

Federal Court



Cour fédérale

Date: 20101105

Docket: T-1075-10

Citation: 2010 FC 1094

Ottawa, Ontario, November 5, 2010

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

SCHNEUR ZALMAN RABIN

Applicant

and

**MINISTER OF CITIZENSHIP
AND IMMIGRATION CANADA**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review by the applicant, Schneur Zalman Rabin (hereinafter the applicant), pursuant to section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7. The applicant challenges the decision rendered by Canadian Citizenship Officer, Jo-Anne Mac Donald (the Citizenship Officer), dated January 25, 2010, denying the applicant's application

for citizenship on the basis of statutory requirements set forth in the *Citizenship Act*, R.S.C. 1985, c. C-29 (the Act).

[2] The applicant was self-represented at the hearing before this Court.

Factual Background

[3] The applicant's mother's father, Moshe Polter, was born in Belgium on September 8, 1938. In 1951, he immigrated to Canada as a permanent resident. On November 19, 1957, Mr. Polter became a naturalized Canadian citizen.

[4] On December 18, 1960, Mr. Polter married Carol Tenenbaum and thereafter settled in Detroit, Michigan (USA). From this union was born the applicant's mother, Yaffa Finkel Polter, on April 28, 1963.

[5] In 1957 Mr. Polter became a naturalized Canadian citizen. On July 9, 1973, Mr. Polter became a naturalized United States citizen. As a result, Mr. Polter ceased to be a Canadian citizen.

[6] The applicant's father, Yerachmiel Rabin, was born in Sydney, Australia, on June 29, 1956. In 1981 he married the applicant's mother, Yaffa Finkel Polter.

[7] On January 8, 1983, the applicant was born in Detroit, Michigan (USA).

[8] Between September 2000 and July 2003, the applicant was in Canada where he was a student at the Rabbinical College of Canada in Montreal. Between July 2003 and August 2008, the applicant made several visits to Canada. On August 26, 2008, the applicant and his family moved to Montreal where he worked as a spiritual counsellor at the Rabbinical College of Canada.

[9] In May 2009, the applicant and his mother applied for proof of Canadian citizenship. They mailed two (2) applications in the same envelope.

[10] In March 2010, the applicant's mother received her proof of Canadian citizenship, along with the Citizenship Officer's decision of January 25, 2010 indicating that a citizenship certificate cannot be issued to her son.

[11] In June 2010, the applicant renewed his visitor record until July 31, 2013 to work as a spiritual counsellor at the Congregation Ezrat Achim in Montreal.

[12] On July 7, 2010, the applicant filed an application for judicial review of the decision that dismissed his application for a citizenship certificate.

Impugned Decision

[13] In her letter dated January 25, 2010, the Citizenship Officer concluded that the applicant did not meet the requirements set forth under the *Citizenship Act*. More specifically, the Citizenship

Officer determined that the applicant did not meet the requirements of paragraph 3(1)(b) of the Act and is excluded from citizenship by descent by virtue of paragraph 3(3)(a) of the Act.

Issues

[14] The issues that arise in this judicial review are the following:

1. Did the Citizenship Officer render an unreasonable decision and commit a reviewable error?
2. Was there a breach of procedural fairness in the circumstances?

Relevant statutory provisions

[15] The relevant paragraphs of Section 3 of the *Citizenship Act*, R.S.C. 1985, c. C-29, read as follows:

PART I	PARTIE I
THE RIGHT TO CITIZENSHIP	LE DROIT À LA CITOYENNETÉ
<u>Persons who are citizens</u>	<u>Citoyens</u>
<p>3. (1) Subject to this Act, a person is a citizen if</p> <p>(a) the person was born in Canada after February 14, 1977;</p> <p>(b) the person was born outside Canada after February 14, 1977 and at the time of his birth one of his parents, other than a parent who adopted him, was a</p>	<p>3. (1) Sous réserve des autres dispositions de la présente loi, a qualité de citoyen toute personne :</p> <p>a) née au Canada après le 14 février 1977;</p> <p>b) née à l'étranger après le 14 février 1977 d'un père ou d'une mère ayant qualité de citoyen au moment de la naissance;</p>

citizen;

(c) the person has been granted or acquired citizenship pursuant to section 5 or 11 and, in the case of a person who is fourteen years of age or over on the day that he is granted citizenship, he has taken the oath of citizenship;

(c.1) the person has been granted citizenship under section 5.1;

[...]

