Federal Court of Appeal | Cour d'appel fédérale

Date: 20170621

Docket: A-394-15

Citation: 2017 FCA 132

CORAM: **STRATAS J.A.**
WEBB J.A.
GLEASON J.A.

BETWEEN:

ALEXANDER VAVILOV

Appellant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Heard at Toronto, Ontario, on April 4, 2016.

Judgment delivered at Ottawa, Ontario, on June 21, 2017.

REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRED IN BY:	WEBB J.A.
DISSENTING REASONS BY:	GLEASON J.A.

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REASONS FOR JUDGMENT

STRATAS J.A.

A. Introduction

[1] The appellant appeals from the judgment of the Federal Court (*per* Bell J.): 2015 FC 960. The Federal Court dismissed the appellant's application for judicial review of a decision of the

Registrar of Citizenship. The Registrar invoked paragraph 3(2)(*a*) of the *Citizenship Act*, R.S.C. 1985, c. C-29 and cancelled the appellant's citizenship under subsection 26(3) of the *Citizenship Regulations*, SOR/93-246.

[2] The appellant was born in Canada in 1994. Normally, that would have made him a citizen of Canada: *Citizenship Act*, paragraph 3(1)(*a*). Until 2010, the appellant assumed he was a Canadian citizen. On July 27, 2010, that assumption was thrown into doubt.

[3] On that day, when the appellant was living with his family in the United States, FBI agents, armed, entered the family home and arrested his parents. Unknown to the appellant, all his life his parents had been acting under assumed names. Unknown to the appellant, his parents were espionage agents for Russia.

[4] This changed everything. The appellant was forced to go to Russia to live in a country to which he had no connection. His surname was changed from Foley to Vavilov. To this day, the appellant considers himself and his brother—also caught up in all of this—to be Canadian.

[5] But the Registrar of Citizenship disagreed. The Registrar found that the appellant is not Canadian and cancelled his citizenship under subsection 26(3) of the *Citizenship Regulations*, SOR/93-246. According to the Registrar, paragraph 3(2)(*a*) of the *Citizenship Act* applies. Under that paragraph, if neither parent is a citizen or lawfully admitted to Canada for permanent residence and either was "a diplomatic or consular officer or other representative or employee of a foreign government," the child is not a Canadian citizen despite being born in Canada.

[6] According to the Registrar, the appellant's parents were not citizens or permanent residents at the time of his birth. And—in what has been the central issue here and below—the Registrar found that the appellant's parents were "employees of a foreign government" within the meaning of paragraph 3(2)(*a*) of the *Citizenship Act*.

[7] The appellant applied for judicial review of the Registrar's decision. The Federal Court dismissed it. The Federal Court reviewed the Registrar's interpretation of "employee of a foreign government" in paragraph 3(2)(*a*) of the Act for correctness. It agreed with the Registrar. The Federal Court also dismissed a procedural fairness complaint the appellant made.

[8] The appellant appeals to this Court. The appellant reiterates the procedural fairness complaint in this Court. He also submits that both the Federal Court and the Registrar erred in their interpretation of "employee in Canada of a foreign government" in paragraph 3(2)(*a*) of the *Citizenship Act*.

[9] For the reasons below, I would allow the appeal, set aside the judgment of the Federal Court, allow the application for judicial review, and quash the decision of the Registrar to revoke the appellant's citizenship. Unless another ground for revocation applies—and none has been argued here—the appellant is entitled to Canadian citizenship under paragraph 3(1)(*a*) of the *Citizenship Act*.

B. Review for procedural fairness

[10] The appellant submits, as he did below, that the Registrar failed to disclose to him the case he was to meet. Thus, he was not able to make adequate submissions to the Registrar. He says this was a breach of the obligations of procedural fairness.

(1) The standard of review

[11] The standard of review for matters of procedural fairness is currently in dispute in this Court. A number of different approaches have been identified and persist. These are described in this Court's decision in *Bergeron v. Canada (Attorney General)*, 2015 FCA 160 at paras. 67-72.

[12] This difference persists even in the face of the Supreme Court's most recent case on point, *Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502. While correctness is identified as the standard of review (at para. 79), the standard the Supreme Court actually applied was one that gave the administrative decision-maker a "margin of deference" and "some deference" (at para. 89).

[13] It follows that I cannot agree with the Federal Court's statement in its reasons (at para. 15) that it is "settled law that issues of procedural fairness are reviewed on the standard of correctness." While some may disagree, in my view the law remains unsettled, as this Court has described in *Bergeron*, above.

[14] This being said, on the facts of this case, it is unnecessary, as it was in *Bergeron*, to say more about the standard of review for procedural fairness or to resolve this issue in this case. Even if the standard of review were correctness, on the facts of this case I would not give effect to this ground of review.

(2) Analysis

[15] The appellant received an invitation to make submissions by way of a fairness letter from the Case Management Branch. He submits that failing to disclose the documentation which prompted this letter constituted a breach of procedural fairness. He complains that he had to "piece together information" from information requests made under the *Access to Information Act*, R.S.C. 1985, c. A-1. Some information arrived only after the decision was made.

[16] I reject this submission. The fairness letter dated July 18, 2013 to the appellant gave him a detailed summary of the legal issues and the facts that bore upon these issues. From this, he could ascertain the case he was to meet.

[17] Even if the appellant should have been provided with more at the time of the fairness letter in order to make submissions, I would still not give effect to the appellant's procedural fairness complaint. The appellant, through his own efforts, ended up being aware of the case to meet and was able to make meaningful submissions. On the facts of this case, where the issue is a precise question of law drawing upon known facts—an issue of statutory interpretation—and the affected party, here the appellant, was fully empowered to address these matters, it cannot be

said that there was any prejudice. In such circumstances, the administrative decision will not be quashed: *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202, 111 D.L.R. (4th) 1; and see also *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6.

