Federal Court of Appeal | Cour d'appel fédérale

Date: 20150604

Docket: A-457-14

Citation: 2015 FCA 139

CORAM: **STRATAS J.A.**
RYER J.A.
RENNIE J.A.

BETWEEN:

DEEPAN BUDLAKOTI

Appellant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Heard at Ottawa, Ontario, on May 26, 2015.

Judgment delivered at Ottawa, Ontario, on June 4, 2015.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: RYER J.A.
RENNIE J.A.

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REASONS FOR JUDGMENT

STRATAS J.A.

[1] The appellant appeals from the judgment dated September 9, 2014 of the Federal Court (*per* Justice Phelan): 2014 FC 855. The Federal Court dismissed the appellant's application for judicial review. It declined to grant the appellant a declaration that he is a Canadian citizen.

[2] For the following reasons, I would dismiss the appeal with costs.

A. Basic facts

[3] In 1989, the appellant was born in Canada. Both of his parents were Indian nationals, not Canadian citizens.

[4] In 1992, his parents applied to become permanent residents. In their application, they listed the appellant as a dependent child. Their application was granted and the appellant and his parents become permanent residents.

[5] In 1995, the appellant's parents applied for Canadian citizenship. It is not clear why the appellant did not apply or why no application was made on his behalf. In any event, only the parents were granted Canadian citizenship.

[6] Years later, in 2009, while still a permanent resident, the appellant was convicted of breaking and entering and was sentenced to four months in jail. Later, in 2010, he was convicted of weapons trafficking, possession of a firearm while prohibited, and trafficking in narcotics. He was sentenced to three years in jail.

[7] In 2011, the Minister of Citizenship and Immigration investigated the appellant's status. As a result of that, he considered the appellant to be a permanent resident, not a Canadian citizen. He declared the appellant to be inadmissible to Canada because of these offences, which

constituted "serious criminality" under the Act: *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, paragraph 36(1)(*a*). Then the Minister applied for an order from the Immigration and Refugee Board permitting him to remove the appellant from Canada: *Ibid.*, paragraph 45(*d*).

[8] The appellant opposed the application. He submitted to the Board that he was a Canadian citizen and could not be removed. The appellant submitted that he was born in Canada after February 14, 1977 and, as a result, became a Canadian citizen under the *Citizenship Act*, R.S.C. 1985, c. C-29, paragraph 3(1)(*a*).

[9] The Minister disagreed. He pointed to the fact that at the time of the appellant's birth his parents, Indian nationals, were employees of Indian High Commission officials. In that situation, Canadian citizenship does not arise upon birth: *Citizenship Act*, above, paragraph 3(2)(*a*). The appellant contested this, alleging that he was born after his parents' employment with Indian High Commission officials ended.

[10] As can be surmised from the arguments made to the Board, the Board had to decide a narrow question of fact: exactly when did the parents' employment end? If it ended before the appellant's birth, the appellant was a citizen under paragraph 3(1)(*a*) of the *Citizenship Act* and so the Board could not make the removal order. If it ended after the appellant's birth, the appellant was not a citizen under paragraph 3(1)(*a*) and the Board could make the removal order. The parties had a full opportunity to adduce evidence and make submissions on this issue. In these reasons, I shall call this issue the "employment issue."

[11] The Board ruled against the appellant on the employment issue. It found that the parents' employment ended after the appellant's birth. So the appellant was not a citizen under paragraph 3(1)(*a*) of the *Citizenship Act*. As a result, the removal order became effective: *Minister of Public Safety and Emergency Preparedness v. Budlakoti*, December 8, 2011, File No, 018-B0-00674 (Immigration and Refugee Board); *Immigration and Refugee Protection Act*, above, paragraph 45(*d*).

[12] The appellant applied to the Federal Court for leave to commence a judicial review of the Board's decision. On May 24, 2012, the Federal Court dismissed the application.

[13] At this point, the employment issue was finally determined: the appellant was not a Canadian citizen under paragraph 3(1)(*a*). Whether the appellant was or could be a Canadian citizen on other grounds under the *Citizenship Act* has remained open to this day—the appellant has never explored this, nor has he ever applied to the Minister under the *Citizenship Act* on any grounds.

[14] In 2012, while he was still serving his criminal sentence, the appellant received a negative pre-removal risk assessment under the *Immigration and Refugee Protection Act*. By the end of 2012, he had served his criminal sentence and was transferred to the Customs and Border Protection Agency for detention pending removal in accordance with the removal order.

