Cour d'appel fédérale | Federal Court of Appeal

**Date: 20151005**

**Docket: A-124-15**

**Citation: 2015 FCA 212**

**Present: TRUDEL J.A.**

**BETWEEN:**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Appellant**

**and**

**ZUNERA ISHAQ**

**Respondent**

**and**

**ATTORNEY GENERAL OF ONTARIO**

**Intervener**

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on October 5, 2015.

REASONS FOR ORDER BY: TRUDEL J.A.

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## REASONS FOR ORDER

**TRUDEL J.A.**

[1] This is a Motion by the Minister of Citizenship and Immigration (the Minister) for a stay of a September 15, 2015 judgment of this Court (2015 FCA 194) and of the related February 6, 2015 judgment of the Federal Court (2015 FC 156).

[2] Both judgments relate to operational bulletin 359, dated December 12, 2011, later incorporated into Policy Manual C-15 (the Policy). The Policy requires citizenship candidates who wear full or partial face coverings to remove those face coverings during the recitation of the oath of citizenship at a citizenship ceremony, in order to receive their Canadian citizenship.

[3] The respondent challenged the Policy under section 2(*a*) and subsection 15(1) of the *Canadian Charter of Rights and Freedoms*, Part I of *The Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982 c. 11 (*Charter*), and on the administrative law grounds that the Policy was inconsistent with its governing legislation and that it unduly fettered the discretion of citizenship judges who administer the oath.

[4] On a preliminary matter, the Federal Court found that the application was not premature, as policies alleged to be unlawful or unconstitutional may be challenged at any time (*May v. CBC/Radio Canada*, 2011 FCA 130, 231 C.R.R. (2d) 369). This argument was not strongly advocated by the appellant before our Court with respect to the administrative question.

[5] The Federal Court declared the Policy to be unlawful, finding it to be mandatory in nature and inconsistent with the *Citizenship Act*, R.S.C. 1985, c. c-29 and its regulations. The Federal Court judge exercised his discretion not to decide the *Charter* issues, as it was unnecessary to do so.

[6] Although this Court did not endorse all of the Federal Court's findings, it dismissed the Minister's appeal stating that there was no basis to interfere with the Federal Court's finding as

to the mandatory nature of the impugned change in policy. This Court decided not to consider the *Charter* issues, because it was unnecessary for the disposition of the case and because the record was relatively scant with respect to those issues.

[7] This Court and the Federal Court did not decide whether the Minister could or could not impose rules regarding taking the oath, but only that he could not achieve the result that he seeks through a change in policy. It remains open to the Minister to proceed by way of properly enacted regulations, subject of course to *Charter* limits.

[8] The Minister has filed a Notice of Application for Leave to Appeal to the Supreme Court of Canada and seeks a stay of the Federal Court of Appeal and Federal Court's judgments until the later of either: (a) final determination of the appellant's Application for Leave to Appeal to the Supreme Court of Canada or; (b) if leave is granted, a final determination of the appeal by the Supreme Court of Canada.

[9] Having considered the appellant's record, the respondent's record and the appellant's reply, I conclude that the Motion for stay is to be denied with costs to the respondent.

[10] I also took notice of the Memorandum of Fact and Law of the Intervenor, the Attorney General of Ontario. In view of my conclusion, I need not address the appellant's reply submissions that the Attorney General of Ontario does not have the standing to intervene in this stay. She intervened as of right in the Federal Court of Appeal pursuant to a notice of

Constitutional Question, but no Constitutional Question was addressed by our Court in its decision that is the subject of the appellant's Motion for stay.

[11] The grounds for the Motion raised by the appellant are as follows:

a) The Minister has filed a Notice of Application for Leave to Appeal to the Supreme Court of Canada from this Court's September 15, 2015 dismissal of the Minister's appeal from the decision of Boswell J. dated February 6, 2015 (the Judgments);

b) The Judgments raise an issue of public importance that has not been decided by the Supreme Court of Canada: what is the proper interpretive approach to construing an administrative policy in order to determine whether it has an impermissible mandatory effect fettering administrative decision making in a manner not authorized by statute?;

c) By providing guidance to citizenship judges who must ensure that the oath, the last statutory requirement to become a citizen, is taken, the policy at issue enhances the integrity of obtaining citizenship and promotes the broader objective of having the oath recited publicly, openly and in community with others. These are important Canadian values and an integral part of becoming a Canadian citizen. Irreparable harm to the public interest in these values would result from the policy being subject to a declaration of invalidity pending the appeal to the Supreme Court of Canada;

d) Regarding the balance of inconvenience, the irreparable harm to the public interest represented by the Minister if the stay is not granted exceeds the harm to the Respondent if the stay is granted;

e) This stay Motion is urgent because if the stay is not granted, the Respondent's taking of the oath will render the Minister's appeal to the Supreme Court of Canada moot;

f) Rules 8, 35, and 55 of the Federal Courts Rules, and section 65.1 of the Supreme Court Act, R.S.C., 1985, c. S-26.