[18] The appellant also submits that one of the officers at the Case Management Branch "appeared" to have prejudged the issues and "may have continued to remain involved" in the file in the face of a recusal request by the appellant. The quoted portions show that the appellant has candidly admitted that the evidence in the record is not firm on this point. As well, the line between prejudgment of the issues and expressing hypotheses concerning the issues before making a conclusion is a fine one. Certainly pre-judgment in the sense of approaching the matter with a closed mind is a concern. However, I am not persuaded on this record that this threshold was met here.

C. Review of the substance of the decision

[19] The appellant says that the Registrar's decision to revoke his citizenship was unreasonable and, thus, must be quashed. He says that his parents were not "employee[s] in Canada of a foreign government" under paragraph 3(2)(*a*) of the *Citizenship Act.* As a result, paragraph 3(2)(*a*) does not apply. This leaves paragraph 3(1)(*a*) of the *Citizenship Act* as the governing provision in his case. As a person born in Canada in 1994, he is entitled to citizenship.

(1) Standard of review

[20] We are to assess whether the Federal Court properly chose the standard of review and whether it applied it properly. If the Federal Court chose the wrong standard of review, we are to apply the proper standard of review, assess the decision of the administrative decision-maker against that standard and, if necessary, provide a proper remedy: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paras. 45-47.

[21] The central issue before the Registrar, the Federal Court and this Court is one involving the interpretation and application of paragraph 3(2)(*a*) of the *Citizenship Act*.

[22] The Federal Court found (at para. 16) that the standard of review is correctness. It held that "the interpretation of [paragraph 3(2)(*a*) of the *Citizenship Act*] is a question of law of general application across Canada and raises a pure question of statutory interpretation." It added that "no privative clause is engaged and the statutory scheme does not offer any basis upon which it can be said that the Registrar possesses any greater expertise than the courts in interpreting the impugned section."

[23] On this, the appellant agrees with the Federal Court and submits that the standard of review is correctness.

[24] I disagree. We are bound by decisions of the Supreme Court of Canada directly on point.

[25] On issues of statutory interpretation, the Supreme Court's most recent decision on point, *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293, stands for the proposition that reasonableness is the presumed standard of review for the decision of an administrative decision-maker familiar with a frequently used statute, like the Registrar of Citizenship here who is interpreting the *Citizenship Act*.

[26] On this, the majority of the Supreme Court in *Edmonton East* confirmed a line of earlier jurisprudence on this point.

[27] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the Supreme Court held (at para. 54) that "[d]eference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity."

[28] In *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 at para. 34, the majority of the Supreme Court held that "unless the situation is exceptional…the interpretation by the tribunal of 'its own statute or statutes closely connected to its function, with which it will have particular familiarity' should be presumed to be a question of statutory interpretation subject to deference on judicial review."

[29] These are just two. There are many other cases where the Supreme Court has employed the presumption of reasonableness in the case of interpretations of regulatory provisions by administrative decision-makers.

[30] It is also presumed that reasonableness is the standard of review when an administrative decision-maker applies a statutory provision to the facts it finds in the case before it: *Dunsmuir* at para. 53.

[31] Presumptions of reasonableness such as these are rebuttable. However, following the reasons of the majority of the Supreme Court in *Edmonton East*, the presumption is not easily rebutted.

[32] Both the appellant and the Federal Court submit that there is no privative clause in the *Citizenship Act*. But that was true in *Edmonton East* as well and the majority declined in that case to find that the presumption of reasonableness was rebutted.

[33] As well, I note that Parliament has enacted subsection 22.1(1) of the *Citizenship Act*, imposing a requirement that leave be sought in order to apply for judicial review. The respondent submits that this statutory indication may be taken as reinforcing the idea that decisions of the Registrar are not lightly reviewed and that "some degree of deference is owed." For the purposes of this case it is sufficient to say that this tends to reinforce the presumption of deference.

[34] To some extent, the standard of review debate in this case is not of great practical import.

[35] Reasonableness is said to be a range of acceptable and defensible outcomes or a margin of appreciation: *Dunsmuir* at para. 47; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895 at para. 38. The Supreme Court has repeatedly said that

reasonableness "takes its colour from the context" and "must be assessed in the context of the particular type of decision-making involved and all relevant factors": *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5 at para. 18; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 59; and most recently *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, [2016] 1 S.C.R. 770 at para. 22. For this reason, sometimes we see some administrative decision-makers afforded a very broad range or margin of appreciation and others less so: compare, for example, cases like *Wilson*, above, with *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 S.C.R. 616.

[36] There is authority in this Court for the proposition that where reasonableness is the standard of review and where, as here, the interests of the individual are high (affecting the court's sensitivity to rule of law concerns), this Court may apply the reasonableness standard in a more exacting way: see, *e.g.*, *Canada (Minister of Transport, Infrastructure and Communities) v. Farwaha*, 2014 FCA 56, [2015] 2 F.C.R. 1006 at para. 92; *Attaran v. Canada (Attorney General)*, 2015 FCA 37, 467 N.R. 335 at para. 49; *Walchuk v. Canada (Justice)*, 2015 FCA 85 at para. 33.

[37] On issues of statutory interpretation in the immigration context, the Supreme Court recently has also been applying reasonableness in an exacting way. Not surprisingly, because of the presumption of reasonableness, it is acting under the reasonableness standard of review, but it assesses the administrative decision-maker's interpretation of a statutory provision closely, in fact sometimes in a manner that appears to be akin to correctness: see, *e.g.*, *Kanthasamy v.*

Canada (Citizenship and Immigration), 2015 SCC 61, [2015] 3 S.C.R. 909; *B010 v. Canada (Citizenship and Immigration)*, 2015 SCC 58, [2015] 3 S.C.R. 704; *Febles v. Canada (Citizenship and Immigration)*, 2014 SCC 68, [2014] 3 S.C.R. 431; *Ezokola v. Canada (Citizenship and Immigration)*, 2013 SCC 40, [2013] 2 S.C.R. 678. In fact, it has been a while since the Supreme Court has afforded a decision-maker in the immigration context much of a margin of appreciation on statutory interpretation issues.

