Federal Court  Cour fédérale

Date: 20130404

Docket: T-897-12

Citation: 2013 FC 336

Ottawa, Ontario, April 4, 2013

PRESENT:

BETWEEN:

NANAKMEET KAUR KANDOLA by her Guardian at Law, MALKIAT SINGH KANDOLA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant, Nanakmeet Kaur Kandola, seeks judicial review under section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 of a decision by a Citizenship Officer (the Officer) dated April 25, 2012, refusing the Applicant's application for registration as a Canadian citizen born outside of Canada.

[2] The Applicant seeks an order setting aside the decision refusing her registration and certification as a Canadian citizen, and directing the Respondent to reconsider the application "on the basis that, on the present record, there is no reason to refuse it."

FACTS

[3] The Applicant was born in Chandigarh, India, on June 3, 2009. She was conceived through *in vitro* fertilization (IVF). An embryo, produced by the egg of an anonymous stranger fertilized *in vitro* by the sperm of another anonymous stranger, was implanted in the Applicant's birth mother. The Applicant's guardian, a Canadian citizen, and her Indian birth mother are married. They are registered as the Applicant's parents and are so listed on her Indian birth certificate.

[4] In an unrelated proceeding, the Applicant's guardian gave Citizenship and Immigration Canada (CIC) officials notice of the circumstances of the birth. CIC learned about his wife's fertility problems from an interview on January 7, 2009, in the course of considering her sponsored application for a permanent residence visa.

[5] On September 30, 2011, the Applicant's guardian applied for a Citizenship Certificate (Proof of Citizenship) on behalf of the Applicant at the Canadian High Commission in New Delhi. The Respondent claims that he had made a previous application, which was also refused.

[6] On April 19, 2012, in supplementary submissions, the Applicant's guardian informed the Officer who rendered the decision, of the presumption in Indian law that a child born to a married woman is the child of her husband.

[7] After the decision was rendered on April 25, 2012, the Applicant's guardian filed a request to the Officer pursuant to section 317 of the *Federal Courts Rules*, SOR/98-106 for materials in its file not in the possession of the Applicant. The materials sent contained neither the April 19, 2012 submissions nor any CIC policy stating that officers should only recognize genetic parents.

DECISION UNDER REVIEW

[8] The Officer refused the application by letter dated April 25, 2012. I reproduce below those portions of the letter explaining his reasons for so doing:

> …
>
> Section 3 of the *Citizenship Act* sets out who is a Canadian citizen. The pertinent paragraph for your child's application is paragraph 3(1)(*b*), which states that a person is a Canadian citizen if "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."
>
> For the purposes of determining citizenship by birth outside Canada to a Canadian parent (derivative citizenship), Canadian law relies on evidence of a blood connection (or genetic link) between parent and child which can be proven by DNA testing. This principle of *jus sanguinis* has deep historical roots both in Canada and internationally, and it is evident from the legislative history of the *Citizenship Act* that Parliament has always intended the term "parent" to refer to genetic parents for derivative citizenship purposes. In addition to the requirement of a genetic link between parent and child, there also needs to be evidence of a parental link, or an intention to parent the child, for determining citizenship. The present citizenship policy is simply a reflection of the current law and is aimed at clarifying the law in light of new technologies for assisted human reproduction.
>
> For the purposes of determining citizenship by birth outside Canada to a Canadian parent (derivative citizenship), the present citizenship policy only recognizes genetic parents (parents who have a genetic

> link to the child concerned). In all cases where there exists information suggesting that a parent, through whom a claim of derivative citizenship is made, may not be the genetic parent, DNA evidence is requested.
>
> The DNA evidence you have submitted concerning Nanakmeet demonstrates less than 99.8% accuracy, which is the acceptable standard for citizenship purposes. Consequently, you have been found not to be Nanakmeet's genetic parent.
>
> Since you have been found not to be the genetic parent of Nanakmeet, you may wish to explore options for intercountry adoption in order to regularize the parental relationship for the purpose of applying for Canada citizenship or immigration (please consult the CIC website for further information at: http://www.cic.gc.ca/english/immigrate/adoption/index .asp).
>
> In the event that an adoption is not possible because you are already recognized as the legal parent(s) in the foreign jurisdiction where the child was born (including having your name(s) on the birth certificate), or adoption is not possible for other reasons, you may be eligible for facilitation of your return to Canada through discretionary immigration processing, such as a temporary resident permit for your child. Once in Canada, you may choose to submit on behalf of your child a humanitarian and compassionate permanent resident application, or to apply for a discretionary grant of citizenship.
>
> Consequently, the application for a citizenship certificate for your child has been refused. …

APPLICANT'S POSITION

[9] The Applicant submits that the Respondent has failed to interpret the applicable provisions of the *Citizenship Act*, R.S.C. 1985, c. C-29 [the *Act*] in accordance with section 10 of the *Interpretation Act*, R.S.C. 1985, c. I-21, which requires that the interpretation of the law must evolve with the evolution of technology. The Applicant maintains the Respondent's interpretation does not take into account IVF and has denied the Applicant's rights "intended by Parliament for those humans created as she has been."

