

Federal Court



Cour fédérale

Date: 20141029

Docket: T-2042-13

Citation: 2014 FC 1028

Ottawa, Ontario, October 29, 2014

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

SHAHEEN AFZAL

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] On September 26, 2013, the applicant attended before a citizenship judge in Hamilton, Ontario, swore the oath of allegiance to Her Majesty Queen Elizabeth II and committed to faithfully observe the laws of Canada. She was issued a certificate of citizenship and left at the conclusion of the ceremony a Canadian citizen. Or did she?

[2] Previously, the applicant had failed both of the mandatory pre-conditions to citizenship established by section 5(1)(d) and (e) of the *Citizenship Act* (RSC, 1985, c C-29) (the *Act*):

Grant of citizenship

Attribution de la citoyenneté

5. (1) The Minister shall grant citizenship to any person who

5. (1) Le ministre attribue la citoyenneté à toute personne qui, à la fois:

[...]

[...]

(d) has an adequate knowledge of one of the official languages of Canada;

d) a une connaissance suffisante de l'une des langues officielles du Canada;

(e) has an adequate knowledge of Canada and of the responsibilities and privileges of citizenship;

e) a une connaissance suffisante du Canada et des responsabilités et avantages conférés par la citoyenneté;

[3] On the written test, the applicant scored 2/6 on the language component and 8/20 on the knowledge component. Her scores did not improve on her subsequent appearance before the citizenship judge, receiving 0/6 on the language component and 4/20 on the knowledge component. The citizenship judge checked the boxes indicating that the applicant did not meet the mandatory requirements of section 5(1)(d) and (e). In the "Reasons" section the judge wrote:

Applicant signed ICES consent form. The Applicant failed the language hearing 0/6 and does not comply with paragraph 5(1)(d) of the Citizenship Act. The Applicant failed the knowledge hearing 4/20 and does not comply with paragraph 5(1)(e) of the Citizenship Act.

[4] No recommendation was made by the citizenship judge to the Minister under section 5(3) of the *Act* that the Minister grant citizenship on compassionate grounds.

[5] There ensued a series of administrative errors. The citizenship judge checked the wrong “Decision” box, indicating that the application for Canadian citizenship was granted. The next day, on September 5, 2013, the departmental citizenship official responsible for processing the file signed the box “Decision seen” and checked the box “Citizenship Granted 5(1),” compounding the original error. A few days later, the applicant received a notice to appear for a citizenship ceremony and on September 26, 2013, she took the Oath of Citizenship and was given a citizenship certificate.

[6] Immediately after the ceremony however, citizenship officer Jean-Simon Cantin, who served as clerk for the citizenship ceremony (and was not the officer who checked the “Decision seen” box), observed the error. He immediately called the applicant at her home and left a message with her son. The next day, officer Cantin called the applicant on her cellular phone, again leaving a message. The calls were not returned.

[7] On or about November 22, 2013, the Registrar concluded that the applicant had been issued the certificate in error, and pursuant to section 26(3) of the *Citizenship Regulations* (SOR/93-246) (*Regulations*), cancelled the citizenship certificate. Section 26(3) of the *Regulations* provides:

<p>26 (3) Where the Minister has determined that the holder of a certificate of naturalization, certificate of citizenship, miniature certificate of citizenship or other certificate that contains the holder's photograph, or certificate of renunciation, issued or granted under the Act or prior legislation or any regulations made thereunder <u>is not entitled to the certificate, the Registrar shall cancel the certificate.</u></p>	<p>26 (3) Lorsque le ministre a déterminé que le titulaire d'un certificat de naturalisation, d'un certificat de citoyenneté, d'un certificat de citoyenneté petit format ou autre certificat de citoyenneté portant sa photographie, ou d'un certificat de répudiation délivré ou attribué en vertu de la Loi ou de la législation antérieure ou en application de leurs règlements <u>n'a pas droit à ce certificat, le greffier annule le certificat.</u></p>
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(emphasis added)

(je souligne)

[8] In sum, the applicant received a highly valued privilege which the Minister seeks to take back, and the question framed for decision is whether the *Regulations* provide the authority to do so. The applicant contends that the *Regulations* do not confer in the Registrar the authority to revoke a certificate of citizenship. The *Regulations* are not a collateral mechanism to supplement the statutory grounds under which citizenship, once obtained, can be lost. Section 7 in Part II of the *Act*, makes this clear:

No loss except as provided

Perte de la citoyenneté

7. A person who is a citizen shall not cease to be a citizen except in accordance with this Part or regulations made under paragraph 27(j.1).