[38] Further rendering the standard of review of less practical import in this case is the fact that we have before us little in the way of the reasoning of the Registrar. On the central statutory interpretation issue before us, the Registrar said nothing.

[39] We can only assume the Registrar relied on an analyst's report that was provided. But, as we shall see, that report contains only one brief paragraph on the statutory interpretation issue, and a very limited one at that. In such circumstances, it is hard to give much deference to the decision; the concern is that we cannot be sure that the statutory interpretation issue was adequately considered. On some occasions like this, we have quashed an administrative decision because we cannot engage in reasonableness analysis or because we are concerned that administrative decision-making is being immunized from review: see, *e.g.*, *Leahy v. Canada (Citizenship and Immigration)*, 2012 FCA 227, [2014] 1 F.C.R. 766; *Canada v. Kabul Farms Inc.*, 2016 FCA 143; and see the wider discussion of this point in *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128.

(2) Analysis

(a) Introduction

[40] Despite the foregoing and even affording the Registrar leeway under the reasonableness standard, I find that the result the Registrar reached on these facts, namely that the appellant's parents were "employee[s] in Canada of a foreign government" in paragraph 3(2)(*a*) of the Act, is not supportable, defensible or acceptable and, thus, is not reasonable within the meaning of para. 47 of *Dunsmuir*, above.

[41] It is trite that statutory provisions are to be interpreted in accordance with their text, context and purpose: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559.

[42] The need to take into account the purpose of statutory provisions is made especially important by section 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21, a section that applies to all, courts and administrative decision-makers alike. It provides that a statutory provision "shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."

[43] Equally important, as we shall see, is the context of paragraph 3(2)(*a*) of the *Citizenship Act*: its legislative history, other paragraphs in subsection 3(2) that shed light on it, and the principles of international law surrounding it.

[44] Even on the understanding that the Registrar considered the issue of statutory interpretation and adopted the reasoning contained in the report of an analyst, when the purpose and context of paragraph 3(2)(*a*) is considered, the Registrar's interpretation of paragraph 3(2)(*a*) of the *Citizenship Act* cannot stand. Except for an abbreviated review of legislative history—only textual in nature—the purpose and context of paragraph 3(2)(*a*) was not considered at all. For example, the analyst's report is striking for its failure to refer to or analyze the other paragraphs of subsection 3(2). Virtually all of the analysis—only textual in nature—fits in a single paragraph in the analyst's report (appeal book, page 30). This sort of cursory and incomplete approach to statutory interpretation in a case like this cannot be acceptable or defensible on the facts and the law: *Dunsmuir*, above at para.47.

[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 citizenship—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.

[46] This purpose makes sense. There is a coherence to it. Citizens of Canada have duties and responsibilities to Canada. They are subject to all Canadian laws. Under this view of the matter,

a child born to parents subject to Canadian laws is a person born in Canada for the purposes of Canadian citizenship laws and, thus, under paragraph 3(1)(*a*), becomes a Canadian citizen upon birth in Canada.

[47] Persons who have diplomatic privileges and immunities do not have duties and responsibilities to Canada and are not subject to all Canadian laws. As such, they and their children are prohibited from acquiring citizenship.

[48] In this regard, I agree with and endorse the following observation of the Federal Court in *Al-Ghamdi v. Canada (Foreign Affairs and International Trade)*, 2007 FC 559, 314 F.T.R. 1 at para. 63:

> It is precisely because of the vast array of privileges accorded to diplomats and their families, which are by their very nature inconsistent with the obligations of citizenship, that a person who enjoys diplomatic status cannot acquire citizenship.

In 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*.

(b) The administrative decision in more detail

[49] The Registrar did not offer any significant reasons herself. However, consistent with *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*,

2011 SCC 62, [2011] 3 S.C.R. 708, we may look to the record in order to discern the reasons. Here, it is reasonable to conclude that the Registrar's reasons are found in the analyst's report the Registrar received.

[50] The analyst's report concluded that for paragraph 3(2)(*a*) to apply, the foreign employee in Canada need not benefit from privileges and immunities. It reached this conclusion by looking only briefly at an amendment that superficially appeared to narrow the wording of the paragraph:

> The previous iteration of the exception of right to Canadian citizenship to persons born in Canada in the *Canadian Citizenship Act, 1947* is more narrow than the iteration found in subsection 3(2) of the current *Citizenship Act* as the earlier provisions link the terms "representative" and "employee" to an official and/or recognized accreditation or, even more directly, to a diplomatic mission. The way in which subsection 3(2) of the *Citizenship Act* is written, however, differentiates "diplomatic or consular officers" from "representatives to employees of a foreign government."

[51] The analyst looked to the definition of "diplomatic or consular officers" in section 35 of the *Interpretation Act*—"includes an ambassador, envoy, minister, chargé d'affaires, counsellor, secretary, attaché, consul-general, consul, vice-consul, pro-consul, consular agent, acting consul-general, acting consul, acting vice-consul, acting consular agent, high commissioner, permanent delegate, adviser, acting high commissioner, and acting permanent delegate"—and concluded that "employee[s] in Canada of a foreign government" must mean something different.

[52] Textually and logically, this does not necessarily follow. Many persons occupying these offices are "employee[s] in Canada of a foreign government" in the sense that a foreign

government employs them. And, as can be seen from the word “includes” in the definition of “diplomatic or consular officers,” it is non-exhaustive.

