire.

[…]

PART IX OFFENCES AGAINST RIGHTS OF PROPERTY
[…]

Punishment for theft

334. Except where otherwise provided by law, every one who commits theft

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years, where the property stolen is a testamentary instrument or the value of what is stolen exceeds one thousand dollars; or

(b) is guilty

(i) of an indictable offence and is liable to imprisonment for a term not exceeding two years, or

(ii) of an offence punishable on summary conviction,

where the value of what is stolen does not exceed one thousand dollars.

PARTIE IX INFRACTIONS CONTRE LES DROITS DE PROPRIÉTÉ
[…]

Punition du vol

334. Sauf disposition contraire des lois, quiconque commet un vol:

a) est coupable d'un acte criminel et passible d'un emprisonnement maximal de dix ans, si le bien volé est un titre testamentaire ou si la valeur de ce qui est volé dépasse mille dollars;

b) est coupable:

(i) soit d'un acte criminel et passible d'un emprisonnement maximal de deux ans,

(ii) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire,

si la valeur de ce qui est volé ne dépasse pas mille dollars.

APPENDIX “B”

Excerpts from the reasons of Snider J. in *Skomatchuk, supra*, in which she explains the legislation governing citizenship revocation proceedings.

III. Legal Framework

A. Procedural Rights

[…]

(1) Section 10(1) of the Citizenship Act, 1985

¶ 10 Pursuant to s. 10(1) of this Act, the Minister may make a report to the Governor in Council to the effect that a person has obtained their citizenship "under this Act" by false representation or fraud or by knowingly concealing material circumstances. If the Governor in Council is then satisfied that the person obtained their citizenship in such a manner, "the person ceases to be a citizen".

[…]

(2) Deeming Provision of s. 10(2) of the Citizenship Act, 1985

¶ 12 It may be the case that a person did not directly lie or conceal information at the time of obtaining Canadian citizenship but did so to the overseas immigration officer who approved him for entry into Canada. This situation is addressed in s. 10(2). Pursuant to this provision, a person is deemed to have obtained his citizenship by fraud or by knowingly concealing material circumstances if he was "lawfully admitted to Canada for permanent residence by false representation or fraud or by knowingly concealing material circumstances" and, because of that admission, subsequently obtained his citizenship.

(3) Section 18 Notice

¶ 13 Section 18 of the Act requires that, before the Minister makes a report to the Governor in Council, he must give notice of his intention to do so to the person concerned. That person may then request that the question of whether he obtained his citizenship by false representation or fraud or by knowingly concealing material circumstances be referred to this Court. If this Court decides in the positive, the Court's decision will form the basis of the Minister's report.

¶ 14 In this proceeding, Notice under s. 18 was signed by the Minister on November 13, 2004 and provided to Mr. Skomatchuk. By Notice of Request, Mr. Skomatchuk requested that the Minister refer this case to the Federal Court.

(4) Effect of Court's Determination under s. 18

¶ 15 The Court's determination does not, in itself, constitute a decision to revoke or terminate the citizenship of a person. Rather, the decision of this Court provides the Minister with a factual basis for the report and may constitute the foundation of a decision of the Governor in Council. Only the Governor in Council has the duty and power to decide whether to revoke citizenship. While the decision made by this Court under s. 18 is final and cannot be appealed (Citizenship Act, 1985, s. 18(3)), a decision of the Governor in Council may be judicially reviewed (see for example, Oberlander v. Canada (Attorney General), 2004 FCA 213, [2004] F.C.J. No. 920 (QL)).

B. Substantive Rights

[…]

(2) Meaning of "lawfully admitted"

¶ 18 To establish what is meant by the term "lawfully admitted", I must turn to the Immigration Act, 1948. In s. 2(n), "landing" is defined as "the lawful admission of an immigrant to Canada for permanent residence".

¶ 19 For admission to Canada, an individual was required to undergo an examination before an immigration officer to determine whether he "is or is not admissible to Canada" (Immigration Act, 1948, s. 20(1)). Section 20(2) requires that the person "shall answer truthfully all questions put to him ... and failure to do so ... shall, in itself, be sufficient ground for deportation". Of further interest is s. 50(f) which stipulated that every person who "knowingly makes any false or misleading statement at an examination or inquiry under this Act or in connection with the admission of any person to Canada or the application for admission by any person" was guilty of an offence under the Immigration Act, 1948.

¶ 20 In sum, the scheme in 1957 was clear; misrepresentation during the examination for landing was not to be condoned. A person who lied or withheld material facts from the immigration officers before whom he appeared for examination was not "lawfully admitted" to Canada (Canada (Minister of Citizenship and Immigration) v. Bogutin, [1998] F.C.J. No. 211 (QL) (F.C.T.D.) at para. 126) and, thus, was in breach of the Citizenship Act, 1948. (Underlining added by Kelen J.)

C. Burden and Standard of Proof

¶ 21 The burden of proof clearly rests with the plaintiff Minister.

[…]

¶ 24 Thus, it is well established that, for a proceeding of this nature, the standard of proof is the civil standard of balance of probabilities. In a case, such as this, however, where the allegations of conduct are morally blameworthy and have serious consequences for the defendant, the jurisprudence teaches that I take great care in assessing the evidence (see, for example Odynsky, above at para. 13).

¶ 25 The balance of probabilities standard will be met if the Court is satisfied, on the evidence, that the existence of a fact in dispute is more probable than not. In other words, based on the evidence before this Court, I must find that the event or fact in dispute is not only possible but probable (Obodzinsky, above at paras. 8-9). In this context of serious allegations and consequences for the individual, the inherent probability or improbability of an event is itself a matter to be taken into account (Re H (minors), [1996] A.C. 563 (H.L.)).

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-234-04
STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION PLAINTIFF and YURY DINABURGSKY DEFENDANT
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	September 11, 2006
REASONS FOR JUDGMENT AND JUDGMENT:	KELEN, J.
DATED:	September 29, 2006

APPEARANCES:

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