[10] The Applicant raises the following two issues. The first is whether the lawful construction of paragraph 3(1)(*b*) of the *Act* allows the Ministers' officials to restrict derivative citizenship to those who have a direct genetic link to a Canadian parent. The second is whether the Ministers' officials may "absolutely displace the benefits of the presumption of legitimacy to a child born to that married woman."

[11] The Applicant claims she is the legitimate offspring of her birth mother and her guardian. She maintains that for the purpose of paragraph 3(1)(*b*) of the *Act* they should be considered her parents.

[12] The Applicant argues that to uphold the Officer's interpretation of parent contradicts the common law presumption of legitimacy without statutory authority, and conflicts with Indian law, the ordinary meaning of the word "parent" in paragraph 3(1)(*b*), and the definition of "parent" in section 2 of the *Citizenship Regulations*, SOR/93-246. She further argues that the Officer's definition is also premised on Parliament intending a restrictive definition based on *jus sanguinis* which is not in keeping with the advancements in reproductive technology or consistent with the evolving nature of the Constitution.

RESPONDENT'S POSITION

[13] The Respondent adopts the position that Canadian law requires a blood connection or genetic link between parent and child in a derivative citizenship application. In support of this

position the Respondent relies upon Operational Bulletin 381 (the Bulletin), dated March 8, 2012, and the principles of statutory interpretation.

[14] The Respondent contends that the Bulletin "specifically addresses the question of who is considered a parent in the absence of a genetic link." The Bulletin states that children born through assisted human reproduction or surrogacy arrangements with no genetic link to Canadian parents are ineligible for citizenship.

[15] The Respondent argues that in such cases, parents must seek adoption to obtain citizenship for their child. In cases where it is not possible for intending parents to adopt, such as in this instance where the names of the intending parents figure on the birth certificate of the child, then facilitation of their return to Canada may be made through discretionary citizenship or immigration case processing.

[16] With respect to policy, the Respondent argues that reproductive technologies present cause for concern with respect to immigration. There is the potential for easily obtained false documents claiming to be evidence of birth via assisted human reproduction that can easily explain DNA tests which do not demonstrate shared genetic material with parents. There is also the potential for human trafficking and undue gain. The Respondent submits that the Minister's interpretation and application of section 3(1)(*b*) of the *Act* with respect to the requirement of a blood relationship for derivative citizenship rests partly on the above policy factors.

[17] The Respondent argues that the principles of statutory interpretation support Operational Bulletin 381. The words of a statute are to derive meaning from their broad context (*Re Rizzo & Rizzo Shoes*, [1998] 1 S.C.R. 27; *R v. Ahmad*, 2011 SCC 6 at paragraph 28). According to the Respondent, the ordinary meaning of a provision is presumed to be the meaning intended by the legislature and should be accepted by the court in absence of a reason to reject it. The Respondent argues that the distinction between "parent" and "parent who adopted" in subsection 3(1)(*b*) demonstrates that the term "parent" is limited and "may be interpreted as the traditional understanding of the term – a blood connection between parent and child."

[18] In addition, the Respondent maintains that citizenship "has traditionally been a restrictive concept", with the *Act* only allowing for three methods of becoming a citizen: *jus soli*, *jus sanguinis*, and naturalization. Although assisted human reproduction was not available in 1977 when Bill C-14 was passed to include adopted children, the provincial law definition of parents included adoptive parents, so in the Respondent's view, Parliament intended the definition to be the traditional definition based on *jus sanguinis*.

[19] The Respondent contends that the case law supports this position. In *Valois-D'Orleans v. Canada (Minister of Citizenship and Immigration*, 2005 FC 1009 at paragraph 16, the Federal Court held that "[a] s it stands, the Act does not, save for an adoptive parent, depart from the ordinary meaning that the parent must be one who is in a blood relationship with the child." Similarly, in *Azziz* at paragraph 73, the Court held that paragraph 3(1)(*b*) "concerns only the natural children of a parent who is a Canadian citizen at the time of the birth." Also, in *Canada (Minister of Citizenship and Immigration) v. McKenna*, [1999] 1 F.C. 401 (C.A.) at paragraphs 57 and 85, the Federal Court

of Appeal refers to the automatic right of citizenship that "birth children of a Canadian citizen" possess, and in dissent Justice Linden refers to a connection "represented by blood or soil." *Taylor v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1053, also refers to "natural-born" and "biological parents".