[15] In March 2013, the High Commission of India advised the Minister that it would not issue a travel document to the appellant because India did not recognize the appellant as an

Indian national. This makes sense. The appellant has never applied for Indian citizenship. So on the files of the Indian authorities, the appellant may not have been recorded as an Indian national.

[16] In April 2013, the appellant was released from custody on certain bonds and conditions. He has remained in Canada to this day, still subject to those conditions.

B. The appellant brings new proceedings in the Federal Court

[17] On September 23, 2013, the appellant brought an application for judicial review in the Federal Court. The Federal Court's judgment in that application is the subject of this appeal.

[18] In his application, the appellant asked the Federal Court to declare that he is a Canadian citizen. He advanced two bases for the declaration and the Federal Court rejected both of them:

- *The employment issue*. The appellant argued the employment issue that the Board had determined against him. Applying the legal doctrine of issue estoppel, the Federal Court concluded that the appellant could not relitigate the employment issue. However, the Federal Court nevertheless considered the factual merits of the employment issue. After examining the evidence before it—substantially the same evidence that was before the Board—the Federal Court ruled against the appellant, finding that he was born while his parents were employees of Indian High Commission officials (at paragraphs 34-38).

- *The constitutional issues*. The appellant submitted that he is a stateless person entitled to Canadian citizenship under sections 6 and 7 of the Canadian Charter of Rights and Freedoms. In both the Federal Court and in this Court, the appellant emphasized the importance of citizenship to personhood and one's sense of belonging and well-being. The appellant also emphasized the difficulties suffered by the appellant arising from what he alleges the Canadian government has done to him. At the outset of its reasons on this point, the Federal Court expressed "grave doubts" about its ability to proceed in the absence of "other relief or proceedings" (at paragraphs 29-30) but nevertheless disposed of the constitutional issues on their merits (at paragraphs 39-49).

C. The appellant's submissions and some necessary clarifications

[19] The appellant appeals to this Court, submitting that the Federal Court erred on all issues: issue estoppel did not apply, the Federal Court committed reviewable error in deciding the employment issue, and the Federal Court should have determined the constitutional issues in the appellant's favour.

[20] Both in the appellant's written materials and in oral argument, the appellant asserts certain facts and positions. These facts and positions bear upon the appeal before us and must be clarified.

[21] First, in his notice of appeal and affidavit the appellant suggests that the Canadian government revoked his citizenship. This is not true. The Canadian government has never revoked his citizenship. Rather, at all times, the issue has been whether the appellant is a Canadian citizen and should be recognized as such, or, if he is not a Canadian citizen, whether he should be granted Canadian citizenship.

[22] Second, in both the Federal Court and this Court, the appellant attaches much significance to the fact that for many years he had been issued a Canadian passport. No significance can be taken from that: *Pavicevic v. Canada (Attorney General)*, 2013 FC 997, 20 Imm. L.R. (4th) 37. If the appellant was not a citizen, he never should have received a passport. The passport office's error is not a grant of citizenship.

[23] Third, in his memorandum, the appellant submits that he is "stateless." It is true that as a result of the facts described above, the appellant is not recognized as a citizen of any country at the present time. But that is not statelessness in the international law sense. Under Article 1 of the 1961 Convention on the Reduction of Statelessness (acceded to by Canada on July 17, 1978), a person is stateless only where the person does not have national status or citizenship in Canada and the person is "otherwise stateless"—*i.e.*, as a legal or practical matter the person cannot get citizenship or national status elsewhere. Article 1 of the Convention reads as follows:

> 1. A Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless. Such nationality shall be granted:
>
> (a) at birth, by operation of law, or
>
> (b) upon an application being lodged with the appropriate authority, by or on behalf of the person concerned, in the manner prescribed by the national law. Subject to the provisions of paragraph 2 of this Article, no such application may be rejected.

> A Contracting State which provides for the grant of its nationality in accordance with sub-paragraph (b) of this paragraph may also provide for the grant of its nationality by operation of law at such age and subject to such conditions as may be prescribed by the national law.

As we shall see, based on the record before us, the appellant can take steps to apply for citizenship in India and in Canada. He is not yet stateless.