(g) the person was born outside Canada before February 15, 1977 to a parent who was a citizen at the time of the birth and the person did not, before the coming into force of this paragraph, become a citizen;

[...]

Not applicable — after first generation

(3) Subsection (1) does not apply to a person born outside Canada

(a) if, at the time of his or her birth or adoption, only one of the person's parents is a citizen and that parent is a citizen under paragraph (1)(b), (c.1), (e), (g) or (h), or both of the person's parents are citizens under any of those paragraphs;

(b) if, at any time, only one of

c) ayant obtenu la citoyenneté — par attribution ou acquisition — sous le régime des articles 5 ou 11 et ayant, si elle était âgée d'au moins quatorze ans, prêté le serment de citoyenneté;

c.1) ayant obtenu la citoyenneté par attribution au titre de l'article 5.1;

...

g) qui, née à l'étranger avant le 15 février 1977 d'un père ou d'une mère ayant qualité de citoyen au moment de la naissance, n'est pas devenue citoyen avant l'entrée en vigueur du présent alinéa;

...

Inapplicabilité après la première génération

(3) Le paragraphe (1) ne s'applique pas à la personne née à l'étranger dont, selon le cas :

a) au moment de la naissance ou de l'adoption, seul le père ou la mère a qualité de citoyen, et ce, au titre de l'un des alinéas (1)b), c.1), e), g) et h), ou les deux parents ont cette qualité au titre de l'un de ces alinéas;

b) à un moment donné, seul le

the person's parents was a citizen and that parent was a citizen under any of the following provisions, or both of the person's parents were citizens under any of the following provisions:

père ou la mère a qualité de citoyen, et ce, au titre de l'une des dispositions ci-après, ou les deux parents ont cette qualité au titre de l'une de celles-ci :

(i) paragraph 4(b) or 5(b) of the *Canadian Citizenship Act*, S.C. 1946, c. 15,

(i) les alinéas 4b) ou 5b) de la *Loi sur la citoyenneté canadienne*, S.C. 1946, ch. 15,

(ii) paragraph 5(1)(b) of the *Canadian Citizenship Act*, S.C. 1946, c. 15, as enacted by S.C. 1950, c. 29, s. 2,

(ii) l'alinéa 5(1)b) de la *Loi sur la citoyenneté canadienne*, S.C. 1946, ch. 15, édicté par S.C. 1950, ch. 29, art. 2,

(iii) paragraph 4(1)(b) of the *Canadian Citizenship Act*, S.C. 1946, c. 15, as enacted by S.C. 1952-53, c. 23, s. 2(1),

(iii) l'alinéa 4(1)b) de la *Loi sur la citoyenneté canadienne*, S.C. 1946, ch. 15, édicté par S.C. 1952-53, ch. 23, par. 2(1),

(iv) paragraph 5(1)(b) of the *Canadian Citizenship Act*, S.C. 1946, c. 15, as enacted by S.C. 1950, c. 29, s. 2 and amended by S.C. 1952-53, c. 23, s. 3(1),

(iv) l'alinéa 5(1)b) de la *Loi sur la citoyenneté canadienne*, S.C. 1946, ch. 15, édicté par S.C. 1950, ch. 29, art. 2 et modifié par S.C. 1952-53, ch. 23, par. 3(1),

(v) paragraph 4(1)(b) of the *Canadian Citizenship Act*, R.S.C. 1952, c. 33, as enacted by S.C. 1952-53, c. 23, s. 13(1),

(v) l'alinéa 4(1)b) de la *Loi sur la citoyenneté canadienne*, S.R.C. 1952, ch. 33, édicté par S.C. 1952-53, ch. 23, par. 13(1),

(vi) paragraph 5(1)(b) of the *Canadian Citizenship Act*, R.S.C. 1952, c. 33, as amended by S.C. 1952-53, c. 23, s. 14(1),

(vi) l'alinéa 5(1)b) de la *Loi sur la citoyenneté canadienne*, S.R.C. 1952, ch. 33, modifié par S.C. 1952-53, ch. 23, par. 14(1),

(vii) subsection 39B(1) of the

(vii) le paragraphe 39B(1) de

Canadian Citizenship Act,
R.S.C. 1952, c. 33, as enacted
by S.C. 1967-68, c. 4, s. 10, or

la *Loi sur la citoyenneté
canadienne*, S.R.C. 1952, ch.
33, édicté par S.C. 1967-68,
ch. 4, art. 10,

(viii) paragraph 4(1)(b) or
5(1)(b) or subsection 42(1) of
the former Act.