7. Le citoyen ne peut perdre sa citoyenneté que dans les cas prévus à la présente partie ou aux règlements pris en vertu de l'alinéa 27(j.1).

[9] The applicant also says that the cancellation was unlawful as the decision was made without notice to her and in breach of procedural fairness and must be set aside.

[10] Before considering these arguments, I turn to the consequences of the failure of the Minister to appeal the decision of the citizenship judge. No notice of appeal from the decision of the citizenship judge was filed even though the Minister and his officials had knowledge of the error within the 60-day appeal period provided by section 14(5). The applicant contends that, having missed the appeal period, the Registrar cannot, through the device of an administrative, regulatory provision, collaterally attack the decision of the citizenship judge.

[11] In my view, this argument is a distraction from the central question of the interpretation of the statute and regulations. Subsequent to the issuance of the certificate, no appeal could be taken from the citizenship judge's decision. That decision was spent, replaced by the oath and certificate. It must be remembered that the error was discovered after the certificate was issued and the oath taken. It was too late to appeal – not because 60 days had expired, which it had not, but because the factual substratum of the appeal had evaporated. The foundation of the applicant's claim or proof of citizenship was no longer the citizenship judge's decision, but rather it was the certificate of citizenship.

I. Issues and Standard of Review

[12] The central question before the Court is the resolution of the tension or interface between section 7 of the *Act* and section 26(3) of the *Regulations*. The *Regulations* upon which the Registrar relied to cancel the certificate are authorized by section 27 of the *Act*. Section 27(j) and (k) of the *Act* provide:

Regulations

27. The Governor in Council may make regulations

[...]

(j) providing for the surrender and retention of certificates of citizenship, certificates of naturalization or certificates of renunciation issued or granted under this Act or prior legislation or any regulations made thereunder if there is reason to believe that the holder thereof may not be entitled thereto or has contravened any of the provisions of this Act;

[...]

(k) providing for the surrender and cancellation of certificates referred to in paragraph (j) where the holder thereof has ceased to be entitled thereto;

(emphasis added)

Règlements

27. Le gouverneur en conseil peut, par règlement

[...]

j) régir la restitution et la rétention des certificats de citoyenneté, de naturalisation ou de répudiation délivrés en vertu de la présente loi ou de la législation antérieure ou en application de leurs règlements lorsqu'il y a des raisons de croire que leur titulaire n'y a peut-être pas droit ou a enfreint la présente loi;

[...]

k) régir la restitution et l'annulation des certificats mentionnés à l'alinéa j) lorsque leur titulaire a cessé d'y avoir droit;

(je souligne)

[13] The core of the applicant's position is that in section 7, Parliament directed its mind to the circumstances under which citizenship could be lost and expressly prescribed the extent to which citizenship could be lost using regulatory authority. Neither of the exceptions in section 7 (misrepresentation or material disclosure) nor the circumstances contemplated by regulation 27(j.1) (born outside of Canada to a Canadian but did not become a citizen prior to February 15, 1977) are engaged in this case.

[14] The central question, being one of statutory interpretation, is assessed against a correctness standard of review. Whether there was a breach of procedural fairness is also assessed against a standard of correctness, but the determination by the Registrar that the applicant's citizenship was granted as a result of administrative error involves applying a legal standard to a set of facts. It is therefore a question of mixed fact and law and is reviewable on a standard of reasonableness.

II. The Statutory Scheme Governing Citizenship

[15] The foundation of Canadian citizenship is statutory. There is no independent or free-standing right to citizenship except as accorded by the provisions in Part I of the *Act – The Right to Citizenship*. Largely writ, citizenship can be acquired through birth (section 3(1)(a) and (b)) or, as in this case, consequent to permanent residency (section 3(1)(c)). Part II of the *Act - Loss of Citizenship* - authorizes revocation of citizenship pursuant to subsection 10(1) where the Governor-in-Council is satisfied, on the basis of a report from the Minister, that the person has obtained citizenship by fraud or misrepresentation. Administrative error is not one of the enumerated grounds in Part II.

