Federal Court  Cour fédérale

Date: 20150810

Docket: T-1976-14

Citation: 2015 FC 960

Fredericton, New Brunswick, August 10, 2015

PRESENT: The Honourable Mr. Justice Bell

BETWEEN:

ALEXANDER VAVILOV

Applicant

And

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Summary

[1] This is a judicial review of the decision of the Registrar of Citizenship (Registrar) communicated to Alexander Vavilov on August 15, 2014, in which the Registrar revoked Mr. Vavilov's citizenship pursuant to paragraph 3(2)*(a)* of the *Citizenship Act*, RSC 1985, c C-29. The Registrar based his decision upon the fact that Mr. Vavilov's parents were employees of a foreign government and not lawful Canadian citizens at the time of his birth.

Mr. Vavilov challenges the Registrar's decision on a number of grounds. For the reasons set out below I am of the view the Registrar's factual conclusions meet the test of reasonableness contemplated by the Court in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*], and his interpretation of the law is correct. For those reasons, I would dismiss the judicial review application.

II. Facts

A. *Background*

[2] The Applicant, Alexander Vavilov was born in Canada on June 3rd, 1994. Mr. Vavilov has a brother approximately 3 years his senior. Their parents, Andrey Bezrukov and Elena Vavilova entered Canada from Russia some time prior to the birth of their children, and assumed the identities of two deceased Canadians. The exact date of entry is unknown. The Canadian government issued passports to them under their assumed identities. It is not disputed that those identity documents were obtained fraudulently.

[3] While Mr. Vavilov's parents were living in Canada, both completed post-secondary education and were employed under their assumed identities. When the children were born, Ms. Vavilova became a stay-at-home mother and Mr. Bezrukov continued to run a successful business. In 1995, Mr. Bezrukov undertook post-secondary study in France. The family left Canada to take up residence in France. The children were 1 and 4 years old, respectively, at that time. It is also the last time any member of the family resided in Canada. The family lived in

France until August of 1999, after which they moved to Boston, Massachusetts where Mr. Bezrukov began studies at Harvard's John F. Kennedy School of Government.

[4] While in Boston, Mr. Vavilov's parents became naturalized American citizens under their assumed Canadian identities. After their naturalization, their sons obtained American citizenship. There is little other information in the record about Mr. Vavilov's life until June 1st, 2010 when agents of the United States (US) Federal Bureau of Investigation entered the family home and arrested his parents. Both parents were charged with one count of conspiracy to act as unregistered agents of a foreign government and two counts of conspiracy to commit money laundering.

[5] 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.

[6] Mr. Vavilov and his brother used their Canadian passports to fly to Russia on July 5th, 2010. The American government revoked Mr. Vavilov's passport and American citizenship and, on December 10, 2010, he and his brother were issued Russian passports and birth certificates. Mr. Vavilov has renewed his Russian passport on at least one occasion.

B. *Procedural History*

[7] In 2010 and 2011, Mr. Vavilov made two unsuccessful attempts to obtain a Canadian passport. In June of 2012, he applied for a Canadian student visa, which was issued and then cancelled in August of the same year as a result of security, identity, and citizenship concerns regarding Mr. Vavilov and his family.

[8] Mr. Vavilov and his brother officially changed their surnames to Vavilov after Canadian officials informed the brother that new passport applications would not be granted if they relied on their parents' assumed identities. Mr. Vavilov obtained an amended Ontario birth certificate on December 1, 2011, setting out his name as Alexander Philip Anthony Vavilov, and his parents' true names and places of birth. Based on this amended birth certificate, he applied for and, on January 15, 2013, obtained a Certificate of Canadian Citizenship (the Certificate). In his application for the Certificate, Mr. Vavilov stated that his parents were not employed by a foreign government or international agency at the time of his birth.

[9] With the new birth and citizenship certificates, Mr. Vavilov applied for an extension of his Canadian passport. When the Canadian government did not issue the passport in a timely manner, Mr. Vavilov commenced an application for *mandamus* in the Federal Court. That

application was discontinued on agreement between the parties that a decision would issue by July 19, 2013.