[24] Fourth, the appellant states that the Canadian government is responsible for his current situation and so the onus is on the Canadian government, with or without an order of this Court, to remedy the situation. I do not accept this. The appellant's situation is due to an unfortunate confluence of factors both within and beyond his control. There was a time when the appellant, a permanent resident, could have applied for Canadian citizenship but he did not do so. Now, due to his criminal conduct, the appellant has lost his status as a permanent resident and, thus, cannot become a Canadian citizen by that route. For some time now, the appellant has been aware that Indian authorities do not consider him to be an Indian national. But the appellant has not tried to apply for Indian citizenship under Indian law. He has also been aware that the Minister does not consider him to be a Canadian citizen by virtue of his birth in Canada, a position now confirmed by the Board. Yet the appellant has not explored whether another ground for citizenship may be asserted under the *Citizenship Act*. As we shall see, there is another ground that the appellant can advance, but to date he has not advanced it. Finally, it is worth repeating that the Canadian government has not taken away the appellant's citizenship, nor has it prevented the appellant from applying for citizenship or national status in India or Canada.

[25] Finally, the appellant has suggested that the appellant is unable to obtain medical care covered by the Ontario Health Insurance Plan because of his status as a stateless person. That is not true. The appellant had OHIP coverage as a permanent resident: section 1.4 of the *Regulation under the Health Insurance Act*, R.R.O. 1990, Reg. 552. But he lost his medical coverage when he lost his permanent resident status. That happened as a result of the appellant's "serious criminality" arising from his convictions for breaking and entering, weapons trafficking, possession of a firearm while prohibited, and trafficking in narcotics: see *Immigration and Refugee Protection Act*, paragraphs 45(*d*) and 46(1)(*d*).

[26] With these clarifications made and the facts seen as they objectively are, I now turn to an analysis of the issues.

D. Analysis

(1) Introductory considerations: the analytical steps to be followed

[27] This is a judicial review with a jumble of issues. We have prior administrative proceedings before the Board (now concluded and final), two international jurisdictions in play, multiple arguments on multiple issues on both sides, future options that may or may not be available to the appellant, difficulties suffered by the appellant from a situation that was both within and beyond his control, certain findings of law and fact by the Federal Court, and grave doubts expressed by the Federal Court about its ability to proceed in the absence of other relief or proceedings. So what issues should be considered, in what order, and how?

[28] To answer that, it is useful to keep front of mind the three distinct analytical steps in any judicial review:

(1) *Preliminary objections*. Are there any recognized reasons why the judicial review or any issues in it should not be heard? For example, the matter may be moot, the matter may not be sufficiently public in nature to be reviewable, the Court may not have statutory jurisdiction over the matter or the relief sought, the basis for the review was not raised below but should have been, the judicial review may be premature, other forums may exist in which the applicant may obtain adequate and effective relief, or the applicant is impermissibly relitigating an issue that has been previously decided. This is not a complete list.

(2) *The merits of the judicial review*. Bearing in mind the standard of review, are substantive or procedural grounds for review of an administrative decision triggered? In the case of other matters that may properly form the subject of judicial review under sections 18 and 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, is there a basis upon which a remedial response—*e.g.*, declarations, prohibition orders, orders for mandamus or procedendo—would be warranted?

(3) *Remedies*. What remedies are legally available in the circumstances of the case? Here, it must be remembered that remedies are discretionary. Thus, the Court must consider whether to exercise its discretion in favour of a remedy, and if so, what sort of remedy and on what terms, if any?

(See generally *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, [2014] 2 F.C. 557.)

[29] Preliminary objections are "show stoppers": *JP Morgan*, above at paragraph 47. Where they are well-founded and the reviewing court cannot hear some or all of the issues placed before it, those issues are finished. The reviewing court need not proceed further with them.

[30] Depending on the nature of the preliminary objection, it might be wise for the reviewing court not to proceed further. For example, take the preliminary objection that there is another administrative forum available to the applicant to get adequate and effective relief. When that objection is well-founded, the applicant will often seek relief in the other forum. That forum will consider the merits, find the facts and the law and, where warranted, inject specialized administrative appreciations and policies into its analysis. Unless there is a good reason, a reviewing court should not offer views on those issues in advance. The different roles of the reviewing court and the administrative decision-maker should be respected to the extent possible: *Delios v. Canada (Attorney General)*, 2015 FCA 117 at paragraphs 41-42; *Connolly v. Canada (Attorney General)*, 2014 FCA 294, 466 N.R. 44 at paragraph 7; *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, 428 N.R. 297 at paragraph 17

[31] In the case at bar, did the Federal Court proceed in the manner just described? To a considerable extent, it did.