[16] In the case of a permanent resident seeking Canadian citizenship, the specific statutory pre-conditions of the *Act* must be met. Those conditions require demonstration of a certain level of linguistic competence in either of Canada's official languages and an adequate knowledge of Canada's social, civic and political norms. These competencies must be established before citizenship can be granted.

[17] Section 14(1) provides that a citizenship application “shall be considered by a citizenship judge who shall...determine whether or not the person who made the application meets the requirements of this Act and the regulations”. Under section 14(2), the citizenship judge shall approve or not approve the application. As noted, section 14(5) allows the Minister or the applicant to appeal the decision of the citizenship judge within sixty days.

[18] Section 12 in Part IV of the *Act - Certificate of Citizenship* - provides that where an application for citizenship under section 5 is approved the Minister shall issue the certificate.

Application for certificate of citizenship	Demandes émanant de citoyens
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12. (1) Subject to any regulations made under paragraph 27(i), the Minister shall issue a certificate of citizenship to any citizen who has made application therefore.	12. (1) Sous réserve des règlements d'application de l'alinéa 27i), le ministre délivre un certificat de citoyenneté aux citoyens qui en font la demande.
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Issue of certificate	Délivrance aux nouveaux citoyens
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(2) When an application under section 5 or 5.1 or subsection 11(1) is approved, the Minister shall issue a certificate of citizenship to the applicant.	(2) Le ministre délivre un certificat de citoyenneté aux personnes dont la demande présentée au titre des articles 5 ou 5.1 ou du paragraphe 11(1) a été approuvée.
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When effective**Entrée en vigueur**

<p>(3) A certificate issued pursuant to this section does not take effect until the person to whom it is issued has complied with the requirements of this Act and the regulations respecting the oath of citizenship.</p>	<p>(3) Le certificat délivré en application du présent article ne prend effet qu'en tant que l'intéressé s'est conformé aux dispositions de la présente loi et aux règlements régissant la prestation du serment de citoyenneté.</p>
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III. The Applicant's Perspective on the Statutory Scheme

[19] The applicant contends that she is a citizen, has the certificate to prove it, and, further, that in section 7 Parliament expressly addressed the only circumstances under which citizenship, once obtained, can be lost. The *Regulations* contemplated by section 27 of the *Act* are necessarily confined to the implementation and support of those circumstances in Part II of the *Act* pertaining to the loss or revocation of citizenship, or where the certificate is required for civil or criminal proceedings or as evidence in an investigation. Further, the language of section 27(j) of the *Act* "if there is reason to believe that the holder thereof may not be entitled thereto" cannot constitute an independent authority to revoke citizenship, as Parliament has expressly considered this in sections 7 and 10.

[20] To elaborate, the applicant's perspective is that section 26(3) of the *Regulations* has to be interpreted in conjunction with sections 7, 12(2), 14(1) and (14(5) of the *Act*, and if done so, section 26(3) of the *Regulations* does not give the Registrar the power to cancel a citizenship certificate that was issued after an application for citizenship was approved by a citizenship judge. More bluntly, the applicant asserts that the respondent is relying on section 26(3) of the *Regulations* to do what the *Act* does not allow. Section 12 of the *Act* requires that citizenship be

granted, and Parliament has prescribed and limited the means of recourse to either an appeal or the launch of revocation proceedings.

[21] In sum, the applicant's argument is that the finality contemplated by the statutory scheme cannot, in the absence of legislative authority, be set aside simply because the Minister wishes the result were otherwise. To interpret the *Regulations* so broadly would render the scheme meaningless, as the certificate could be revoked simply by administrative action of the Registrar who came to the view that the applicant was not entitled to the certificate. The legislation contemplates a right of appeal (now a right to seek leave to commence judicial review) to the Federal Court and revocation proceedings. The statute itself provides that the Minister *shall* issue the certificate and, similarly, that if not content with the decision of the citizenship judge, the Minister may appeal.