(c) The Federal Court’s reasons

[53] The Federal Court held that “employee[s] in Canada of a foreign government” applied to all such employees, regardless of diplomatic or consular status. It held that to interpret paragraph 3(2)(*a*) in any other way would leave the section without any meaning.

[54] In my view, this implies that there can be no employees in Canada of a foreign government who have diplomatic or consular status and who are not diplomatic or consular officers. Put another way, the Federal Court has assumed that employees in Canada of a foreign government who have diplomatic privileges and immunities are the same persons as those who have diplomatic or consular status.

[55] This is not the case. There can be employees in Canada of a foreign government who do have privileges and immunities and who are not diplomatic or consular officers: see *Foreign Missions and International Organizations Act*, ss. 3 and 4 and Schedule II, articles 1, 41, 43, 49 and 53.

(d) Further analysis of the *Citizenship Act*

[56] In my view, whether or not someone is an employee in Canada of a foreign government is just part of what triggers the operation of paragraph 3(2)(*a*) of the *Citizenship Act*. The additional element of diplomatic immunity triggers the paragraph. The text is consistent with this interpretation.

[57] Subsection 3(2) mirrors provisions in the *Foreign Missions and International Organizations Act* and the *Vienna Convention on Diplomatic Relations*: see, for example, the similar phrasing of certain terms in article 1 in the *Convention* and subsection 3(2) of the *Citizenship Act*. Together, the *Foreign Missions and International Organizations Act* and the *Vienna Convention on Diplomatic Relations*, among other things, provide for civil and criminal immunity for consular officials who carry out their responsibilities in Canada. The mirroring between these two and subsection 3(2) of the *Citizenship Act* strongly indicates a relationship between the two—*i.e.*, that the presence of diplomatic immunity matters.

[58] According to the *Vienna Convention on Diplomatic Relations*, a consular officer is to protect in the receiving state (here Canada) the interests of the sending (or foreign) state and its nationals within the limits set out in international law. It defines a consular official as any person entrusted with that capacity and diplomatic agents as members of the diplomatic staff of the mission. Persons not associated with the mission are not considered diplomatic staff and are outside of the Convention and, thus, are outside of the *Foreign Missions and International*

Organizations Act. The appellant's parents, who as we shall see, in no way possessed diplomatic immunity, cannot fall under paragraph 3(2)(*a*) of the *Citizenship Act*.

[59] It is trite that subsection 3(2), including paragraph 3(2)(*a*), should be interpreted in accordance with relevant principles of customary and conventional international law, here the articles in the *Vienna Convention on Diplomatic Relations* that have been incorporated into Canadian law: *Foreign Missions and International Organizations Act*, s. 3; *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292 at paras. 35-39; *B010*, above at para. 47. This is all the more where the provision to be construed has been enacted with a view towards implementing international principles or against the backdrop of those principles: *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1234 at p. 1371.

[60] The articles of the *Vienna Convention* set out which officials of a foreign government enjoy diplomatic status and civil and criminal immunity. Under those provisions, certain employees of a foreign government can enjoy immunity.

[61] The context of paragraph 3(2)(*a*) of the *Citizenship Act* must also be examined. It sits within subsection 3(2) and, to some extent, draws meaning from the other paragraphs in the subsection. Key here is a portion of paragraph 3(2)(*c*). Subsection 3(2) in its entirety reads as follows:

(2) Paragraph (1)(*a*) does not apply to a person if, at the time of his birth, neither of his parents was a citizen or lawfully admitted to Canada for	(2) L'alinéa (1)*a*) ne s'applique pas à la personne dont, au moment de la naissance, les parents n'avaient qualité ni de citoyens ni de résidents

permanent residence and either of his parents was	permanents et dont le père ou la mère était :
(*a*) a diplomatic or consular officer or other representative or employee in Canada of a foreign government;	*a)* agent diplomatique ou consulaire, représentant à un autre titre ou au service au Canada d'un gouvernement étranger;
(*b*) an employee in the service of a person referred to in paragraph (a); or	*b*) au service d'une personne mentionnée à l'alinéa a);
(*c*) an officer or employee in Canada of a specialized agency of the United Nations or an officer or employee in Canada of any other international organization to whom there are granted, by or under any Act of Parliament, diplomatic privileges and immunities certified by the Minister of Foreign Affairs to be equivalent to those granted to a person or persons referred to in paragraph (*a*). [emphasis added]	*c*) fonctionnaire ou au service, au Canada, d'une organisation internationale — notamment d'une institution spécialisée des Nations Unies — bénéficiant sous le régime d'une loi fédérale de privilèges et immunités diplomatiques que le ministre des Affaires étrangères certifie être équivalents à ceux dont jouissent les personnes visées à l'alinéa *a*). [Non souligné dans l'original.]

[62] The underlined portions suggest that the persons referred to in paragraph 3(2)(*a*) have been granted "diplomatic privileges and immunities." Thus, paragraph 3(2)(*a*) covers only those "employee[s] in Canada of a foreign government" that have "diplomatic privileges and immunities."

[63] Also part of the context surrounding paragraph 3(2)(*a*) of the *Citizenship Act* is its legislative history.

[64] In 1946, any person born in Canada was entitled to Canadian citizenship as of right. No exceptions were made for the children of diplomats or others. See *The Citizenship Act*, S.C. 1946, c. 15.

[65] In 1950, the Act was amended. It provided in subsection 5(2) that if a person were born in Canada and the person's "responsible parent" was

- "an alien" and not a permanent resident, and

- "a foreign diplomatic or consular officer or a representative of a foreign government accredited to His Majesty", "an employee of a foreign government attached to or in the service of a foreign diplomatic mission or consulate in Canada" or "an employee in the service" of "a foreign diplomat or consular officer,"

then the person was not entitled to Canadian citizenship by virtue of being born in Canada: *An Act to Amend the Canadian Citizenship Act*, S.C. 1950, c. 29, s. 2.