[10] On July 18, 2013, the Registrar wrote to Mr. Vavilov (the fairness letter). Instead of providing him with a decision regarding his passport application, the Registrar informed him there was reason to believe the Certificate had been issued in error. The Registrar informed Mr. Vavilov he had reason to believe his parents were granted citizenship under assumed identities and were employees of the SVR while in Canada. In the fairness letter the Registrar cited paragraph 3(2)*(a)* of the *Citizenship Ac*t and invited Mr. Vavilov to provide "any information" that would address the Registrar's concerns within 30 days of the date of the letter. The Registrar extended the deadline to accommodate requests for information by Mr. Vavilov pursuant to the *Access to Information Act*, RSC, 1985, c A-1.

[11] One of the requests for information resulted in some dispute between the parties. That dispute forms one of the grounds for relief on this judicial review application. Briefly, one of the documents disclosed to the Applicant shows that the Case Management Officer assigned to this matter asked the Foreign Affairs Protocol Office for an opinion on Mr. Vavilov's status. That office stated it could not provide an opinion because Mr. Vavilov's parents did not have diplomatic, consular, or other official status. Mr. Vavilov enquired as to why the opinion was sought and, furthermore, asked that the person who had requested the opinion recuse herself from any further involvement in the matter, she apparently having prejudged the issue. The Respondent counters that the opinion was not necessary as it was outside the mandate of the Department of Foreign Affairs and International Trade and, in any event, no opinion was

provided. The Respondent claims there is simply no issue to be addressed as a result of this disclosure. I agree with the position advanced by the Respondent. I am of the view there is no merit to the bias allegation raised by Mr. Vavilov. Officials are entitled to ask questions and seek opinions in the course of performing their duties without worrying about the spectre of a bias allegation. Nothing more will be said regarding this issue in the course of these reasons.

[12] On August 15, 2014, the Registrar informed Mr. Vavilov his Certificate was cancelled as of that date and that the Canadian government no longer "recognizes" him as a "citizen of Canada" and that he "no longer holds legal status" in Canada. The Registrar relied upon the same reasons as communicated in the fairness letter – his parents were not lawfully Canadian citizens or permanent residents at the time of his birth, and furthermore, they were, at the time of his birth, "employees or representatives of a foreign government" for the purposes of paragraph 3(2)*(a)* of the *Citizenship Act*.

III. Issues

[13] The following issues are raised on this judicial review:

1. Was there a breach of fairness with regard to disclosure of documents to the Applicant?
2. Did the Registrar err in interpreting paragraph 3(2)*(a)* of the *Citizenship Act*?
3. Was the decision of the Registrar reasonable on the evidence before it?

IV. Relevant Provisions

[14] For convenience, ss. 3(1)*(a)* and 3(2)*(a)* of the *Citizenship Act* are reproduced below:

Persons who are citizens	**Citoyens**
3. (1) Subject to this Act, a person is a citizen if	3. (1) Sous réserve des autres dispositions de la présente loi, a qualité de citoyen toute personne :
(a) the person was born in Canada after February 14, 1977;	*a)* née au Canada après le 14 février 1977;
…	[…]
Not applicable to children of foreign diplomats, etc.	**Inapplicabilité aux enfants de diplomates étrangers, etc.**
(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 permanent residence and either of his parents was	(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 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;

V. Analysis

A. *Standard of Review*

[15] It is settled law that issues of procedural fairness are reviewed on the standard of correctness (See: *CUPE v Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 SCR 539; *Khela*

v Mission Institution, 2014 SCC 24, [2014] 1 SCR 502). It follows that the duty to disclose will be determined on this standard.

[16] Mr. Vavilov does not make submissions on the appropriate standard of review to be applied to the Registrar's interpretation of s. 3(2)*(a)*. The Respondent makes lengthy submissions on the matter and arrives at the conclusion that reasonableness should apply. I respectfully disagree. I am of the view the interpretation of s. 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. Furthermore, 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. (See: *Dunsmuir*, above; *Kandola v Canada (Minister of Citizenship and Immigration)*, 2014 FCA 85, [2014] FCJ No 322; and *Kinsel v Canada (Minister of Citizenship and Immigration)*, 2014 FCA 126, [2014] FCJ No 781).

