Federal Court of Appeal | Cour d'appel fédérale

Date: 20150609

Docket: A-455-14

Citation: 2015 FCA 141

CORAM: **STRATAS J.A.**
SCOTT J.A.
BOIVIN J.A.

BETWEEN:

OWAIS AHMED ASAD
RAHIM AHMED

Appellants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Heard at Winnipeg, Manitoba, on May 6, 2015.

Judgment delivered at Ottawa, Ontario, on June 9, 2015.

REASONS FOR JUDGMENT BY: BOIVIN J.A.

CONCURRED IN BY: STRATAS J.A.
SCOTT J.A.

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REASONS FOR JUDGMENT

BOIVIN J.A.

I. Background

[1] This is an appeal from a decision of Mr. Justice Russell of the Federal Court (the Judge) dated September 26, 2014 (2014 FC 921). The Judge dismissed the application for judicial review from the decision of an Officer at the Canadian High Commission in Islamabad, Pakistan

(the Officer). The Officer refused the application of Mr. Owais Ahmed Asad (the adult appellant) for citizenship of his adopted son Rahim Ahmed (the child appellant) (collectively, the appellants) made under subsection 5.1(1) of the *Citizenship Act*, R.S.C. 1985, c. C-29 (the Act).

[2] The adult appellant and his wife are Canadian citizens who, after a number of years of marriage, had no children. The adult appellant signed an "Irrevocable Deed of Adoption" (Deed of Adoption) for the child appellant, who was born in Pakistan on October 22, 2008. The said Deed of Adoption was executed on April 18, 2009 and notarized on June 23, 2009. Pursuant to the Guardian and Wards Act, 1890 in force in Pakistan, the Court of Civil/Family Judge & Judicial Magistrate of Hyderabad Sindh (the Family Court) issued a Guardianship Certificate to the adult appellant and his wife, also on June 23, 2009.

[3] In March 2011, the adult appellant applied for Canadian citizenship for the child appellant under section 5.1 of the Act, which provides that a non-Canadian child, adopted by Canadian parents and meeting the requirements of the Act, can directly be granted citizenship without the requirement of first becoming a permanent resident.

[4] The Deed of Adoption and the Guardianship Certificate issued by the Family Court were submitted in support of the application.

[5] By letter dated October 2, 2013, the Officer refused the grant of citizenship. The main ground for refusal was that the *Muslim Family Laws Ordinance, 1961* (the Ordinance 1961) only allows for the sharia law practice of kafala, which is akin to the concept of guardianship. Kafala,

noted the Officer, does not create a permanent parent-child relationship. Although the Officer did not reference it explicitly, section 5.1 of the *Citizenship Regulations*, SOR/93-246 (the Regulations) mandates that a valid adoption includes full severance of the legal relationship between the child and his or her biological parents. The Officer's conclusion was expressed as follows:

> […] no adoption as it is understood in Canada or under the framework provided by *Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption* has taken place. Therefore the application for Canadian Citizenship for a person under the guardianship of a Canadian Citizen to be adopted cannot be processed.
>
> (Appeal book at page 127)

[6] In reviewing the Officer's decision, the Judge found that the standard of review was reasonableness. He upheld the Officer's decision on the basis that there was no evidence as to whether an adoption had taken place in accordance to the laws of Pakistan. In so doing, the Judge made the following observations at paragraphs 41 and 60 of his reasons:

> [41] In attacking the Officer's reasons and conclusions by way of judicial review, the Applicants have attempted to suggest various ways in which the Officer is either wrong or unreasonable. In the end, however, it has to be acknowledged that they chose not to provide the Officer with direct evidence on point such as, for example, an opinion by a qualified expert on the law or laws of adoption in Pakistan and how they had complied with those laws. If adoption is possible in Pakistan as it is understood under the *Hague Convention on Protection of Children and Co-operation in Respect of Interlocutory* [sic] *Adoption* [*Hague Convention*], the Applicants could easily have settled this point with appropriate evidence. Instead they have chosen to challenge the Decision after the fact by suggesting in various indirect ways why the Officer was either wrong or unreasonable.
>
> …
>
> [60] In my view, the adoption deed and related documentation do not establish that, under the law of Pakistan, a severance has occurred in this case. We do not know whether these parties could, by agreement, sever the biological relationship as a matter of law. The Applicants have not established that the Officer was either

wrong or unreasonable when he found that the adoption deed establishes a form of guardianship, which is not an adoption as required by Canadian law.