ISSUES

[20] In my view, the determinative issue on this application is whether the Citizenship Officer erred in his interpretation of paragraph 3(1)(*b*) of the *Act* by requiring a genetic link to derivative parents thereby excluding the Applicant?

STANDARD OF REVIEW

[21] The issue involves the Minister's interpretation of the *Act*. The applicable standard of review for such questions is correctness. See: *Canada (Minister of Fisheries and Oceans) v. David Suzuki Foundation*, 2012 FCA 40 at paragraph 6, *Takeda Canada Inc. v. Canada (Minister of Health)*, 2013 FCA 13 at paragraph 29.

ANALYSIS

[22] In Canadian law there are three possible sources of a right to citizenship:

a. *jus soli*, when a person is born on Canadian soil,

b. *jus sanguinis*, when a person's "blood" or a genetic parent is Canadian, and

c. naturalization in accordance with the laws of Canada, namely the *Citizenship Act*.

See: *Valois-d'Orleans* at paragraph 12 and *McKenna* at paragraph 18.

[23] The Applicant was not born on Canadian soil and she claims no genetic link to her only intended parent who is Canadian. Consequently her right of citizenship cannot be sourced through a claim of *jus soli* or *jus sanguinis* .

[24] The remaining source for the Applicant is the right of citizenship conferred by legislation. I reproduce below the applicable provision of the *Act*:

3. (1) Subject to this Act, a person is a citizen if	**3.** (1) Sous réserve des autres dispositions de la présente loi, a qualité de citoyen toute personne
…	…
(*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;	*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;
…	…
5.1 (1) Subject to subsection (3), the Minister shall on application grant citizenship to a person who was adopted by a citizen on or after January 1, 1947 while the person was a minor child…	**5.1** (1) Sous réserve du paragraphe (3), le ministre attribue, sur demande, la citoyenneté à la personne adoptée par un citoyen le 1er janvier 1947 ou subséquemment lorsqu'elle était un enfant mineur…

[25] The key question in this instance is whether the Applicant's legal guardian is a parent for the purposes of paragraph 3(1)(*b*) of the *Act*. The *Act* does not expressly require a genetic link between

parent and child in legitimation cases. It is a question of interpreting the meaning of the term "parent" in the *Act*.

[26] This case is not about fraudulent claim of parentage or any other misrepresentation of facts. The Applicant and her legal guardian and birth mother were forthright from the outset with respect to all elements of the application. The case can therefore be distinguished on its facts from certain authorities cited to the Court, including *Valois-d'Orleans* and *Azziz*, where fraud is involved and different issues are raised.

[27] Although Justice Hughes and Justice Martineau seem to pronounce definitively on the issue at paragraph 16 of *Valois-d'Orleans* and paragraph 73 of *Azziz*, a situation of legitimation by a foreign state was not before the Court in either case. As such, the general statements in these two cases are of little assistance, and I am required to look to the *Act* itself for guidance.

[28] In *Re Rizzo & Rizzo Shoes* at paragraphs 21 and 22, the Supreme Court adopts the following approach to statutory interpretation:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

The Supreme Court also relies upon section 10 of the *Interpretation Act* which provides that every Act "shall be deemed remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according

to its true intent, meaning and spirit". The prescribed approach therefore requires that the words of the *Act* and their ordinary meaning be considered.

[29] *Prima facie*, the word "parent" when used in a statute should be given its ordinary meaning unless in the context of the statute a restricted meaning should be given. See: *Gingell v. R.*, [1976] 2 S.C.R. 86.

[30] At the outset, I note that the Applicant is a minor child. There is no dispute on this point.

[31] The Minister argues that since the Bill C-14 amendments, foreign-born children adopted after February 14, 1977, by Canadian citizens have access to citizenship in the same way as biological children born abroad to Canadian citizens. He argues that by expressly providing for adopted children, Parliament intended the term "parent" in the *Act* to be narrowly interpreted as a blood relation between parent and child. Otherwise, the amendment to allow adoptive parents to pass on derivative citizenship to their children would be redundant. The Minister therefore argues that Parliament intended the more traditional and restrictive definition of "parent" based on the concept of *jus sanguinis*, and any changes to this definition would require legislative amendment.

[32] The Minister's argument is not without merit. However, it fails to take into account an important consideration, namely that Parliament saw fit to define the term "child" in the Act. Section 2 of the *Act* provides: "In this Act, 'child' includes a child adopted or legitimized in accordance with the law of the place where the adoption or legitimating took place;" In so defining

"child," Parliament provides insight into what meaning it intended for the lawful parents of such a child.