[32] As mentioned above, the Federal Court found that the appellant could not raise the employment issue because of the preliminary objection of relitigation or, more particularly, issue estoppel. It was right to hone in on this preliminary objection and decide it.

[33] Having dealt with it, the Federal Court could have left the employment issue there. Issue estoppel and *res judicata*, or more generally doctrines against relitigation, are preliminary objections and once the reviewing court finds they exist, the court need not continue: *Shaju v. Canada (Minister of Citizenship and Immigration)* (1995), 97 F.T.R. 313 (T.D.) *per* Nadon J. (as he then was); Donald J.M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada*, looseleaf (consulted on 27 May 2015) (Toronto: Carswell, 2014), chapter 3.

[34] However, in the case at bar the Federal Court delved into the factual merits of the employment issue, perhaps out of courtesy to the appellant or to confirm it was right to refuse the appellant the declaration he sought. In a case like this—especially where the reviewing court was not remitting the issue back to an administrative decision-maker being reviewed—what the Federal Court did makes much sense.

[35] In the course of its reasons, the Federal Court felt that another preliminary objection was in play. It expressed "grave doubts" about its ability to proceed in the absence of "other relief or proceedings" (at paragraphs 29-30). But it did not explore those doubts further.

[36] In this Court, the parties had some sense of what the Federal Court had grave doubts about. In its memorandum of fact and law (at paragraphs 24-25), the appellant briefly addressed

whether he should have remedied his statelessness by pursuing an "alternative process" such as applying to the Minister under the *Citizenship Act*. The respondent joined issue on this in its memorandum (at paragraphs 45-51) and in oral argument added that Indian citizenship authorities were another adequate and effective forum where the appellant could obtain relief against alleged statelessness. During the hearing in this Court, many questions were asked and many submissions were made on this issue. Therefore, a second preliminary objection—the existence of another forum where adequate and effective relief can be had—is in play before us.

(2) The standard of review in this Court

[37] What is the standard of review of a decision by the Federal Court that a judicial review should not proceed because of a preliminary objection? It is the usual appellate standard of review:

> On this point, we are reviewing a decision made by the Federal Court, not [that of an administrative decision-maker], on whether a preliminary legal objection—prematurity—applies to [bar] the application for judicial review in the Federal Court. Therefore, on this point, the standard of review is the appellate standard of review, not the standard of review that pertains to appeals from judicial reviews of administrative decision-making. *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 applies, not *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paragraphs 45-47.
>
> Under the appellate standard of review described in *Housen*, *supra*, we review extricable legal issues on a correctness basis. On all other issues, we look for palpable and overriding error.

(*Wilson v. Atomic Energy of Canada Limited*, 2015 FCA 17, 467 N.R. 201 at paragraphs 25-26.)

[38] Thus, in this case, in order for this Court to set aside the Federal Court's finding of issue estoppel, the appellant must persuade us that the Federal Court either erred on an extricable legal

issue or committed palpable and overriding error on some other issue: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.

[39] Palpable and overriding error is a high standard:

> Palpable and overriding error is: "Palpable" means an error that is obvious. "Overriding" means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.

(*Canada v. South Yukon Forest Corporation*, 2012 FCA 165, 431 N.R. 286 at paragraph 46.).

[40] As for the second preliminary objection—that there is another forum where adequate and effective relief can be had—the Federal Court did not deal with it fully and did not reach a firm conclusion on it. In a circumstance such as this, we have nothing to defer to. Therefore, we may simply determine the issue on the basis of the record filed before us: *Canada (Attorney General) v. Larkman*, 2012 FCA 204, 433 N.R. 184 at paragraph 60; *Infonet Services Corp. v. Matrox Electronic Systems Ltd.*, 2004 FCA 162 at paragraph 6.

(3) The first preliminary objection: issue estoppel

[41] As mentioned above, the Federal Court found that the appellant was barred from raising the employment issue because the Board had decided the matter and the matter was final because the Federal Court refused leave. It applied the doctrine of issue estoppel.

[42] The Federal Court applied the correct legal test for issue estoppel, it did not err on any extricable legal principle and it did not commit palpable and overriding error. It found that the earlier Board proceedings, now final, involved the same parties and the same issue. Those proceedings determined the employment issue against the appellant. Thus, the Federal Court concluded that issue estoppel barred the appellant from relitigating the employment issue. I find no reviewable error in this. Indeed, on this point I agree with the Federal Court's reasons and conclusions.