II. Legislation and Regulation

[7] Section 5.1 of the *Citizenship Act* provides, in relevant portions:

5.1(1) Subject to subsections (3) and (4), the Minister shall, on application, grant citizenship to a person who was adopted by a citizen on or after January 1, 1947 while the person was a minor child if the adoption	**5.1 (1)** Sous réserve des paragraphes (3) et (4), le ministre attribue, sur demande, la citoyenneté à la personne adoptée par un citoyen le 1er janvier 1947 ou subséquemment lorsqu'elle était un enfant mineur. L'adoption doit par ailleurs satisfaire aux conditions suivantes :
(*a*) was in the best interests of the child;	*a*) elle a été faite dans l'intérêt supérieur de l'enfant;
(*b*) created a genuine relationship of parent and child;	*b*) elle a créé un véritable lien affectif parent-enfant entre l'adoptant et l'adopté;
(*c*) was in accordance with the laws of the place where the adoption took place and the laws of the country of residence of the adopting citizen; and	*c*) elle a été faite conformément au droit du lieu de l'adoption et du pays de résidence de l'adoptant;
(*d*) was not entered into primarily for the purpose of acquiring a status or privilege in relation to immigration or citizenship.	*d*) elle ne visait pas principalement l'acquisition d'un statut ou d'un privilège relatifs à l'immigration ou à la citoyenneté.

[8] Subsection 5.1(3) of the *Citizenship Regulations* provides as follows:

5.1(3) The following factors	**5.1(3)** Les facteurs ci-après

are to be considered in determining whether the requirements of subsection 5.1(1) of the Act have been met in respect of the adoption of a person referred to in subsection (1):

sont considérés pour établir si les conditions prévues au paragraphe 5.1(1) de la Loi sont remplies à l'égard de l'adoption de la personne visée au paragraphe (1) :

(*a*) whether, in the case of a person who has been adopted by a citizen who resided in Canada at the time of the adoption,

a) dans le cas où la personne a été adoptée par un citoyen qui résidait au Canada au moment de l'adoption :

(i) a competent authority of the province in which the citizen resided at the time of the adoption has stated in writing that it does not object to the adoption, and

(i) le fait que les autorités compétentes de la province de résidence du citoyen au moment de l'adoption ont déclaré par écrit qu'elles ne s'opposent pas à celle-ci,

(ii) the pre-existing legal parent-child relationship was permanently severed by the adoption;

(ii) le fait que l'adoption a définitivement rompu tout lien de filiation préexistant;

(*b*) whether, in the case of a person who has been adopted outside Canada in a country that is a party to the Hague Convention on Adoption and whose intended destination at the time of the adoption is a province,

b) dans le cas où la personne a été adoptée à l'étranger dans un pays qui est partie à la Convention sur l'adoption et dont la destination prévue au moment de l'adoption est une province :

(i) the competent authority of the country and of the province of the person's intended destination have stated in writing that they approve the adoption as conforming to that Convention,

(i) le fait que les autorités compétentes de ce pays et celles de la province de destination de la personne ont déclaré par écrit que l'adoption était conforme à cette convention,

(ii) a competent authority of the province — in which the citizen who is a parent of the

(ii) le fait que les autorités compétentes de la province de résidence, au moment de

person resided at the time of the adoption — has stated in writing that it does not object to the adoption, and	l'adoption, du citoyen qui est le parent de la personne ont déclaré par écrit qu'elles ne s'opposent pas à l'adoption
(iii) the pre-existing legal parent-child relationship was permanently severed by the adoption; and	(iii) le fait que l'adoption a définitivement rompu tout lien de filiation préexistant;
(*c*) whether, in all other cases,	*c*) dans les autres cas :
(i) a competent authority has conducted or approved a home study of the parent or parents, as the case may be,	(i) le fait qu'une étude du milieu familial a été faite ou approuvée par les autorités compétentes,
(ii) before the adoption, the person's parent or parents, as the case may be, gave their free and informed consent to the adoption,	(ii) le fait que le ou les parents, selon le cas, ont, avant l'adoption, donné un consentement véritable et éclairé à l'adoption,
(iii) the pre-existing legal parent-child relationship was permanently severed by the adoption, and	(iii) le fait que l'adoption a définitivement rompu tout lien de filiation préexistant,
(iv) there is no evidence that the adoption was for the purpose of child trafficking or undue gain within the meaning of the Hague Convention on Adoption.	(iv) le fait que rien n'indique que l'adoption avait pour objet la traite de la personne ou la réalisation d'un gain indu au sens de la Convention sur l'adoption.