[17] Finally, the application of paragraph 3(2)*(a)* of the *Citizenship Act* to the facts raises an issue of mixed fact and law, and will attract a standard of reasonableness: *Dunsmuir*, above, at para 47.

B. *Procedural Fairness*

[18] Mr. Vavilov contends the Registrar breached its duty of fairness owed to him by failing to disclose the documentation which prompted the first procedural fairness letter. He contends the content of the letter was insufficient to allow him to address the concerns about his citizenship. The Registrar acknowledges he had a duty to allow Mr. Vavilov to respond, but

contends the procedure adopted meets any duty of fairness required by *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, [1999] SCJ No 39.

[19] I agree with the Respondent's contention. In this case, the threshold for procedural fairness is not at the upper end given that Mr. Vavilov is a citizen of Russia, travels on a Russian passport, and would not have been rendered stateless regardless of the outcome of the enquiry. Although perhaps of limited relevance on the issue of the procedural fairness threshold, I would note that Mr. Vavilov has not spent any time in Canada since he was an infant. There is no requirement that the Registrar provide the Applicant with the complete documentation which formed the basis of his concerns. Although raised in the context of a visa application, the observations of Justice de Montigny of this Court (as he then was) in *Nadarasa v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1112, [2009] FCJ No 1350, recently followed by Barnes J. in *Zhang v Canada (Minister of Citizenship and Immigration)* 2015 FC 463, 252 ACWS (3d) 778, are helpful in the present analysis:

> [25] But contrary to the applicant's submission, the jurisprudence of this Court is not to the effect that an applicant must actually be given the document relied upon by the decision-maker, but that the information contained in that document be disclosed to the applicant so that he or she has an opportunity to know and respond to the case against him or her. The following quote from Justice Rothstein (then from this Court) in *Dasent v. Canada (Minister of Citizenship & Immigration)* (1994), [1995] 1 F.C. 720 (Fed. T.D.), at para. 23, is illustrative of that principle:
>
> > The relevant point as I see it is whether the applicant had knowledge of the information so that he or she had the opportunity to correct prejudicial misunderstandings or misstatements. The source of the information is not of itself a differentiating matter as long as it is not known to the applicant. The question is whether the applicant had the opportunity of dealing with the evidence. This is what the long-established authorities indicate the

> rules of procedural fairness require. In the well known words of Lord Loreburn L.C. in *Board of Education v. Rice*, [1911] A.C.179 (H.L.) at page 182:
>
> They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view.

[20] In this case, the Registrar informed Mr. Vavilov, via the procedural fairness letter, of his concerns in a manner that allowed for a meaningful response. The Registrar specifically set out the issues concerning the fraudulent identification used by Mr. Vavilov's parents to obtain citizenship and his concerns about their status as employees or representatives of a foreign government at the time of his birth. Furthermore, when Mr. Vavilov's counsel sought additional information, that information was provided by the Registrar. In my view, the procedure adopted by the Registrar met the requirements of procedural fairness.

C. *Interpretation of s. 3(2)(a)*

[21] Mr. Vavilov's parents were in Canada under assumed identities at the time of his birth. He acknowledges their Canadian passports were obtained by fraud. However, he contends his parents were "lawfully admitted to Canada" and are Canadian citizens because the fraudulently obtained documents were never revoked by the Minister of Citizenship and Immigration. The argument is devoid of any merit and to give it any credence by further analysis would be an affront to all those who attempt to come to this country lawfully and obtain valid Canadian citizenship. Because his parents were not Canadian citizens, if Mr. Vavilov's claim to Canadian citizenship is to succeed, it must be based upon his birth in Canada.

[22] The question to be answered, on the correctness standard, is whether the Registrar erred in finding that individuals living in Canada under an assumed identity and working to establish 'deep cover' operations in order to collect intelligence for a foreign government, are included in the definition of "a diplomatic or consular officer or other representative or employee in Canada of a foreign government" as contemplated by s. 3(2)*(a)* of the *Citizenship Act*. For the reasons that follow, I find the Registrar did not err.