(viii) les alinéas 4(1)b) ou
5(1)b) ou le paragraphe 42(1)
de l'ancienne loi.

Standard of review

[16] With regards to the applicable standard of review to decisions on applications for a citizenship certificate, Justice Martineau in *Azziz v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 663, [2010] F.C.J. No. 767, at paras 27-28, held the following:

[27] Having analyzed the standard of review based on the usual tests, I am of the opinion that the correctness standard applies to the questions of law raised in this case, while the reasonableness standard applies to the findings of fact regarding which the analyst has recognized expertise. The questions of procedural fairness or bias are subject to the standard of correctness.

[28] In this respect, an analyst's decision concerning the sufficiency of the evidence submitted by an applicant to confirm the citizenship of a person is reasonableness (*Worthington v. Canada*, 2008 FC 409, [2009] 1 F.C.R. 311 at paragraph 63).
[...]

[17] In the present case, the Citizenship Officer's decision must therefore be reviewed on the standard of reasonableness.

[18] As for the issues related to questions of procedural fairness raised by the applicant, they are to be reviewed according to the standard of correctness (*Azziz*).

Analysis

Statutory provisions

[19] The interpretation of section 3 of the Act - more particularly paragraphs 3(1)(b), 3(1)(g) and 3(3)(a) - is at the heart of this judicial review application.

[20] The applicant contends that because his mother is now considered a citizen by birth, citizenship should extend to him automatically and alleges that the limitation of citizenship by descent to the first generation born outside Canada to a Canadian parent is inapplicable to his case. The respondent disagrees and argues that the wording and intent of the Act does not support the applicant's contention.

[21] The applicant argues that, by virtue of paragraph 3(1)(b) of the Act, his application for proof of citizenship should have been approved. Paragraph 3(1)(b) reads as follows:

3. (1) Subject to this Act, a person is a citizen if

...

(b) the person was born outside Canada after February 14, 1977 and at the time of his birth one of his parents, other than a parent who adopted him, was a citizen;

...

3. (1) Sous réserve des autres dispositions de la présente loi, a qualité de citoyen toute personne :

[...]

b) née à l'étranger après le 14 février 1977 d'un père ou d'une mère ayant qualité de citoyen au moment de la naissance;

[...]

[22] However, paragraph 3(1)(b) cannot be read in a vacuum. The legal effect of applying for citizenship by virtue of paragraph 3(1)(g) – which is the case for the applicant’s mother - triggers paragraph 3(3)(a) and consequently the non-applicability of paragraph 3(1)(b) to the applicant. The introductory wording of subsection 3(1) of the Act is clear: Subject to this Act (...), as is the wording of paragraph 3(3)(a): Subsection (1) does not apply to a person born outside Canada (...).

[23] The applicant’s mother was born in 1963 outside of Canada (Detroit, Michigan, USA) of a Canadian parent but she was never registered as a Canadian citizen prior to the applicant’s birth in 1983 nor before the coming into force of Bill C-37 (An Act to Amend the Citizenship Act) on April 17, 2009, which limits citizenship by descent to the first generation born outside Canada to a Canadian parent.

[24] Following the coming into force of Bill C-37 on April 17, 2009, the applicant’s mother was entitled to apply for proof of citizenship pursuant to paragraph 3(1)(g) of the Act. Paragraph 3(1)(g) of the Act reads as follows:

3. (1) Subject to this Act, a person is a citizen if

...

(g) the person was born outside Canada before February 15, 1977 to a parent who was a citizen at the time of the birth and the person did not, before the coming into force of this paragraph, become a citizen;

...

3. (1) Sous réserve des autres dispositions de la présente loi, a qualité de citoyen toute personne :

[...]

g) qui, née à l’étranger avant le 15 février 1977 d’un père ou d’une mère ayant qualité de citoyen au moment de la naissance, n’est pas devenue citoyen avant l’entrée en vigueur du présent alinéa;

[...]

[25] The applicant's mother - born in 1963 to a Canadian father (Mr. Moshe Polter) - thus applied for proof of citizenship in May 2009 and received it in March 2010. As per paragraph 3(7)(e) of the Act, the applicant's mother is deemed to be a citizen from the time she was born.

