Federal Court  Cour fédérale

Date: 20180425

Docket: T-2477-14

Citation: 2018 FC 450

Vancouver, British Columbia, April 25, 2018

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

TIMOTHY VAVILOV

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Mr. Timothy Vavilov, and his younger brother Alexander were born in Canada. At the time their parents were living in this country under assumed identities.

[2] In June 2010 Timothy's parents were arrested in the United States where it was alleged they had been spying on behalf of the Russian Federation.

[3] In 2011 Timothy attempted to renew his Canadian passport. He was informed he was required to apply for a Canadian citizenship certificate before any passport could be issued. In February 2013, he applied for a certificate of Canadian citizenship. In November 2014 an analyst of the Case Management Branch of Citizenship and Immigration Canada [the analyst] refused that application.

[4] Timothy seeks judicial review of the refusal decision. He argues that the process was unfair. He further argues that the analyst's interpretation of paragraph 3(2)(a) of the *Citizenship Act*, RSC, 1985, c C-29 [*Citizenship Act*] was unreasonable and contrary to section 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]. The respondent submits otherwise.

[5] Timothy's brother Alexander, who found himself in similar circumstances, also challenged the government's interpretation of paragraph 3(2)(a) of the *Citizenship Act* in separate proceedings. Alexander did not advance a *Charter* argument. Decisions from this Court and the Federal Court of Appeal have already been rendered in Alexander's case. In considering Alexander's case the Federal Court of Appeal decided the question of the interpretation of paragraph 3(2)(a): *Vavilov v Canada (Minister of Citizenship and Immigration)*, 2017 FCA 132 [*Vavilov FCA*]. The respondent has sought leave to appeal to the Supreme Court of Canada; a decision on the leave application is pending.

[6] In the meantime, the parties agree that the principle of *stare decisis* dictates that the Federal Court of Appeal's decision is binding and this application must be granted. However, both parties seek more from this Court than the simple granting of Timothy's application.

[7] As mentioned above Alexander did not advance a *Charter* argument. Timothy's counsel submits that in granting the application this Court should consider and determine whether the Registrar of Citizenship's interpretation of paragraph 3(2)(a)—the interpretation rejected by the majority in *Vavilov FCA*—is contrary to section 7 of the *Charter*.

[8] The respondent asks the Court to certify a question in order to ensure the respondent's appeal rights are preserved pending a final decision from the Supreme Court of Canada in Alexander's case.

[9] For the reasons that follow the application is granted, I decline to address the constitutional issue raised by the applicant, and no question is certified.

II. Background

A. *General*

[10] Timothy's parents entered Canada illegally in the late eighties or early nineties, adopted assumed identities and held themselves out to be Canadian citizens. Timothy was born in 1990. In 1995 the family moved from Canada to France. In 1999 the family again relocated to the

United States where they remained until the parents were arrested on conspiracy charges in June 2010, it being alleged they were spying on behalf of the Russian Federation.

[11] Shortly after the arrest Timothy and his brother travelled to Russia. In July 2010 the parents pled guilty to the conspiracy charges and they too were returned to Russia as part of an exchange arrangement between the Russian Federation and the United States.

[12] Timothy attempted to renew his Canadian passport in 2011. He was informed he was required to apply for a Canadian citizenship certificate before any passport could be issued. In February 2013, he applied for a certificate of Canadian citizenship. In November 2014 the application was denied.

[13] Section 3 of the *Citizenship Act* provides that persons born in Canada after February 14, 1977 are Canadian citizens unless neither of the child's parents is a citizen or lawfully admitted to Canada for permanent residence and, among other circumstances, either of the parents were a diplomatic or consular officer or other representative or employee of a foreign government. The analyst concluded that Timothy's parents were employees of a foreign government at the time of his birth and, in accordance with paragraph 3(2)(a) of the *Citizenship Act*, he was not a Canadian citizen.

[14] On the basis of a similar interpretation of paragraph 3(2)(a) the Registrar of Citizenship [Registrar] had previously cancelled Alexander's Canadian citizenship certificate in August

2014. Although the circumstances underpinning the Registrar's decision in Alexander's case and the analyst's decision in this case are identical the two matters have proceeded separately.

B. *Procedural History*

[15] The application for leave and for judicial review was filed on December 4, 2014. By Order dated May 29, 2015 the application for leave was granted and the matter was set down to be heard on August 19, 2015.

[16] Respondent's counsel filed a motion dated July 7, 2015 seeking an order to adjourn the hearing of this matter to a date to be fixed after the Court rendered its decision in Alexander's application for judicial review. By Order dated July 23, 2015 this matter was adjourned *sine die* pending a decision from this Court in Alexander's case.