[66] In 1976, the new *Citizenship Act* came into force and, insofar as the sections in this case are concerned, there has been no change since. The new *Citizenship Act* changed old subsection 5(2) by removing the phrase "an employee of a foreign government" from "attached to or in the service of a foreign diplomatic mission or consulate in Canada" and placed it in new paragraph 3(2)(a): *Citizenship Act*, S.C. 1974-75-76, c. 108, ss. 3(2). It also excluded from acquiring

Canadian citizenship those children born in Canada to officers or employees of an international organization “to whom there are granted...diplomatic privileges or immunities certified…to be equivalent” to “a diplomatic or consular officer or other representative or employee in Canada of a foreign government.” This exemption appears as paragraph 3(2)(*c*) in the Act as it stands today.

[67] The analyst drew significance from the separation of “an employee of a foreign government” from “attached to or in the service of a foreign diplomatic mission or consulate in Canada” in the new subsection 3(2). This was incorrect; the Registrar’s failure to examine the purpose and context of the provision caused a misunderstanding regarding how the various paragraphs in subsection 3(2) interrelate. If “a foreign diplomatic or consular officer or a representative of a foreign government” already included the idea of an employee of a foreign government who has immunity, the amendments to paragraph 3(2)(*a*) and 3(2)(*b*) merely clarified the legislative intent and eliminated a redundancy. Also of significance is paragraph 3(2)(*c*) that was introduced into the 1976 Act. As we have seen, it sheds further light on the meaning of paragraph 3(2)(*a*): employees falling in paragraph 3(2)(*a*) can only be those enjoying diplomatic privileges and immunities.

[68] A Minister commenting on the 1976 change stated that the government did not want to affect people working for large foreign corporations in the same way as diplomats or those working for international organizations like the United Nations who have immunities: J. Hugh Faulkner, Secretary of State of Canada, February 24, 1976, *Minutes of Proceedings and Evidence of the Standing Committee on Broadcasting, Films and Assistance to the Arts*. This

purpose is consistent with the original purpose of the enactment which was to exclude all those, including those employed by foreign governments who have diplomatic immunities, from the benefit of citizenship.

[69] Another important element of context is the customary international law principle, *jus soli*, that is a backdrop to section 3 of the *Citizenship Act*. Under international law, the principle of *jus soli* gives nationality or citizenship to anyone born in the territory of a nation: Professor Ian Brownlie, *Principles of Public International Law*, 5th ed. (Oxford: Clarendon Press, 1998) at pp. 391-393. This is expressed in paragraph 3(1)(*a*) of the *Citizenship Act*. Paragraph 3(2)(*a*) derogates from this principle. Since paragraph 3(2)(*a*) takes away rights that would otherwise benefit from a broad and liberal interpretation, it should be interpreted narrowly: *Brossard v. Quebec*, [1988] 2 S.C.R. 279, 53 D.L.R. (4th) 609 at para. 56. The narrower interpretation is that not all employees of a foreign government fall in paragraph 3(2)(*a*); only those who have diplomatic immunity fall within it.

[70] In discussing the *jus soli* principle in his text, *Principles of Public International Law*, above, Professor Brownlie confirms that under international law, children born to those in a foreign nation who enjoy diplomatic immunities do not acquire the nationality of the foreign state. This is the principle that, in my view, pervades paragraph 3(2)(*a*) of the *Citizenship Act*. Professor Brownlie's analysis is at pages 389-390 of his text (the footnotes are reproduced in square brackets):

> A rule which has very considerable authority stipulated that children born to persons having diplomatic immunity shall not be nationals by birth of the state to

> which the diplomatic agent concerned is accredited. Thirteen governments stated the exception in the preliminaries of the Hague Codification Conference. In a comment [26 A.J. (1929), Spec. Suppl., p. 27] on the relevant article of the Harvard draft on diplomatic privileges and immunities it is stated: "This article is believed to be declaratory of an established rule of international law". The rule receives ample support from the legislation of states [See the *U.N. Legis. Series*, Laws Concerning Nationality (1954) Suppl. Vol. 1959] and expert opinion [Cordova, *Yrbk. ILC* (1953), ii 166 at 176 (Art. III); Guggenheim, i. 317]. The Convention on Certain Questions relating to the Conflict of Nationality Laws of 1930 provides in Article 12: "Rules of law which confer nationality by reason of birth on the territory of a State shall not apply automatically to children born to persons enjoying diplomatic immunities in the country where the birth occurs."
>
> In 1961 the United Nations Conference on Diplomatic Intercourse and Immunities adopted an Optional Protocol concerning Acquisition of Nationality [18 Apr.; 500 U.N.T.S/ 223…], which provided in Article II: "Members of the mission not being nationals of the receiving State and members of their families forming part of their household, shall not, solely by the operation of the law of the receiving State, acquire the nationality of that State"…. In a few instances legislation [the *Canadian Citizenship Act, 1946*, as amended, s. 5(2)…] and other prescriptions […] exclude the *jus soli* in respect of the children of persons exercising official duties on behalf of a foreign government….

[71] In the above passage, Professor Brownlie cites Canada's first *Citizenship Act* as embodying the principle that the *jus soli* is excluded in respect of the children of persons exercising official duties on behalf of a foreign government who enjoy immunities. Is it conceivable that since 1946, by virtue of subsequent amendments to the *Citizenship Act*, Canada has departed from this international law principle? I would suggest not. Again, to the extent possible, Canadian legislation should be interpreted as being consistent with international law: see the authorities in paragraph 59, above.