[12] Subsection 65.1(1) of the *Supreme Court Act* states that:

| ***Supreme Court Act*, R.S.C. 1985, c. S-26** | ***Loi sur la Cour Suprême*, L.R.C. 1985, ch. S-26** |
|---|---|
| **65.1(1)** The Court, the court appealed from or a judge of either of those courts may, on the request of the party who has served and filed a notice of application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, on the terms deemed appropriate. | **65.1(1)** La Cour, la juridiction inférieure ou un de leurs juges peut, à la demande de la partie qui a signifié et déposé l'avis de la demande d'autorisation d'appel, ordonner, aux conditions jugées appropriées, le sursis d'exécution du jugement objet de la demande. |

[13] Insofar as the Motion concentrates on the assertion of an issue of public importance and central Canadian values at play in this case, it seems awkward for this Court rather than the Supreme Court of Canada to decide whether a stay should be granted especially when the appellant has already filed his Notice of Application for Leave to Appeal to the Supreme Court of Canada.

[14] This said, it is trite law that the test for whether to grant a Motion to stay is set out in *RJR — Macdonald Inc. v. Canada (Attorney General),* [1994] 1 S.C.R. 311 [*RJR-Macdonald*]: First, a preliminary assessment must be made of the merits of the case to ensure that a serious question has been raised. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits (*Ibid*, at page 334).

[15] It is also trite law that failure of any of the three elements of the test is fatal.

[16] I chose not to pronounce myself on whether or not there is a serious issue to be determined. As indicated, I am of the respectful view that this is a question better left for the Supreme Court of Canada.

[17] I will say, however, that the issue the appellant raises in his motion is not one which this Court considered.

[18] Indeed, the appellant's proposed issue has nothing to do with the matter as it was presented before us, where the appellant conceded that his appeal could not succeed in the event that the Policy was found to be mandatory and that valid regulations would have to be promulgated by the Governor in Council pursuant to subsection 27(*h*) of the *Citizenship Act* in order to achieve the goal which the Minister seeks to achieve through policy assertions.

[19] My ultimate conclusion flows from my finding that the appellant fails on the second prong of the *RJR-Macdonald* test - the irreparable harm.

[20] Presuming that the appellant is right that the Policy at issue is not mandatory and citizenship judges can apply it or not — to use the appellant's language as expressed by counsel at the hearing of the appeal, that the Policy merely amounts to an encouragement in the strongest language possible — how can one raise a claim of irreparable harm?

[21] Moreover, a declaration that the Policy is unlawful leaves no void, simply reverting to the underlying laws and regulations and lawful policies previously in force. Before this Court,

counsel for the appellant went so far as to characterize the Policy as already having no force or effect, prior to any judicial intervention. It is simply inconsistent to claim, on the one hand, that a policy has no binding effect on decision-makers, but that irreparable harm would result if that policy was to be declared unlawful on the other.

[22] As the respondent rightly states, Citizenship and Immigration Canada had valid guidelines and procedures to ensure that citizenship candidates take the oath prior to the adoption of the Policy (Respondent's written representations, at para. 8). These guidelines and procedures are undisturbed by the finding that the Policy is unlawful. There is no legislative or regulatory void.

[23] I find that the appellant has not demonstrated that refusing his application for stay would result in irreparable harm to the public interest. This suffices to dispose of the appellant's motion for stay.

[24] As a result, the motion for stay is dismissed with costs to the respondent.

"Johanne Trudel"

J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | A-124-15 |
| **STYLE OF CAUSE:** | THE MINISTER OF CITIZENSHIP AND IMMIGRATION v. ZUNERA ISHAQ AND ATTORNEY GENERAL OF ONTARIO |

**MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES**

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| **REASONS FOR JUDGMENT BY:** | TRUDEL J.A. |
| **DATED:** | OCTOBER 5, 2015 |

**WRITTEN REPRESENTATIONS BY:**

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| Peter Southey<br>Negar Hashemi<br>Julie Waldman | FOR THE APPELLANT<br>THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| Lorne Waldman | FOR THE RESPONDENT<br>ZUNERA ISHAQ |
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