[26] Of considerable importance in the interpretation of the relevant statutory provisions of the Act in the case at bar is paragraph 3(3)(a) which was introduced by Bill C-37 under the heading "Not applicable – after first generation". Paragraph 3(3)(a) states the following:

<p>3. (3) Subsection (1) does not apply to a person born outside Canada</p> <p>(a) if, at the time of his or her birth or adoption, only one of the person's parents is a citizen and that parent is a citizen under paragraph (1)(b), (c.1), (e), (g) or (h), or both of the person's parents are citizens under any of those paragraphs; [...]</p>	<p>3. (3) Le paragraphe (1) ne s'applique pas à la personne née à l'étranger dont, selon le cas :</p> <p>a) au moment de la naissance ou de l'adoption, seul le père ou la mère a qualité de citoyen, et ce, au titre de l'un des alinéas (1)b), c.1), e), g) et h), ou les deux parents ont cette qualité au titre de l'un de ces alinéas; ...</p>
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[27] Paragraph 3(3)(a) thus expressly excludes from citizenship by descent persons born outside Canada if, at the time of their birth or adoption, one of their parents is a Canadian citizen under paragraphs (1)(b), (c.1), (e), (g), or (h) of the Act. The evidence establishes that the applicant's mother's situation is covered by paragraph 3(1)(g): she was not a citizen prior to the coming into force of Bill C-37 on April 17, 2009, but was eligible to apply for proof of citizenship under paragraph 3(1)(g) of the Act which she did in May 2009. By virtue of paragraph 3(3)(a), paragraph 3(1)(b) of the Act does not apply to the applicant and, as a result, the limitation of citizenship by

descent to the first generation born outside Canada to a Canadian parent rule applies to the applicant.

[28] The applicant also raised an argument based on the legal theory of retroactivity by which he should benefit retroactively from his mother's citizenship. The Court is of the view that the relevant statutory provisions of the Act - paras 3(1)(b), 3(1)(g) and 3(3)(a) - read together cannot sustain the applicant's retroactivity argument. The Court is unable to find any intent or clear indication in the Act with respect to retroactivity as it relates to the applicant in the case at bar. In accordance with the principle of the rule of law, the applicant's retroactivity argument is unsustainable.

[29] In a judicial review proceeding, the role of the Court is not to substitute its opinion to the one of the Officer. In other words, the Court will not intervene if the Citizenship Officer's decision is reasonable. In the case at bar, and following a review of the evidence and the relevant provisions of the Act, the Court finds that the Citizenship Officer considered the applicant's family background and applied the relevant statutory provisions of the Act to the relevant facts. The Court is therefore of the opinion that the decision is reasonable as it falls in the range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.R. 190). It follows that the intervention of this Court is not warranted.

Procedural fairness

[30] The applicant also alleges that there was a breach of procedural fairness in the circumstances because Citizenship and Immigration of Canada (CIC) failed to send him a direct response and also failed to advise him of the terms of appeal.

[31] On that point, although it would have been more appropriate for CIC to send a direct response to the applicant, in this case, the Court finds that the applicant did not suffer any prejudice for not having received a response from CIC in March 2010, at the same time as his mother. Any potential prejudice was alleviated by the fact that the respondent refrained from raising any preliminary objections based on the fact that the delay had expired when the applicant filed its application for judicial review (see Motion Record (by the Respondent) for an extension of delay to the Tribunal's Record). The applicant was accordingly not precluded from bringing forward a judicial review application. The Court finds therefore that, in these circumstances, there has been no breach of procedural fairness.

[32] With respect to the absence of the terms of appeal in CIC's letter, the Court agrees with the respondent that CIC had no legal obligation to advise the applicant of the terms of appeal since this case is an application for judicial review and not an appeal from a Citizenship Judge's decision made under subsection 14(5) of the Act.

[33] The Court sympathizes with the applicant in light of the circumstances having led him to file this application for judicial review. The Court observes that the applicant is not precluded from applying for permanent residence in Canada.

[34] For all these reasons, the Court dismisses this application for judicial review.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the present application for judicial review be dismissed.

“Richard Boivin”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1075-10

STYLE OF CAUSE: SCHNEUR ZALMAN RABIN
v. MINISTER OF CITIZENSHIP AND
IMMIGRATION CANADA

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: October 27, 2010

REASONS FOR JUDGMENT: BOIVIN J.

DATED: November 5, 2010

APPEARANCES:

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FOR THE APPLICANT
(ON HIS OWN BEHALF)

Simone Truong

FOR THE RESPONDENT

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FOR THE RESPONDENT