[72] The interpretation of paragraph 3(2)(*a*) the appellant urges upon us and that which I have set about above is consistent with international law and, in the circumstances, is the only reasonable one that was available to the Registrar.

[73] The respondent submits that "[i]t is the intimate connection with the foreign government in Canada that triggers the provision." The respondent goes even further: under paragraph 3(2)(*a*), citizenship is to be denied to a child of a foreign national who was in Canada representing the "interests of his or her own government." And it applies to the children of foreign spies. Giving Canadian citizenship to the children of persons of that sort is "inconsistent with the duties and responsibilities of Canadian citizenship." See the respondent's memorandum of fact and law at paras. 72-76.

[74] It seems to me that the respondent is ascribing to paragraph 3(2)(*a*) a breadth that the text, context and purpose of the paragraph cannot bear. The respondent's interpretation does not explain why the language of subsection 3(2) of the Act borrows many of the same phrases that the *Vienna Convention on Diplomatic Relations* uses in the context of diplomatic immunity. Nor does it explain the legislative history of the subsection. The respondent's suggestion that the provision contemplates that the "interests" of a foreign national must be considered injects a qualitative element into the analysis, the sort of element that Parliament tries to avoid when defining who is a citizen and who is not. (On the need to interpret legislation in certain contexts in a manner that provides bright lines, see, *e.g.*, *Apotex Inc. v. Merck & Co., Inc.*, 2011 FCA 364, 430 N.R. 74 at para. 27.) In my view, much clearer and broader legislative text would be needed in order to persuade me that Parliament intended to exclude from citizenship a child of a foreign national who was in Canada representing the "interests of his or her own government."

(e) Application to the facts of the case

[75] The reasons of the Federal Court (at paras. 4-5) set out the facts pertaining to the appellant's parents the Registrar relied upon in applying paragraph 3(2)(*a*) of the *Citizenship Act* to the appellant and cancelling his Canadian citizenship:

> …Both parents were charged [in the United States] with one count of conspiracy to act as unregistered agents of a foreign government and two counts of conspiracy to commit money laundering.
>
> The charges related to operations referred to in the United States as the "illegals" program. This constitutes a subversive program whereby foreign nationals, with the assistance of their governments, assume identities and live in the United States while performing "deep cover" foreign intelligence assignments. After undergoing extensive training in their own country, in this case, Russia, these agents work to obscure any ties between themselves and their true identities. They establish seemingly legitimate alternative lives, referred to as "legends", all the while taking direction from the Russian Foreign Intelligence (SVR) service. According to the charging documents, Mr. Vavilov's parents were known to be part of this program since the early 1990s, and were collecting intelligence for the SVR, who paid for their services. On July 8, 2010, Mr. Vavilov's parents pled guilty to the conspiracy charge and were returned to Russia in a spy swap the next day.

[76] Just from these facts alone, one can see that the appellant's parents never enjoyed any immunity from criminal prosecution. They were charged with criminal offences in the United States. Their status was the same in Canada.

[77] The analyst, whose report was relied upon by the Registrar, found the following:

> On the balance of probabilities, it is submitted that [the appellant's parents] were deployed to Canada, a "host country," specifically for the task of stealing the

> identities of Canadians and building their respective Canadian legends prior to relocating to the United States, the "target country", as Canadians.

[78] While in Canada, the appellant's parents were never enjoying civil or criminal immunity. The analyst found that they did not hold any form or level of diplomatic or consular status. It found that agents of the SVR (the Russian Foreign Intelligence service), which the appellant's parents were, are not afforded diplomatic or consular privileges because such a direct and overt association with Russian authorities would risk jeopardizing their capacity to create convincing and "non-Russian" legends.

[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.

[80] Before concluding, I wish to deal with one reason offered by the Federal Court in upholding the reasonableness of the Registrar's decision. The Federal Court suggested the following (at para. 25):

> In my view the Registrar correctly found that this scenario is captured by s. 3(2)(*a*) of the *Citizenship Act*. To conclude otherwise would lead to the absurd result that children of a foreign diplomat, registered at an embassy, who conducts spy operations, cannot claim Canadian citizenship by birth in Canada but children of those who enter unlawfully for the very same purpose, become Canadian citizens by birth. The proper application of the rules of statutory interpretation should not lead to absurd results. (See: [Ruth Sullivan, *Statutory Interpretation*, 2nd ed., (Irwin Law Inc. 2007)] at 209).

[81] The absurdity here appears to be based on the Federal Court's own assessment of policy: spies are spies, and the children of spies should not receive Canadian citizenship.

[82] If we delve into our own assessments of policy, it could equally be said, perhaps, that the sins of parents ought not to be visited upon children without clear authorization by law. As well, the evidentiary record is full of evidence about how the appellant knew nothing of his parents' secret life and how much he regards himself as a Canadian.

[83] But, unless made legally relevant by some rule of common law or legislation on the books or a discretion legally bestowed, reviewing courts are not to have regard to such matters. Reviewing courts are restricted to the evidentiary record, the legislation and case law bearing on the problem, judicial understandings of the rule of law and constitutional standards—not freestanding policy divorced from those considerations.

[84] We all have freestanding policy views. But judicial review is about applying legal standards, not our own views of what may or may not be absurd: *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171 at paras. 38-39. The interpretive principle against absurdity applies to interpretations that run counter to legislative policy or, colloquially, "what the legislator must have intended"—not our own sense of what is right and wrong.

[85] Here, Parliament's legislation, viewed in light of its text, context and purpose, very much dictates the result of this judicial review. It is open to Parliament to amend this legislation if, after judicial interpretation, it is not implementing the policies it considers appropriate.