[43] The appellant submits that issue estoppel is a discretionary bar and that, as a matter of discretion, the Federal Court should have allowed him to relitigate the employment issue on its merits. In this case, the appellant points to evidence that was not available at the time of the Board proceedings that it placed before the Federal Court.

[44] I agree with the appellant that issue estoppel is a discretionary bar. The Supreme Court has confirmed this and has set out the legal principles that must guide the court's discretion: *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460.

[45] But the Federal Court found that the new evidence placed before it did not cast a different light on the matter. Accordingly, it did not exercise its discretion in favour of rehearing the employment issue. The appellant has not shown any palpable and overriding error in this factually-suffused assessment.

(4) The second preliminary objection: there are other adequate and effective forums for relief

[46] The central thrust of the appellant's constitutional case is that unless relief is granted, he will continue to be stateless, in contravention of the Charter and the Convention, with all the difficulty that causes to the appellant. Some of that difficulty, the appellant says, implicates constitutionally protected interests. For example, the appellant submits that his statelessness is preventing him from having medical coverage under the Ontario Health Insurance Plan. He also points to the release conditions that restrict him.

[47] But the Minister urges us to find that those issues cannot yet be raised by way of judicial review. He says the appellant has administrative avenues by which he can avoid being stateless: he can try to obtain citizenship either in India or in Canada. According to the Minister, the appellant has refrained from pursuing those avenues and he must pursue them first.

[48] I agree with the Minister. The appellant does have other adequate and effective forums for relief that, in these circumstances and as a matter of law, he must pursue first.

[49] On the state of the evidence before us, India is an adequate and effective forum for the appellant. The appellant has considerable connection with India. The Board found he was born to two Indian nationals while they were working for officials with the Indian High Commission. This raises the apprehension that the appellant could be a national of India by birth and that he may apply for Indian national status or citizenship. Many states grant national status or

citizenship in circumstances such as these. If Indian authorities grant the appellant national status or citizenship, any alleged statelessness would disappear.

[50] On the record before us, the appellant has not shown any legal or practical obstacle to acquiring national status or citizenship in India. Nothing has been placed before us that would suggest that a person born in Canada to two Indian nationals working for officials with the Indian High Commission cannot apply for Indian national status or citizenship or that, as a legal matter, India would deny the appellant national status or citizenship.

[51] In attempting to prove statelessness for later administrative or legal proceedings, the appellant conceded at the hearing of the appeal that the best proof that India will not grant national status or citizenship is for him to apply to the Indian authorities and be refused. But the appellant has never applied to those authorities.

[52] And nothing prevents the appellant from pursuing a grant of Canadian citizenship under subsection 5(4) of the *Citizenship Act*. Indeed, for some time now, the appellant has been able to invoke the ground of "special and unusual hardship" in that subsection by requesting that the Minister provide him with a certificate of citizenship under section 12 of the *Citizenship Act*: see also section 10 of the *Citizenship Regulations*, S.O.R./93-246 for some procedural guidance. In argument before us, both parties admitted that subsection 5(4) is a potential avenue for the appellant to pursue.

[53] Subsection 5(4) of the *Citizenship Act* permits the Minister to grant the appellant citizenship if he can demonstrate "special and unusual hardship". Subsection 5(4) provides as follows:

5. (4) Despite any other provision of this Act, the Minister may, in his or her discretion, grant citizenship to any person to alleviate cases of special and unusual hardship or to reward services of an exceptional value to Canada.	**5**. (4) Malgré les autres dispositions de la présente loi, le ministre a le pouvoir discrétionnaire d'attribuer la citoyenneté à toute personne afin de remédier à une situation particulière et inhabituelle de détresse ou de récompenser des services exceptionnels rendus au Canada.

[54] On the issue of "special and unusual hardship," the appellant may adduce evidence of lack of success in obtaining status as an Indian national or citizen, medical issues, statelessness, difficulties and harms associated with being stateless, and other matters bearing on the issue. The appellant may also invoke the Convention as a matter that the Minister should consider: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193. It will be for the Minister to assess the relevance and weight of all of these things. And it will be for the Federal Court, if leave is sought and granted under Part V.1 of the *Citizenship Act*, to review the Minister's decision.

[55] Therefore, on the record before us, the appellant can legally and practically apply for national status or citizenship in India and in Canada. But he has declined to do so.