[23] If one reads s. 3(2)*(a)* in a contextual and purposive manner, taking the plain meaning of the words, it must include representatives and employees in Canada of foreign governments, regardless of diplomatic or consular status. To find otherwise would render the words "other representative or employee in Canada" meaningless. This would be inconsistent with any reasoned approach to statutory interpretation, and offends the rule that Parliament intends each word in a statute to have meaning (See: Ruth Sullivan, *Statutory Interpretation*, 2nd ed., (Irwin Law Inc. 2007, at 184 [*Sullivan*]). This rule flows from the assumption that the legislator avoids tautology.

[24] The question which remains is whether those who establish themselves, at the behest of a foreign government, for the purposes of gathering intelligence for that foreign government constitute "representatives or employees". The fact the section refers to both employees and representatives is telling. My view is re-enforced by the French version which speaks even more broadly about those "représentant à un autre titre ou au service au Canada d'un gouvernement étranger". The wording is clearly meant to cover individuals who are in Canada as agents of a foreign government, whatever their mandate. In this case, the task was to steal identities, obtain

fraudulent citizenship and, with the benefit of that citizenship, further the fraud on one of our closest allies – the purpose of the fraud being to obtain intelligence and provide information to the Russian government. Anyone who moves to this country with the explicit goal of establishing a life to further a foreign intelligence operation, be it in this country or any other, is clearly doing so in the service of (French version), or as an employee or representative of, a foreign government.

[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: Sullivan, above, at 209).

D. *Reasonableness*

[26] The final issue for determination is whether it was reasonable for the Registrar to conclude that Mr. Vavilov's parents were in Canada as part of their SVR operation for the Russian government. For the reasons that follow, I find that it was.

[27] I find there was sufficient evidence, when considering the arrest and conviction records and use of false identities by Mr. Vavilov's parents, for the Registrar to conclude they were "illegals" working on a deep cover assignment for the SVR, while in Canada. In addition to the public record, the information contained in the internal analyst's report is instructive in that it

speaks to the long term pattern one would expect to see from an illegal. This includes pursuing higher education and legitimate employment in a host country, in this case Canada, to establish a "legend" that becomes increasingly documented and plausible. The legend becomes so authentic that it appears to be reality. In the report to the Registrar, which was disclosed to Mr. Vavilov, the analyst states:

> Open-source information indicates that the SVR tasked Mr. Bezrukov with collecting intelligence from U.S. officials on topics related to U.S. foreign policy on a variety of topics related to America's position on Central Asia, Russia, and a variety of national security issues (including the nuclear non-proliferation, the U.S. position on Iran's nuclear weapons program, and the U.S. foreign policy objectives in Afghanistan).
>
> Considering Mr. Bezrukov's objectives, it is reasonable to believe that his pursuit of undergraduate (i.e.: Bachelor degree at York University in Toronto, Canada) and graduate degrees in the fields of international business and public administration both enhance the strength of his legend.

[28] The record contains no contradictory evidence. It was open to the Registrar to accept this report, which he reasonably did. I am satisfied the Registrar's decision on the facts falls within the range of possible, acceptable outcomes as contemplated by *Dunsmuir*, above, at para 47.

VI. Conclusion

[29] Mr. Vavilov does not dispute his parents' status as illegals in the United States, nor does he dispute that their Canadian citizenship and passports were obtained by fraud. There is adequate evidence on the record to reasonably conclude that his parents' presence in Canada constituted part of their SVR mission for the Russian government. This enabled them to establish their legend.

[30] The application for judicial review is dismissed.

[31] I would certify the following questions of general importance:

1. What is the standard of review applicable to the determination of whether Mr. Vavilov is not a Canadian citizen by reason of the application of paragraph 3(2)*(a)* of the *Citizenship Act*?

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

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. The following questions of general importance are certified:

    1. What is the standard of review applicable to the determination of whether Mr. Vavilov is not a Canadian citizen by reason of the application of paragraph 3(2)*(a)* of the *Citizenship Act*?

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

"B. Richard Bell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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