IV. Analysis

A. *The Statutory Foundation for Cancellation by Regulation*

[22] Any consideration of the relationship between statutes and regulations begins with two principles. First, it is axiomatic that the words of an act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the act, the object of the act, and the intention of Parliament. Second, the *Regulations* are subordinate legislation, and as such cannot derogate from or be inconsistent with the statute. As Professor Ruth Sullivan explains in *Statutory Interpretation*, 2nd ed (Toronto: Irwin Law, 2007) at page 312, "the paramountcy of statutes over delegated legislation operates as a presumption" and in cases of

conflict, “the statute is presumed to prevail”. The *Regulations* cannot take away that which the statute has granted.

[23] To this extent the applicant’s argument is well-founded. Statutes cannot be undone by subordinate legislation. In order to revoke by regulation, a citizenship certificate, granted by statute, there must be a foundation in the statute. There is such a foundation. Indeed, there are two: section 12(3) and section 27(j) of the *Act*. I turn first to section 12(3).

[24] Section 12(3) provides:

When effective

12 (3) A certificate issued pursuant to this section does not take effect until the person to whom it is issued has complied with the requirements of this Act and the regulations respecting the oath of citizenship.

Entrée en vigueur

12 (3) Le certificat délivré en application du présent article ne prend effet qu’en tant que l’intéressé s’est conformé aux dispositions de la présente loi et aux règlements régissant la prestation du serment de citoyenneté.

[25] Subsection 12(3) provides a legislative foundation for the cancellation of a certificate issued in error. A certificate, even if issued, is of no effect where the conditions precedent to citizenship have not been met. The applicant’s citizenship was not revoked and sections 7, 10 and 18 not engaged, as the applicant never had citizenship. The requirements of the *Act* had not been fulfilled.

[26] I turn to the second legislative foundation which supports the regulatory action. To repeat, section 27 authorizes regulations:

Regulations**Règlements**

27. The Governor in Council may make regulations

27. Le gouverneur en conseil peut, par règlement

[...]

[...]

(j) providing for the surrender and retention of certificates of citizenship, certificates of naturalization or certificates of renunciation issued or granted under this Act or prior legislation or any regulations made thereunder if there is reason to believe that the holder thereof may not be entitled thereto or has contravened any of the provisions of this Act;

j) régir la restitution et la rétention des certificats de citoyenneté, de naturalisation ou de répudiation délivrés en vertu de la présente loi ou de la législation antérieure ou en application de leurs règlements lorsqu'il y a des raisons de croire que leur titulaire n'y a peut-être pas droit ou a enfreint la présente loi;

[...]

[...]

(k) providing for the surrender and cancellation of certificates referred to in paragraph (j) where the holder thereof has ceased to be entitled thereto;

k) régir la restitution et l'annulation des certificats mentionnés à l'alinéa j) lorsque leur titulaire a cessé d'y avoir droit;

(emphasis added)

(je souligne)

[27] Sections 27(j) and (k) contemplate two circumstances where a certificate of citizenship may be cancelled. In this case, the Registrar believed that the applicant was not entitled to the certificate. That belief had an objective foundation, rooted in the record before her. The action was purely administrative, and required no adjudicative assessment, or importantly, re-adjudication of the substance of the citizenship judge's decision. The authority under the *Regulations* was used as it was intended, not to change, vary or substitute a Ministerial decision for the one that was reached under the *Act*, rather to ensure that the outcome conformed with the

adjudicative process contemplated by the *Act* itself. Viewed in this light regulation 26(3) is analogous to Federal Court Rule 397(1)(a) which allows the Court to reconsider an order where the order does not accord with the reasons given. That is precisely what occurred here. Rules of practice applicable to superior courts contain mechanisms to address administrative errors and it is not surprising to see an analogous provision in legislation like the *Citizenship Act*.

[28] To read section 7 as to trump section 27 of the *Act* would produce two absurd results. First, the valued right of citizenship would be given to someone who was not, as a matter of fact or as a matter of law, entitled to it. Parliament's intention that all Canadians possess a minimal degree of linguistic ability and civic awareness would be thwarted. Secondly, the procedure triggered to remedy the administrative error, namely that of a ministerial report and Cabinet consideration and adjudicative review, would be entirely disproportionate to the nature of the issues underlying cancellation of the certificate.