[56] The general rule is that parties can proceed to a reviewing court only after all adequate and effective recourses in the administrative scheme have been exhausted. This Court has described the general rule as follows:

> Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews. All of these express the same concept: absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course. This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.

(*Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61, [2011] 2 F.C. 332 at paragraph 30; *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561, 96 D.L.R. (3d) 14; *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, 125 D.L.R. (4th) 583; and see also the extensive discussions in *JP Morgan*, above at paragraphs 84-91 and *Wilson*, above at paragraphs 24-41.)

[57] According to this general rule, a reviewing court can only be approached as a last resort after other adequate, effective forums for relief have been pursued and have failed: see, *e.g.*, *JP Morgan*, above at paragraph 81; *Froom v. Canada (Minister of Justice)*, 2004 FCA 352, [2005] 2 F.C. 195; *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2014 FCA 245, 465 N.R. 152. In this case, the appellant has approached the reviewing court, the Federal Court, not as a last resort but as a first resort. This Court's comments in paragraphs 100 and 101 of *JP Morgan* are apposite:

> …[T]he question is not whether [parties'] rights can be fully vindicated. They can. The question is how to do it consistent with proper practices and procedures, when to do it, in what forum, and by what means.
>
> For some, judicial review in the Federal Court is a preferred tool of first resort. They are wrong. It is a tool of last resort, available only when a cognizable

> administrative law claim exists, all other routes of redress now or later are foreclosed, ineffective or inadequate, and the Federal Court has the power to grant the relief sought.

[58] Important rationales lie behind the general rule that a reviewing court should be approached as a last resort, not a first resort: *Wilson*, above at paragraphs 30-33; *Forest Ethics Advocacy Association*, above at paragraphs 40-45. One rationale—of force in this case—is that where Parliament has set up an exclusive statutory scheme in which a particular administrative official, here the Minister, grants citizenship based on particular statutory standards and in accordance with legislatively prescribed procedures, a person seeking citizenship cannot bypass that scheme and go directly to a reviewing court.

[59] In its discretion, a reviewing court can relax the rigour of the general rule. Like all discretions exercised by reviewing courts, this discretion "must be exercised judicially and in accordance with proper principles": *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at paragraph 40; Guy Régimbald, *Canadian Administrative Law*, 2d ed. (Markham, ON: LexisNexis, 2015) at page 542.

[60] This Court has held that it rarely exercises its discretion in favour of relaxing the general rule because of the strong rationales underlying it: *Wilson*, above at paragraph 33; *C.B. Powell*, above at paragraph 33; and see also *Spidel v. Canada (Attorney General)*, 2010 FC 1028 at paragraph 16. The cases show that the general rule can be relaxed where concerns about the rule of law are aroused or where the public law values implicated by the case favour early, immediate access to a reviewing court: *Wilson*, above at paragraph 30 (examples of public law values) and

paragraph 33; and see the discussion in *Boogaard v. Canada (Attorney General)*, 2013 FC 267 at paragraphs 23-35. The existence of constitutional issues, alone, is not enough to warrant early, immediate access to a reviewing court where an adequate and effective forum for relief exists elsewhere: *Forest Ethics Advocacy Association*, above. Something extra—for example, urgent circumstances—are required before the general rule can be relaxed: *Okwuobi v. Lester B. Pearson School Board*; *Casimir v. Quebec (Attorney General)*; *Zorrilla v. Quebec (Attorney General)*, 2005 SCC 16, [2005] 1 S.C.R. 257 at paragraphs 51-53.

[61] Applying these principles to the appellant's case, I conclude that Indian and Canadian administrative authorities who grant national status or citizenship are adequate and effective forums for the appellant to obtain relief: see the discussion above at paragraphs 46-55. The general rule against early, immediate access to the reviewing court applies. Further, there are no considerations in this case favouring a relaxation of this general rule.

[62] The appellant offers three submissions against these conclusions.

[63] First, in his memorandum of fact and law, the appellant suggests that the Minister is not an adequate or effective forum because he does not have the power to consider the Charter when exercising powers under the *Citizenship Act*.