[17] The Registrar's decision in Alexander's case was upheld by this Court in *Vavilov v Canada (Minister of Citizenship and Immigration)*, 2015 FC 960 [*Vavilov FC*]). Two questions were certified by the applications judge and the matter was appealed.

[18] Respondent's counsel then sought an order granting a further adjournment in this matter to a date after the Federal Court of Appeal rendered its decision on the appeal of *Vavilov FC*. The motion was refused by Order dated December 10, 2015. By letter dated March 21, 2016 the respondent again submitted that it was not in the interests of justice for the parties to re-plead the issues. It appears the March 21 letter was not brought to the immediate attention of the Court and by Order dated March 24, 2016 this matter was set down to be heard on May 31, 2016. The

March 21 letter was separately considered and by Direction dated March 24, 2016 the written request was refused and the May 31, 2016 hearing date was maintained.

[19] By letters dated May 26, 2016 the parties jointly sought an adjournment. By Oral Direction the request for adjournment pending the Federal Court of Appeal's determination in *Vavilov FC* was granted the same day.

[20] On June 21, 2017, the Federal Court of Appeal by majority judgment quashed the Registrar's decision to cancel Alexander's Canadian citizenship certificate. In doing so the majority answered the following certified question in the affirmative:

> Are the words "other representative or employee in Canada of a foreign government" found in paragraph 3(2)(a) of the *Citizenship Act* limited to foreign nationals falling within these words who also benefit from diplomatic privileges and immunities?

[21] The respondent has sought leave to appeal *Vavilov FCA* to the Supreme Court of Canada. A decision is now pending on that leave application.

[22] On November 28, 2017 the respondent filed a motion seeking a further adjournment pending final determination by the Supreme Court of Canada of the issues raised in Alexander's case. Timothy's counsel opposed a further adjournment and the motion was denied. This application was heard on April 5, 2018.

[23] By letter dated April 23, 2018 respondent's counsel advised the Court that a decision on the leave application in Alexander's case is expected from the Supreme Court on April 26, 2018.

I have not delayed the release of this judgment and reasons as the decision on the leave application will not impact either my judgment or reasons for judgment in this matter.

III. Issues

[24] The application raises the following issues:

A. Is the Federal Court of Appeal's interpretation of paragraph 3(2)(a) of the *Citizenship Act* in *Vavilov FCA* determinative of this application?

B. Should the *Charter* issue be considered?

C. Should a question be certified for the purposes of preserving the respondent's appeal rights?

IV. Analysis

A. *Is the Federal Court of Appeal's interpretation of paragraph 3(2)(a) of the Citizenship Act in Vavilov FCA determinative of this matter?*

[25] In *Vavilov FCA* the majority of the Federal Court of Appeal concluded that only one reasonable interpretation of paragraph 3(2)(a) of the *Citizenship Act* was available. After noting that statutory provisions are to be read "in accordance with their text, context and purpose" Justice Stratas writing for the majority states at para 45:

> [45] As I shall demonstrate, the purpose of paragraph 3(2)(*a*) of the Act is to bring Canadian law into accordance with international law and other domestic legislation, including the *Foreign Missions and International Organizations Act*, S.C. 1991, c. 41. The aim was to ensure that paragraph 3(2)(*a*)—which prohibits the Canadian-born children of employees of foreign governments from

> obtaining Canadian citizen—applies only to those employees who benefit from diplomatic privileges and immunities from civil and/or criminal law. Under this interpretation, "employee[s] in Canada of a foreign government" includes only those who enjoy diplomatic privileges and immunities under the *Vienna Convention on Diplomatic Relations*, 500 U.N.T.S. 241.

[26] He then concludes at paragraph 48 that "[i]n my view, only those who enjoy diplomatic privileges and immunities fall under the "employee[s] in Canada of a foreign government" exception in paragraph 3(2)(a) of the Citizenship Act."

[27] Justice Stratas then notes at paragraphs 78 and 79 that even though the applicant's parents were agents of the Russian Foreign Intelligence service, it was undisputed that they did not enjoy civil or criminal immunity while in Canada. Consequently they were not captured by paragraph 3(2)(a), and the revocation of their son Alexander's Canadian citizenship certificate could not be sustained:

> [79] On these undisputed facts, and based on the above interpretation of paragraph 3(2)(*a*) of the *Citizenship Act*—the only reasonable interpretation available and the only one that is consistent with the text, context and purpose of the provision—the revocation of the appellant's citizenship cannot be sustained.