[29] Further, to borrow from *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at para 27 a "label of absurdity" can be attached to interpretations that render some part of the statute "pointless or futile". The argument advanced by the applicant with respect to the scope of section 7 neutralizes both section 12(3), the purpose of which is to provide a fail-safe measure in circumstances such as these and section 27(j), which contemplates that citizenship certificates might be issued in circumstances where the requirements of the *Act* were not met. This is not a case where citizenship, once lawfully granted, is lost or revoked. Here, the applicant never had citizenship. That is the effect of sections 12(3) and 27(j).

[30] Section 27 of the *Act* contemplates cancellation in situations such as those in this case where a certificate has been issued through administrative error as well as in exigent or emergent circumstances. Parliament, in enacting section 27, understood the necessity of regulations to give effect to the *Act* and its objectives. This interpretation of section 27(j) and (k) is a plain and obvious reading of the statute, but also is consistent with the obligation under section 12 of the *Interpretation Act* (RSC, 1985, c I-21) to read the statute with a “fair, large and liberal construction and interpretation as best ensures the attainment of its objects”. This interpretation also aligns with the principle of achieving “harmony, coherence, and consistency” within and between statutes (*Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at para 27, citing *R v Ulybel Enterprises Ltd.*, 2001 SCC 56 at para 52). No section of the statute is negated, and there is coherence between sections 12(3) and 27 of the *Act* and section 26(3) of the *Regulations*.

[31] In sum, section 26(3) of the *Regulations* is authorized by section 27(j) and (k) of the *Act*. Regulation 26(3) is neither inconsistent with, nor a derogation from, any right created by the *Act* itself; rather section 26(3) implements, administratively, the intent of Parliament as reflected in sections 12(3) and 27(j) and (k) of the *Act*. This interpretation also ensures that the privilege of Canadian Citizenship is granted only as intended by Parliament.

[32] Before concluding, I turn to *Stanizai v Canada (Minister of Citizenship and Immigration)*, 2014 FC 74, and in particular in paragraph 44 of the decision, where Justice Anne Mactavish states that “an error within the offices of the respondent does not have the effect of overriding the statutory requirements of the *Citizenship Act* and conferring a discretion on the Minister to withhold citizenship that he would not otherwise have.” This decision is relied on by

the applicant, but it is entirely distinguishable on its facts. In *Stanizai*, the applicant met all the statutory requirements for citizenship but the Minister nevertheless delayed in granting citizenship. The applicant in the present case did not meet the statutory requirements for citizenship. Further, *Stanizai* did not involve the use of section 26(3) of the *Regulations* to cancel the citizenship certificate. The decision does not advance the applicant's position.

[33] I turn now to the applicant's alternative argument, namely that the cancellation breached the principles of procedural fairness. The standard of review for this is correctness.

[34] The Court of Appeal, in *Veleta v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 138, made clear its view as to the application of the principles of procedural fairness in matters dealing with citizenship. Regardless of the scope and extent to which those principles apply, and in respect of which aspect of the process they might apply, the applicant in this case had notice that there was an issue with her citizenship certificate. The obligation to provide notice and the duty of fairness discharged by the two calls to the applicant by officer Cantin. The applicant chose not to avail herself of further information that would have been forthcoming had she returned the calls. A party cannot turn a blind eye, or a deaf ear, to the information that is made available to her and then plead lack of notice and breach of procedural fairness.

[35] In any event, even if there was a breach of procedural fairness, I would withhold relief. Relief under section 18.1 of the *Federal Courts Act* is equitable and discretionary and can be withheld where setting aside the decision would not affect the ultimate result; *Mobil Oil Canada Ltd. v Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202, at paras 51, 52. In

this case, the applicant failed both of the mandatory requirements established by statute. To set aside the decision would serve no purpose, as the applicant would still be ineligible for citizenship. Remedies that serve no purpose will not be granted.

JUDGMENT

THIS COURT ORDERS that the application for judicial review is dismissed with costs.

“Donald J. Rennie”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2042-13

STYLE OF CAUSE: SHAHEEN AFZAL v THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

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JUDGMENT AND REASONS: RENNIE J.

DATED: OCTOBER 29, 2014

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