D. Questions stated

[86] The cancellation of the appellant's citizenship took place under subsection 26(3) of the *Citizenship Regulations*. The Federal Court may review the cancellation of citizenship if it grants leave to commence a judicial review: section 22.1 of the *Citizenship Act*. An appeal from the Federal Court to this Court can only be made if the Federal Court, acting under subsection 22.2(*d*) of the *Citizenship Act*, states that a serious question of general importance is involved.

[87] The Federal Court stated two serious questions of general importance for the consideration of this Court.

[88] The first question stated by the Federal Court concerned the standard of review. In my view, that was not a serious question of general importance within the meaning of subsection 22.2(*d*). If it were stated alone, it would not be sufficient to allow the appellant to bring an appeal to this Court. There must be a serious question of general importance relating to a substantive or procedural matter concerning the *Citizenship Act* itself or proceedings under it.

[89] The second question, however, is proper. A modest rephrasing of it is required.

E. Proposed disposition

[90] The proper stated question and my proposed answer to it are as follows:

> Question: 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?
>
> Answer: Yes.

[91] Therefore, for the foregoing reasons, I would allow the appeal, set aside the judgment of the Federal Court in file T-1976-14, allow the application for judicial review, and quash the decision of the Registrar to cancel the appellant's citizenship.

"David Stratas"
J.A.

"I agree
Wyman W. Webb J.A."

GLEASON J.A. (Dissenting Reasons)

[92] I have read the reasons of my colleague, Stratas. J.A., and concur that, regardless of the applicable standard of review, there was no denial of procedural fairness in this case as the fairness letter provided adequate disclosure to the appellant. I also concur that the reasonableness standard applies to the review of the Registrar's decision. However, with respect, I disagree with my colleague's analysis of the reasonableness of that decision and therefore would dismiss this appeal and answer the certified question in the negative.

[93] In my view, the breadth of the range of potential reasonable decisions in any given case is a function of the nature of the question before the administrative decision-maker whose decision is being reviewed and is not a function of the nature of the tribunal itself. Thus, the fact that the Registrar is acting under the *Citizenship Act* does not mean that her decision is, by that reason alone, entitled to a lesser degree of deference than the reasonableness standard would normally prescribe. Rather, the range of appreciation for her decision is informed by the nature of the question that was before her due to the teaching of the Supreme Court in *Dunsmuir*, which mandates a unified approach to judicial review of all administrative decisions.

[94] Questions that are poly-centric in nature or that involve the exercise of discretion by a decision-maker will often give rise to more than a single reasonable response and thus a variety of different determinations in respect of these sorts of questions may well be reasonable: *Dunsmuir* at para. 47; *McLean* at paras. 38-41. The decision of the Supreme Court of Canada in *Khosa* provides an example of a situation where a discretionary decision of a decision-maker in the immigration context was afforded considerable deference by the Supreme Court of Canada.

[95] Where the question examined by the administrative decision-maker involves statutory interpretation, the text, context and purpose of the provision as well as the reasons (if any) given by the administrative decision-maker will be relevant to discerning the reasonableness of the decision-maker's interpretation of the provision in its constituent statute: see, e.g., *McLean* at paras. 42-70; *Edmonton East* at paras. 41-61; and *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93 at paras. 53-102, 396 D.L.R. (4th) 527.

[96] If the text of the provision in question rationally admits of more than one interpretation and the context and purpose of the provision do not clearly necessitate adopting one interpretation over the other, I believe that the choice of the administrative decision-maker to adopt one among competing interpretations must be afforded deference. To conclude otherwise is to engage in correctness review as in such circumstances the reviewing court is substituting its views for those of the tribunal on the basis of disagreement as to the correct interpretation of the provision in question, even though the interpretation of the administrative decision-maker is defensible as a rational textual interpretation that is not necessarily negated by the context or purpose of the provision.

[97] Considerations other than these may also impact the reasonableness of an administrative decision-maker's interpretation. Notably, where that decision-maker declines to follow a well-established line of authority on a point, its decision may well be unreasonable: *Bahniuk v. Canada (Attorney General)*, 2016 FCA 127 at para. 15, 484 N.R. 10; *Canadian Pacific Railway Company v. Canada (Transport, Infrastructure and Communities)*, 2015 FCA 1 at para. 59, 466 N.R. 132; *Canadian National Railway Company v. Emerson Milling Inc.*, 2017 FCA 79 at

para. 70 (available on CanLII). The decisions in *Wilson* and *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 S.C.R. 458 can be understood as being illustrations of this principle.

[98] Turning to the present case, I believe that the text of paragraph 3(2)(*a*) of the Act admits of at least two rational interpretations: either the term "employee" means what it plainly states and includes all employees of a foreign government who have children in Canada or conversely, as urged by the appellant, the term "employee" includes only those employees of a foreign government who enjoy diplomatic immunity and who have children in Canada. A strong case can be made for the former interpretation as the appellant's interpretation requires the reader to read words into the text of the legislative provision that were abrogated by Parliament in 1976 when it deleted the words "attached to or in the service of a foreign diplomatic mission or consulate in Canada" from the provision covering included "employees". Given the contextual factors framing the provision, I believe it reasonable to interpret this amendment to be substantive and informative, contrary to what is argued by the appellant.

[99] More specifically, I do not find that the context or purpose of the provision necessarily mandates the appellant's interpretation. The comments made by former Secretary of State of Canada J. Hugh Faulkner in 1976 when paragraph 3(2)(*c*) was adopted are not dispositive as they concern a different provision and, indeed, the difference in wording between paragraphs 3(2)(*c*) and 3(2)(*a*) of the Act can reasonably be read to support the interpretation of the Registrar.