[28] In the present case, the decision letter acknowledges that Timothy was born in Canada to parents who (1) were neither Canadian citizens nor permanent residents and (2) "were not accredited diplomats in Canada and never benefited from diplomatic immunity." The fact that Timothy's parents did not benefit from diplomatic immunity means they were not "other representative[s] or employee[s] in Canada of a foreign government" as interpreted by the majority of the Federal Court of Appeal. Timothy therefore does not come within the paragraph

3(2)(a) exception and, having been born in Canada after February 14, 1977, is a citizen (*Citizenship Act* paragraph 3(1)(a)). The decision in *Vavilov FCA* is determinative.

B. *Should the Charter issue be considered?*

[29] In reply to correspondence from respondent's counsel advising that a hearing of this matter may not be necessary in light of the binding nature of *Vavilov FCA*, Timothy's counsel took the position that the *Charter* issue raised in this matter was of crucial importance to Timothy and his brother. Respondent's counsel submits that to grant this application on the issue of statutory interpretation alone would constitute a breach of justice. I disagree.

[30] In written submissions by the applicant the *Charter* argument is set out as a conditional if/then proposition:

> In the event that this Court decides that the Respondent has correctly interpreted Section 3(2) of the *Citizenship Act*, and that it applies to children born to parents who are employees of a foreign government but who do not benefit from any diplomatic or consular immunities, then the provision violates section 7 of the *Charter*. [Emphasis added].

[31] As set out above the respondent's paragraph 3(2)(a) interpretation has been rejected: consequently the section 7 *Charter* violation complained of does not arise.

[32] In submitting that the Court should nonetheless address the *Charter* argument the applicant is asking this Court to embark on a *Charter* analysis based on the factual premise that Timothy is not a Canadian Citizen. That factual premise is precluded by the Federal Court of Appeal's interpretation of paragraph 3(2)(a), a paragraph that the majority found was open to

only one reasonable interpretation. The jurisprudence makes clear that where issues can be resolved under principles of administrative law and statutory interpretation, constitutional issues need not be decided (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 11, 174 DLR (4th) 193; *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3 at para 19; *B010 v Canada (Citizenship and Immigration)*, 2015 SCC 58 at para 74).

[33] I am not prepared to make unnecessary and hypothetical *Charter* determinations in disposing of this application. In the absence of a concrete and real dispute, I decline to address the applicant's *Charter* arguments.

C. *Should a question be certified for the purposes of preserving the respondent's appeal rights?*

[34] The respondent requests that the question answered in the affirmative by the Federal Court of Appeal in *Vavilov FCA* and set out earlier in this judgment be certified again to ensure the respondent's appeal rights in the present matter are preserved.

[35] To be certified, a question "must be dispositive of the appeal, must transcend the interests of the parties and must raise an issue of broad significance or general importance. In consequence, the question must have been dealt with by the Federal Court and must necessarily arise from the case itself (as opposed to arising out of the way in which the Federal Court may have disposed of the case)" [Emphasis added]. (*Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at para 36 [*Lewis*]).

[36] A question "that need not be decided…can never be an issue that grounds a properly certified question." (*Lai v Canada (Public Safety and Emergency Preparedness)*, 2015 FCA 21 at para 10). A question of general importance must be a question that has not been previously settled: "all properly certified questions lack decided binding authority." (*Lewis* at para 39).

[37] In this case I have not had to determine whether the analyst's interpretation of paragraph 3(2)(a) was reasonable. There is no question of broad significance or general importance lacking in decided binding authority. Rather the respondent requests that I certify a question that has been previously answered to permit this matter to remain within the court system in the event the Supreme Court renders a decision that is favourable to the respondent.

[38] A similar situation arose in *Joseph v Canada (Citizenship and Immigration)*, 2015 FC 904 [*Joseph*]. In *Joseph* the applicants requested that judgment be deferred or a question be certified so that they might benefit if a decision then pending in the Supreme Court were to be decided in their favour. Justice Henry Brown declined to delay giving judgment, finding that to do so would invite the bifurcation of proceedings and ignore his duty to decide cases as they arise (*Joseph* at para 49).

[39] In considering the request to certify a question Justice Brown found that the questions proposed were "variants on the questions already put before, considered and answered in the negative by the Federal Court of Appeal" (*Joseph* at para 52). He then concluded:

> [52] […] The questions having been answered, and the Federal Court of Appeal's decision being binding on this Court, no such question will be certified.

[40] The interpretation of paragraph 3(2)(a) of the *Citizenship Act* has been decided. The proposed question was not dealt with in this judgment and does not raise an unanswered question of broad significance or general importance. The respondent's proposed question will not be certified.

JUDGMENT in T-2477-14

THIS COURT'S JUDGMENT is that:

1. The application is granted.

2. The matter is returned for redetermination by a different decision-maker.

3. No question is certified.

"Patrick Gleeson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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