III. The Issues

[9] In my view, the issues to be resolved in this appeal are the following:

a) What is the appropriate standard of review?

b) Was the appropriate standard of review applied properly in the present case?

IV. The Appropriate Standard of Review

[10] On an appeal from an application for judicial review, the task of our Court is to first determine whether the judge identified the proper standard of review and, second, whether he or she properly applied it to each of the issues raised. This Court must thus "step into the shoes" of the Federal Court and focus on the administrative decision at issue (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paras. 45-47).

[11] The parties disagree as to the applicable standard of review.

[12] While the appellants agree that the content of foreign law is a question of fact and findings on such content should attract the standard of review of reasonableness, they submit that the determination as to the content of foreign law in this case is not just a finding of fact on the part of the Officer. Rather, it is a question of general importance to the legal system attracting the correctness standard. As such, the appellants argue, the Federal Court is better placed than the Officer to interpret foreign law. In the alternative, they argue that if the standard of review is reasonableness, the level of deference owed to the Officer is lower and he should be granted only a narrow margin of appreciation.

[13] For its part, the respondent argues that the standard of review is reasonableness and that the Officer is entitled to considerable deference.

[14] For a number of decades, it has been established that in the context of foreign law and citizenship, the Federal Court applies the standard of review of reasonableness. But recently, jurisprudence has emerged resulting in contradictory decisions with some applying the reasonableness standard, and others, correctness.

[15] The case according to which reasonableness has become the applicable standard of review can be traced back to *Canada (Minister of Citizenship and Immigration) v. Saini*, 2001 FCA 311, [2002] 1 F.C. 200 [*Saini*].

[16] In that case, our Court determined that a finding of foreign law was one of fact (*Saini* at para. 26). While *Saini* concerned the review of a Federal Court decision and not one of an administrative decision-maker, subsequent citizenship decisions have applied the standard of reasonableness to findings of foreign law (because it is one of fact) and have found that, as such, officers are entitled to considerable deference: *e.g. Canada (Minister of Citizenship and Immigration) v. Sharma*, 2004 FC 1069, [2004] F.C.J. No. 1313; *Lakhani v. Canada (Citizenship and Immigration)*, 2007 FC 674, [2007] F.C.J. No. 914; *Lai v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 361, [2008] 2 F.C.R. 3; *Tindungan v. Canada (Citizenship and Immigration)*, 2013 FC 115, [2014] 3 F.C.R. 275.

[17] Likewise, in the particular context of assessing whether an adoption has occurred in accordance with foreign law, the Federal Court has applied the reasonableness standard. It has consistently afforded deference to the officers' determinations, as to whether a foreign adoption complies with the laws of the country in which it took place (see *Boachie v. Canada (Citizenship*

and Immigration), 2010 FC 672, [2010] F.C.J. No. 821; *Bhagria v. Canada (Citizenship and Immigration)*, 2012 FC 1015, [2012] F.C.J. No. 1118; *Cheshenchuk v. Canada (Citizenship and Immigration)*, 2014 FC 33, [2014] F.C.J. No. 20; *Vasquez v. Canada (Citizenship and Immigration)*, 2014 FC 782, [2014] F.C.J. No. 819; *Dolker v. Canada (Citizenship and Immigration)*, 2015 FC 124, [2015] F.C.J. No. 174).

[18] However, in two recent decisions, the Federal Court has ruled that determinations regarding the content of foreign law are to be reviewed not on the reasonableness standard but correctness: *Kim v. Canada (Citizenship and Immigration)*, 2010 FC 720, [2010] F.C.J. No. 870 and *Dufour v. Canada (Citizenship and Immigration)*, 2013 FC 340, [2013] F.C.J. No. 393 [*Dufour*]. The appellants in the present case rely on these two Federal Court decisions in support of their argument that correctness should be the standard here. It is to be recalled that the Federal Court's decision in *Dufour* was appealed to the Federal Court of Appeal. In confirming the Federal Court's *Dufour* decision, our Court ruled that it did not need to decide the issue of the standard of review because the issue did not arise (*Canada (Citizenship and Immigration) v. Dufour*, 2014 FCA 81, [2014] F.C.J. No. 324 at para. 27).