[100] Whereas paragraph 3(2)(*a*) includes no express requirement that covered employees be subject to diplomatic immunity, paragraph 3(2)(*c*) specifically covers only employees of international organizations who "are granted […] diplomatic privileges and immunities certified by the Minister of Foreign Affairs to be equivalent to those granted to a person or persons referred to in paragraph (*a*)". The absence of such a requirement in paragraph (*a*) makes it possible to interpret that paragraph as including both employees who enjoy and those who do not enjoy diplomatic immunity. The addition of the words "equivalent to those granted to a person or persons referred to in paragraph (*a*)" at the end of paragraph 3(2)(*c*) does not necessarily mean that one must conclude that the employees mentioned in paragraph 3(2)(*a*) of the Act are only those who are entitled to diplomatic immunity as paragraph 3(2)(*c*) merely creates a parallelism with paragraph (*a*) and leaves unanswered the question that was before the Registrar in this case, namely, what the term "employee" in paragraph 3(2)(*a*) of the Act means.

[101] As for issues related to the context and purpose flowing from the *Vienna Convention on Diplomatic Relations*, I likewise believe that this Convention does not necessarily mandate the result urged by the appellant because the Convention and the Canadian domestic legislation that adopts the Convention do not draw a bright line between those who possess diplomatic immunity and those who do not. In fact, by its incorporation of the Convention, the *Foreign Missions and International Organizations Act* extends only partial immunity to entire classes of employees. More specifically, by virtue of Article 37 of the Convention, which is Schedule I to the statute, lower level employees of foreign governments in Canada enjoy certain categories of diplomatic immunity only in respect of acts performed within the course and scope of their duties on behalf of the foreign government. Some employees – "service staff" for example – are thus amendable

to civil suit and to the process of Canadian criminal courts in respect of acts and omissions that fall outside the scope of their employment duties. Article 37 of the Convention, which is Schedule I to the *Foreign Missions and International Organizations Act* provides:

1 The members of the family of a diplomatic agent forming part of his household shall, if they are not nationals of the receiving State, enjoy the privileges and immunities specified in Articles 29 to 36.	1 Les membres de la famille de l'agent diplomatique qui font partie de son ménage bénéficient des privilèges et immunités mentionnés dans les articles 29 à 36, pourvu qu'ils ne soient pas ressortissants de l'État accréditaire.
2 Members of the administrative and technical staff of the mission, together with members of their families forming part of their respective households, shall, if they are not nationals of or permanently resident in the receiving State, enjoy the privileges and immunities specified in Articles 29 to 35, except that the immunity from civil and administrative jurisdiction of the receiving State specified in paragraph 1 of Article 31 shall not extend to acts performed outside the course of their duties. They shall also enjoy the privileges specified in Article 36, paragraph 1, in respect of articles imported at the time of first installation.	2 Les membres du personnel administratif et technique de la mission, ainsi que les membres de leurs familles qui font partie de leurs ménages respectifs, bénéficient, pourvu qu'ils ne soient pas ressortissants de l'État accréditaire ou n'y aient pas leur résidence permanente, des privilèges et immunités mentionnés dans les articles 29 à 35, sauf que l'immunité de la juridiction civile et administrative de l'État accréditaire mentionnée au paragraphe 1 de l'article 31 ne s'applique pas aux actes accomplis en dehors de l'exercice de leurs fonctions. Ils bénéficieront aussi des privilèges mentionnés au paragraphe 1 de l'article 36 pour ce qui est des objets importés lors de leur première installation.
3 Members of the service staff of the mission who are not nationals of or permanently resident in the receiving State shall enjoy immunity in respect of acts performed in the course of their duties, exemption from dues and taxes on the emoluments they receive by reason of their employment and the exemption contained in Article 33.	3 Les membres du personnel de service de la mission qui ne sont pas ressortissants de l'État accréditaire ou n'y ont pas leur résidence permanente bénéficient de l'immunité pour les actes accomplis dans l'exercice de leurs fonctions, et de l'exemption des impôts et taxes sur les salaires qu'ils reçoivent du fait de leurs services, ainsi que de l'exemption prévue à

	l'article 33.
4 Private servants of members of the mission shall, if they are not nationals of or permanently resident in the receiving State, be exempt from dues and taxes on the emoluments they receive by reason of their employment. In other respects, they may enjoy privileges and immunities only to the extent admitted by the receiving State. However, the receiving State must exercise its jurisdiction over these persons in such a manner as not to interfere unduly with the performance of the functions of the mission.	4 Les domestiques privés des membres de la mission qui ne sont pas ressortissants de l'État accréditaire ou n'y ont pas leur résidence permanente sont exemptés des impôts et taxes sur les salaires qu'ils reçoivent du fait de leurs services. À tous autres égards, ils ne bénéficient des privilèges et immunités que dans la mesure admise par l'État accréditaire. Toutefois, l'État accréditaire doit exercer sa juridiction sur ces personnes de façon à ne pas entraver d'une manière excessive l'accomplissement des fonctions de la mission.

[102] As many employees of foreign governments therefore enjoy only partial immunity in Canada, it is impossible to conclude that such employees' "privileges […] are by their very nature inconsistent with the obligations of citizenship", as stated at paragraph 63 in the *Al-Ghamdi* case relied on by my colleague.

[103] I therefore believe that it was open to the Registrar to conclude as she did and that it was reasonable to determine that the appellant's parents fall within the scope of paragraph 3(2)(*a*) of the Act, which disentitles the appellant to Canadian citizenship. I would therefore have dismissed this appeal and answered the certified question in the negative.

"Mary J.L. Gleason"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-394-15
AN APPLICATION FOR JUDICIAL REVIEW FROM A DECISION OF THE MINISTER OF CITIZENSHIP AND IMMIGRATION DATED AUGUST 15, 2014	
STYLE OF CAUSE:	ALEXANDER VAVILOV v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	APRIL 4, 2016
REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRED IN BY:	WEBB J.A.
DISSENTING REASONS BY:	GLEASON J.A.
DATED:	JUNE 21, 2017

APPEARANCES:

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