[33] In the instant case, the record establishes that the Applicant's guardian, a Canadian citizen, and her Indian birth mother are married and are registered as the Applicant's parents. They are listed as her parents on her Indian birth certificate. Absent evidence to the contrary, the record is sufficient to establish this relationship under Indian law. There appears to be no dispute on this point. For the purposes of the application, I am satisfied that the Applicant is the legitimized child of her birth mother and her Canadian legal guardian under Indian law.

[34] As a legitimized child, the Applicant is therefore included in the definition of "child" for the purposes of the *Act*. Had she been an adopted child, the Minister would have been required, on application, to grant her citizenship pursuant to section 5.1 of the *Act*. The question then is whether she should be subjected to a different treatment on the basis that she is legitimized and not adopted. In my view, for the following reasons, she should not be.

[35] Had Parliament intended to treat a legitimized child differently than an adopted child with respect to how the term "parents" is defined for the purposes of paragraph 3(1)(*b*), it would have expressly done so and not included a legitimized child in the same definition. Both are defined as a "child" for the purposes of the *Act*.

[36] The courts have used the definition of "child" to discern the intended meaning of "parent" in statutes that do not expressly define "parent" because the concepts are "correlative," or naturally

linked. (See: *Ogg-Moss v. The Queen*, [1984] 2 S.C.R. 173). Chief Justice Laskin considered the correlative nature of these terms in *Gingell* at page 95. The learned Chief Justice stated that the proper starting point in determining the meaning of the word "parent" in a particular statutory provision is to consider the meaning of "child" as used in the same Act.

[37] In the instant case, the terms parent and child are "correlative". If a minor child is "adopted" or "legitimized," a parent/child relationship necessarily flows from this event. Because of the nature of the relationship, which is essentially about nurturing and dependency, it would be incongruous to recognize a child in such circumstances but not the parent of the child.

[38] On the basis of the definition of "child" in the *Act* and given the correlative nature of the terms "parent" and "child", it would be inconsistent with the object and scheme of the *Act* not to recognize the parent of that same child as a "parent" for the purposes of the *Act*. If Parliament intended asymmetry between these "correlative" terms, it would have legislated a specific definition for "parent." It did not.

[39] Moreover, the Minister's interpretation of the *Act* is inconsistent with the wording of the *Act*. The definition of "child" in section 2 of the *Act* includes children who are adopted or legitimized. Paragraph 3(1)(*b*) of the *Act* states that someone born abroad who "at the time of his birth one of his parents, other than a parent who adopted him, was a citizen" (emphasis added). By excepting only an adoptive parent from this provision under the *Act*, an inference arises from the legislation that any other type of parent (genetic or legitimized) is sufficient to satisfy paragraph

3(1)(*b*). If it were Parliament's intent to exclude legitimized parents as well, it needed to do so expressly.

[40] Further, legitimation renders adoption impossible. The Minister does not dispute this. Consequently, if legitimation of a Canadian parent by a foreign process does not result in either a "parent" or "adoptive parent" relationship with the child and precludes adoption, obtaining Canadian citizenship for the child is not possible except by ministerial discretion or the citizenship process designed for foreign nationals. In my view, such a result would render meaningless the "legitimation" portion of the definition of child and have a discriminatory effect against legitimized children who are not genetically linked to their parents. The *Act* cannot be interpreted in this way.

[41] I therefore construe the term "parent" in paragraph 3(1)(*b*) of the *Act* to include the lawfully recognized parents of a legitimized child in accordance with the laws of the place where the legitimation took place: in this instance, India. The above interpretation is consistent with the words of an Act, read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. The Minister's restrictive interpretation of the term "parent" is not.

[42] Since one of the Applicant's parents, her legal guardian**,** is a Canadian citizen by operation of paragraph 3(1)(*b*) of the *Act*, the Applicant's application cannot be denied by reason of the lack of a genetic link with her Canadian parent.

[43] For the above reasons, I conclude that the Citizenship Officer erred in his interpretation of the *Act* by requiring such a genetic link thereby refusing to consider parents by legitimation to be parents for the purposes of paragraph 3(1)(*b*) of the *Act*.

[44] The application for judicial review will be allowed. The Officer's decision is quashed, and the matter is returned to the Minister to be reconsidered by a different Officer in accordance with these Reasons for Judgment.

JUDGMENT

THIS COURT ADJUDGES that:

1. The application for judicial review is allowed.

2. The Citizenship Officer's decision is quashed, and the matter is returned to the Minister to be reconsidered by a different Officer in accordance with these Reasons for Judgment.

"Edmond P. Blanchard"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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