[19] Seizing upon the unsettled jurisprudence, the appellants submit that clarification is needed. Echoing *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraph 62 [*Dunsmuir*], the appellants further contend that the applicable standard of review in the context of foreign law and citizenship has yet to be determined in a satisfactory manner because going as far back as *Saini*, a fulsome analysis has never been undertaken in this regard. The appellants

thus strongly invite our Court to "address the issue head on through reasoning", and that a standard of review analysis as per *Dunsmuir* is appropriate in the present case.

[20] For the benefit of future cases, I agree.

[21] As set forth by the Supreme Court of Canada in *Dunsmuir*, the standard of review analysis for purposes of determining whether to apply the reasonableness or the correctness standard is dependent on the following relevant factors:

1. the presence or absence of a privative clause;
2. the purpose of the tribunal as determined by interpretation of enabling legislation;
3. the nature of the question at issue; and
4. the expertise of the tribunal.

[22] Turning to the first factor, I note that although decisions such as the one at issue, which are rendered in the context of citizenship, can only be judicially reviewed upon leave, the Act does not contain any privative clause. As observed by the respondent, the "privative clause" factor is "typically assessed as being neutral" and I agree that it is so in the circumstances.

[23] With respect to the second factor, which goes to the "purpose of the decision-making process regarding citizenship", a reading of section 5.1 of the Act, shows that a determination as to whether the requirements for a grant of citizenship are met do not involve obvious

determinative policy or polycentric considerations. As such, this can be considered an *indicium* for deference favouring the standard of reasonableness.

[24] The third factor concerns the nature of the question at issue. Here, it is undoubtedly fact-driven because the Officer will render a decision based on the evidence adduced and the facts of the case. In addition, foreign law is a question of fact (*Saini*) and must be proven by evidence. This too attracts deference, again favouring the standard of reasonableness.

[25] Finally, in terms of the expertise factor, it is trite to note that an officer posted overseas will have developed a significant degree of expertise in the field as well as expertise in assessing foreign law. Here, factual interpretation and specialized understanding predominate. I accordingly have no difficulty finding that an officer's expertise in this context is greater than that of the courts. Again, this attracts deference and hence the standard of reasonableness.

[26] A review of the foregoing *Dunsmuir* factors convinces me that, as found by the Judge in the present case, the applicable standard of review is reasonableness. Deference is owed to officers who consider foreign law, including when they do so in the context of alleged adoptions under section 5.1 of the Act.

[27] However, the level of deference to be afforded to an officer is not unfettered nor set in stone.

[28] When applying the reasonableness standard to an officer's decision, the reviewing court must decide whether it "falls within a range of possible, acceptable outcomes, which are defensible in respect of the facts and law" (*Dunsmuir* at para. 47). In other words, the court must determine whether the decision at issue is within the decision-maker's margin or range of appreciation (*Delios v. Canada (Attorney General)*, 2015 FCA 117, [2015] F.C.J. No. 549). This margin or range of appreciation can be narrow or wide depending on the nature of the question at issue and circumstances before the administrative decision-maker (*Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5; *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 S.C.R. 364; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895).

[29] Applying these principles to decisions of officers who consider foreign law when deciding citizenship applications, the breadth of the margin or range of reasonableness will very much depend on the circumstances of each case.

[30] More specifically, in cases where no evidence of foreign law is adduced, as in the present matter, the nature of the officer's task, as to whether the statutory standards set forth by section 5.1 of the Act are met, allows a wide margin of appreciation to the officer and a hence a wider range of possible and acceptable outcomes (*Canada (Minister of Transport, Infrastructure and Communities) v. Jagjit Singh Farwaha*, 2014 FCA 56, [2014] F.C.J. No. 227).

[31] For completeness, I would add that it necessarily follows from the above analysis that the two cases relied upon by the appellants in support of the correctness standard - i.e. the *Kim* and

Dufour decisions of the Federal Court - are not to be considered good law and should not be followed in circumstances such as the ones at issue in the present case.

[32] One last word on the standard of review before moving to the next portion of these reasons. At hearing before this Court, reference was made by the parties to *Kent Trade and Finance Inc. v. JP Morgan Chase Bank*, 2008 FCA 399, [2009] 4 F.C.R. 109 and *General Motors Acceptance Corp. of Canada Ltd. v. Town and Country Chrysler Ltd.*, 2007 ONCA 904, [2007] O.J. No. 5046. Those cases were rendered in the context of an appellate review, not in the context of an administrative review. They have strictly no application in the present matter.