[64] I disagree. If the appellant applies to the Minister under subsection 5(4) of the *Citizenship Act*, he can present the Charter as a value that the Minister has to take into account when deciding whether the appellant is entitled to a certificate of citizenship: see, *e.g.*, *Doré v. Barreau*

du Québec, 2012 SCC 12, [2012] 1 S.C.R. 395. Or the appellant may submit that any injury to Charter rights and values forms part of the statutory standard of "special and unusual hardship" that the Minister must consider. Put another way, if the Minister disregards Charter values and the appellant's Charter rights in considering "special and unusual hardship", he may be committing reviewable error, either by construing the statutory standard in an unreasonable way, or by reaching a result that itself offends the Charter: see, *e.g.*, *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, 79 Admin. L.R. (5th) 177. In response to questions during oral argument, the appellant conceded that the Charter could be placed before the Minister in these ways. I should add that in making these observations, I am not commenting on the relevancy or materiality of the Charter to an application under subsection 5(4) of the *Citizenship Act*.

[65] Next, the appellant submits that the Minister "has already bluntly expressed his views on the appellant's citizenship" and so his recourses under the *Citizenship Act* are pointless: see appellant's memorandum at paragraph 25. The record shows that in the proceedings before the Board counsel for the Minister submitted that the appellant is not a Canadian citizen. And after the Board ruled that the appellant was not a citizen of Canada, certain of the Minister's officials have expressed the view that the appellant is not a citizen of Canada. The appellant says that these statements show that the Minister is biased.

[66] I disagree. If the appellant applies to the Minister for citizenship under subsection 5(4) of the *Citizenship Act*, the Minister must decide the appellant's application for citizenship fairly on the basis of the evidence presented and the applicable legislative standards, all in accordance

with applicable standards of procedural fairness. Positions taken in earlier legal proceedings and statements that recount the outcome of those proceedings, without more, do not necessarily give rise to an apprehension, real or apprehended, that the Minister will be unable to discharge these obligations. In any application under subsection 5(4), the appellant's hardship, if any, will be determinative, and, as best as can be seen from the evidentiary record, neither the Minister nor his officials have commented on that issue at all.

[67] Finally, the appellant also raises one circumstance that he says is exceptional enough to warrant a relaxation of the general rule against early, immediate access to a reviewing court. He submits that until he is declared a citizen, he cannot obtain medical coverage under the Ontario Health Insurance Plan. However, in the circumstances of this case, this does not warrant early access to a reviewing court. There is no evidence that the appellant needs medical coverage at this time or that, without medical coverage, he cannot access medical care when he needs it. Further, the appellant can address this issue by applying promptly for Canadian citizenship under the route that has been available to him for years, namely subsection 5(4) of the *Citizenship Act*.

[68] Therefore, I uphold the preliminary objection that the appellant has other forums available to him that are adequate and effective. The Federal Court was on the right track when it said that it had "grave doubts" about the appellant's judicial review being able to proceed. Indeed, it could not proceed.

[69] The appellant must first try to obtain citizenship from the Indian and Canadian authorities. Those avenues have been practically and legally available to him for years. Yet he has refrained from pursuing them. Now he should pursue them.

[70] In accordance with the discussion at paragraphs 27-30 above, I decline to offer any views concerning the merits of any application made to the Minister under subsection 5(4) of the *Citizenship Act*. The merits are for the Minister to decide. And the matter might one day arrive in the Federal Court on review and in this Court on appeal. Therefore, nothing in these reasons should be taken as expressing any views on the merits of any subsection 5(4) application made to the Minister.

[71] Finally, these reasons should not be taken as expressing any view regarding whether a bare declaration of the sort sought by the appellant is generally available.

[72] I would only say this: the declaration the appellant seeks in this case would achieve the same effect as a mandamus order against the Minister requiring him to recognize the appellant as a Canadian citizen even though he has never been given the chance by way of application to consider the matter, not even a bit. This goes way beyond the existing jurisprudence.

[73] This buttresses the conclusion I have reached: by coming directly to this Court on judicial review, the appellant is impermissibly bypassing the administrative scheme Parliament has set up under the *Citizenship Act* for determining issues of citizenship.

E. Proposed disposition

[74] For the foregoing reasons, I would dismiss the appeal with costs.

"David Stratas"

J.A.

“I agree
C. Michael Ryer J.A.”

“I agree
Donald J. Rennie J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-457-14
APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE PHELAN DATED SEPTEMBER 9, 2014, NO. T-1564-13	
STYLE OF CAUSE:	DEEPAN BUDLAKOTI v. MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	MAY 26, 2015
REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRED IN BY:	RYER J.A. RENNIE J.A.
DATED:	JUNE 4, 2015

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