

TOP FIVE 2020

Each year at OJEN's Toronto Summer Law Institute, a leading jurist identifies five cases that are of significance in the educational setting. The 2020 cases were selected and discussed by Mr. Justice Lorne Sossin, then of the Ontario Superior Court of Justice and currently of the Court of Appeal for Ontario. This summary, based on these comments and observations, is appropriate for discussion and debate in the classroom setting.

CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION) v VAVILOV, 2019 SCC 65

Date released: 2019 SCC 65

<https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/18078/index.do>

Facts

Alexander Vavilov was born in Toronto and believed that he was a Canadian citizen. It was only after his parents were arrested in the United States that he learned that they were actually “deep cover” Russian spies. Vavilov was born to foreign nationals working on a long-term assignment for the Russian foreign intelligence service. The false identities of his parents were taken on before his birth and were for the purpose of a “deep cover” espionage program directed by the Russian foreign intelligence service, which the United States Department of Justice labelled as the “illegals” program.

Vavilov's parents kept their affiliation with the Russian state unknown, and therefore never held any official diplomatic or consular status and were not granted any diplomatic privilege or immunity. Vavilov found out about his parents' identities when he was 16 years old after they were arrested in the United States for conspiracy to act as unregistered agents

of a foreign government. Until then, he had no idea his parents were spies and he lived and identified as a Canadian and held a Canadian passport.

After two unsuccessful attempts to renew his Canadian passport, Vavilov was informed that he would need to obtain a certificate of Canadian citizenship before he would be issued a passport. Upon obtaining the certificate, he applied again and the Minister of Citizenship and Immigration eventually undertook (an undertaking is essentially a legal promise) to issue a new passport to him.

Vavilov never received his passport. He instead received a “procedural fairness letter” from the Canadian Registrar of Citizenship. The Registrar told him that he had not been entitled to a certificate of citizenship, that his certificate of citizenship had been issued in error and that, following section 3(2)(a) of the *Citizenship Act*, he was not a citizen



of Canada. S. 3(2)(a) does not allow foreign delegates' children to be citizens of Canada by birth (the Registrar saw foreign spies as being foreign delegates). Therefore, even though Vavilov was born in Canada (and people born in Canada after 1977 are considered citizens), it was found that he fits the exception in s. 3(2)(a) since his parents were considered foreign delegates.

Issues

1. What standard of review should a court apply when the merits of an administrative decision are challenged?
2. How should courts conduct a reasonableness review in practice?

Procedural History

Vavilov appealed the Registrar's decision to the Federal Court of Canada. The Federal Court dismissed Vavilov's application for judicial review. Vavilov eventually got this decision overturned by a majority of the Federal Court of Appeal. The Minister of Citizenship and Immigration then appealed the Federal Court of Appeal decision to the Supreme Court of Canada (SCC).

This case is not only about the scenario at hand. Part of the reason that the Supreme Court granted leave (agreed to hear the appeal) was to give clarity on the applicable standard of review analysis in administrative decisions.

Decision

It was not reasonable for the Registrar to interpret s. 3(2)(a) of the *Citizenship Act* as applying to children of individuals who have not been granted diplomatic privileges and immunities at the time of the children's birth. As such, the SCC upheld the Federal Court of Appeal's decision to quash the Registrar's decision.

Ratio

The Judges applied the analysis that they had themselves outlined (see below) and concluded that the standard to be used in reviewing the Registrar's decision is 'reasonableness', and not 'correctness'. There was no basis for departing from the reasonableness presumption, since there is no indication that the legislature intended a standard of review other than reasonableness to apply. As a result, the standard to be applied in reviewing the decision is reasonableness. In other words, the decision made by the Registrar only had to be evaluated on whether it was reasonable, and not whether it was correct.

The SCC decided that the Registrar's decision was not reasonable because the Registrar failed to justify her interpretation of s. 3(2). The majority considered other legislation and international treaties that informed the purpose of s. 3(2), reviewed jurisprudence on the interpretation of s. 3(2)(a), and looked at the potential consequences of the Registrar's



interpretation. The Majority concluded that looking at all the evidence together, there is strong support for the idea that s. 3(2) (a) was not intended to apply to children of foreign government representatives or employees who have not been granted diplomatic privileges and immunities (an example of a privilege or immunity is not being liable to lawsuit or prosecution under Canada's laws).

The SCC viewed it as undisputed that Vavilov's parents had not been granted any diplomatic privileges and immunities. Therefore, the general rule that persons born in Canada after February 14, 1977 are Canada citizens applies and Vavilov is a Canadian citizen.

Reasons

1. What standard of review should a court apply when the merits of an administrative decision are challenged?

The revised standard of review analysis begins with a presumption that reasonableness is the applicable standard in all cases. The presumption of reasonableness review can be rebutted in two types of situations. The first is where the legislature has indicated that it intends a different standard to apply. The second situation in which the presumption of reasonableness review will be rebutted is where the rule of law requires that the standard of correctness be applied. This will be the case for certain categories of

legal questions, namely constitutional questions, general questions of law of central importance to the legal system as a whole, and questions related to the jurisdictional boundaries between two or more administrative bodies.

2. How should courts conduct a reasonableness review in practice?

The last major standard of review principle that comes out of the majority decision is guidance on how to perform a reasonableness review. While courts must recognize the legitimacy and authority of administrative decision makers and adopt a posture of respect, administrative decision makers must adopt a culture of justification and demonstrate that their exercise of delegated public power can be justified. They note that the focus of reasonableness review must take into account both the decision maker's reasoning process for a decision, as well as the outcome that was reached. To see if a decision is "reasonable," the reviewing court should ask if the decision demonstrates important characteristics of reasonableness. This includes justification for the decision, transparency, and intelligibility. All of these characteristics should be justified related to the relevant fact and legal issues of the decision.

The burden of proof is on the party that is challenging the decision and trying to show that it is unreasonable. The court that reviews the decision must be satisfied



that there are serious problems and shortcomings in the decision and that the decision does not show the necessary degrees of justification, transparency, and intelligibility.

The majority outlined two specific ways in which an administrative decision can be unreasonable: an unreasonable decision based on internally incoherent reasoning (like circular reasoning, false dilemmas or unfounded generalizations) and a decision can be unreasonable if it is not justified in relation to the law and facts that are relevant to the decision. For example, the decision not being based on past practices or decisions or misrepresenting the principles of statutory interpretation.



DISCUSSION

1. What is the difference between reasonableness and correctness?

2. What does deference mean?

3. Do you agree that the correct standard in this case is reasonableness?

4. If Vavilov's parents had been given diplomatic privileges and immunities, do you think it would still be fair to strip someone of Canadian citizenship when they were born in Canada? What if Vavilov had known about his parents' real identities or even helped them?

5. In many cases, the Supreme Court of Canada does not give reasons for why they did or did not grant leave. In this case, it was primarily because they wanted to clarify the law on standard of review in administrative decisions in Canada. Do you think the Supreme Court should be clearer about their decision to allow appeals?