V. Application of the Reasonableness Standard

[33] In the present case, the appellants essentially contend that the Ordinance 1961 does not bar secular adoption, and hence the Deed of Adoption was made in accordance with the laws of Pakistan as required by paragraph 5.1(1)(*c*) of the Act. Moreover, according to the appellants, this Deed of Adoption effects the necessary legal severance to fulfill the requirements of adoption under Canadian law. These contentions were rejected by the Officer who determined that the appellants had failed to demonstrate that an adoption had taken place for purposes of the Act. The Judge found that this decision was reasonable.

[34] As part of their challenge, the appellants very much rely on the decision of the Immigration Appeal Division of the Immigration and Refugee Board of Canada [IAD] in *Massey*

v. Canada (Citizenship and Immigration), [2010] I.A.D.D. No. 820, No. VA7-00874 [*Massey*]. In that case, the IAD accepted a deed of adoption as proof of adoption and allowed the appeal from the visa office in Pakistan.

[35] However, this decision does not assist the appellants. Contrary to *Massey*, the appellants in this case have failed to adduce relevant evidence in support of their contentions. For instance, the Officer was not provided with expert evidence regarding the laws of Pakistan or whether the appellants complied with those laws. Nor did the appellants adduce evidence to the effect that the Deed of Adoption resulted in an adoption in Pakistan as understood in Canadian law. Similarly, there was no evidence that the said deed is the same - or a similar - deed than the one adduced in *Massey*. While I agree with the appellants that the Deed of Adoption evidences a strong intention to take care of the child at issue, its legal effects remain unknown, more particularly as it relates to severance of ties with the child's biological parents (Section 5.1 of the Regulations and decision of the Family Court in Pakistan). The *Massey* decision was also rendered in a different context and by a different tribunal. In the circumstance, I find that *Massey* is entirely distinguishable and the Officer was in no way bound to follow it.

[36] The appellants also resort to the conflict of laws principle of *lex fori* to advance their position. They submit that, in the absence of any evidence of foreign law, there is a legal presumption that foreign law is the same as Canadian law. As there is no evidence that the Ordinance 1961, which is a religious law, supersedes secular Pakistani law, the appellants maintain that the Court must apply Canadian law, which allows for secular adoption and give full effect to the Deed of Adoption.

[37] This argument is without merit. As is readily apparent from subsection 5.1(1) of the Act, Parliament has set a statutory standard pursuant to which an adoption must notably be shown to have occurred "in accordance with the laws of the place where the adoption took place and the laws of the country of residence of the adopting citizen" (paragraph 5.1(1)(c)). The language of the Act creates an obligation to adduce evidence of foreign law and the Officer's decision has to be measured according to this standard.

[38] As observed by both the Officer and the Judge, the difficulty for the appellants in the present case stems from the total lack of evidence on record regarding the laws of Pakistan, which would support their position. As such, I can only agree with the respondent that "the appellants have not identified any "secular" law, which supports the proposition that the adoption of Muslims in Pakistan is legal, nor have they established that there is a difference between "secular" law and "religious" law in Pakistan" (Memorandum of the respondent at para. 57). The appellants also relied upon the UN Report entitled *United Nations Committee on the Rights of the Child: Second Periodic Reports of States Parties Due in 1997, Pakistan*, 11 April 2003, CRC/C/65/Add.21, online: Refworld http://www.refworld.org/docid/45377e700.html ; Affidavit of Raymond Gillis, appeal book, page 68 at paragraph 7. However, it does not contain findings that could undercut the Officer's decision.

[39] In the end, I am of the view that the Judge did not err in selecting the reasonableness as the standard of review for all issues before him, including the Officer's determinations regarding the laws of Pakistan. Nor did he err in applying the reasonableness standard.

[40] Accordingly, I would dismiss the appeal. As the parties did not request costs, none shall be awarded.

"Richard Boivin"

J.A.

"I agree
David Stratas J.A."

"I agree
A.F. Scott J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

David Matas	FOR THE APPELLANTS OWAIS AHMED ASAD RAHIM AHMED
Nalini Reddy Brendan Friesen	FOR THE RESPONDENT THE MINISTER OF CITIZENSHIP AND IMMIGRATION

SOLICITORS OF RECORD:

David Matas Winnipeg, Manitoba	FOR THE APPELLANTS OWAIS AHMED ASAD RAHIM AHMED
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT THE MINISTER OF CITIZENSHIP AND IMMIGRATION