

The Niqab, the Oath of Citizenship, and the Blurry Line between Law and Policy

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Case Commented On: *Canada (Citizenship and Immigration) v Ishaq*, [2015 FCA 194](#)

Canada (Citizenship and Immigration) v Ishaq involves a challenge by Zunera Ishaq against a federal requirement that she remove her niqab (a veil that covers most of the face) when taking the Oath of Citizenship at a public citizenship ceremony administered under the *Citizenship Act*, [RSC 1985, c C-29](#). Ishaq was previously successful at the Federal Court Trial Division before Mr. Justice Keith Boswell in *Ishaq v Canada (Citizenship and Immigration)*, [2015 FC 156](#) and on September 15 the Federal Court of Appeal issued a 6 paragraph decision from the Bench dismissing the Minister's appeal and confirming that the federal requirement is unlawful. This is a significant policy issue for the Harper government. The Prime Minister himself has spoken strongly in favour of the requirement (see [here](#)), and not surprisingly the matter is now a significant issue in the federal election campaign. This comment uses the Federal Court of Appeal decision as an opportunity to revisit the rules governing the somewhat difficult relationship between law and policy.

The *Citizenship Act* provides the rules on becoming a Canadian citizen. A person who was not born in Canada but has become a permanent resident under the *Immigration and Refugee Act*, [SC 2001, c 27](#), can apply for citizenship under section 5 of the *Citizenship Act*. The application process is prescribed by the *Citizenship Regulations*, [SOR 93-246](#), and the *Citizenship Regulations, No. 2*, [SOR 2015-124](#). In order to become a Canadian citizen section 3 of the *Citizenship Act* also requires an applicant to swear or affirm the Oath of Citizenship in accordance with section 24 of the Act and the regulations. The Oath of Citizenship is set out in the schedule to the Act as follows:

I swear (*or* affirm) that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Queen of Canada, Her Heirs and Successors, and that I will faithfully observe the laws of Canada and fulfil my duties as a Canadian citizen.

Sections 19 and 20 of the *Citizenship Regulation* states that in the normal course the Oath of Citizenship given in Canada will be taken in a [citizenship ceremony](#) hosted in public before a citizenship judge appointed by the Governor in Council pursuant to section 26 of the Act.

Zunera Ishaq successfully completed her [citizenship test](#) in November 2013 and her application for Canadian citizenship was approved by a citizenship judge on December 30, 2013. All that remained was for her to take the Oath of Citizenship at a citizenship ceremony scheduled for January 14, 2014. Ishaq was informed that she would have to remove her niqab while taking the Oath, in accordance with provisions of the Citizenship and Immigration Policy Manual on citizenship ceremonies (see web version [here](#)) which states a person must be seen and remove any face covering while taking the Oath. According to the Manual, a person who refuses to

remove face coverings will not be presented with the certificate of citizenship necessary to comply with Oath requirement in section 3 of the *Citizenship Act*. Ishaq indicated she was unable to comply with this requirement without betraying her religious faith as a Sunni Muslim which obligates her to wear the niqab in public. Immigration officials offered to arrange seating at the ceremony in a manner that would minimize her exposure to the public while taking the Oath, but they would not budge on the requirement to remove the niqab during the administration of the Oath. Ishaq filed for judicial review asking the Federal Court to enjoin immigration officials from applying these provisions of the Manual at her citizenship ceremony.

The Federal Court of Appeal agreed with the finding of Justice Boswell at Trial Division that the evidence in this case demonstrates the Manual provisions purport to impose a mandatory requirement concerning the taking of the Oath. The evidence before Justice Boswell included a series of emails within the Immigration department:

In looking over the hand written comments from the Minister, it is pretty clear that he would like the changes to the procedure to ‘require’ citizenship candidates to show their face and that these changes be made as soon as possible...My interpretation is that the Minister would like this done, regardless of whether there is a legislative base and that he will use his prerogative to make policy change (cited in 2015 FC 156 at para 46).

...

Under the new directive [Operational Bulletin 359] ...all candidates for citizenship must be seen taking the oath of citizenship at a citizenship ceremony. For candidates wearing full or partial face coverings, face coverings must be removed at the oath taking portion of the ceremony in order for CIC officials and the presiding official (Citizenship Judge) to ensure that the candidate has in fact taken the Oath of Citizenship. Under this new directive there are no options for private oath taking or oath taking with a female official as all candidates for citizenship are to repeat the oath together with the presiding official (cited in 2015 FC 156 at para 47 - emphasis in original).

The Minister himself was quoted at the time the provisions were added to the Manual in late 2011 as stating that the Oath of Citizenship “is a public act of testimony in front of your fellow citizens, it’s a legal requirement, and it’s ridiculous that you should be doing so with your face covered”; and also that: “[y]ou’re standing up in front of your fellow citizens making a solemn commitment to respect Canada’s laws, to be loyal to the country, and I just think it’s not possible to do that with your face covered” (cited in 2015 FC 156 at para 49).

These emails and public statements by the Minister perhaps only further demonstrate the strong policy position of the Harper government on this issue. However the text of the provisions in the Manual (at the time) also suggested removal of face covering is a mandatory requirement:

6.5.1. Witnessing the oath

It is the responsibility of the presiding official and the clerk of the ceremony to ensure that all candidates are seen taking the Oath of Citizenship.

To facilitate the witnessing of the oath taking by CIC officials, all candidates for citizenship are to be seated **together**, as close to the presiding official as possible.

- For larger ceremonies (50 or more candidates), additional CIC officials will be required to assist in the witnessing of the oath. The CIC officials will need to observe the taking of the oath by walking the aisles.

Candidates wearing face coverings are required to remove their face coverings for the oath taking portion of the ceremony.

6.5.2. Candidates not seen taking the oath

In some circumstances, it is difficult to ascertain whether candidates are taking the oath (sometimes due to a face covering). When a candidate is not seen taking the oath by a presiding official or CIC official(s), the clerk of the ceremony must be notified **immediately** following the oath taking portion.

- The candidate's certificate is to be removed from the pile.
- The candidate's name is NOT to be called and the certificate is NOT to be presented (emphasis in original).

The legal problem for the Minister here is that under section 27(1)(h) of the *Citizenship Act* only the Governor in Council can make binding law (in the form of a regulation) respecting the taking of the oath of citizenship. So if these provisions in the Manual are binding law – as opposed to mere policy – then the provisions are *ultra vires* the Minister and his delegates. Indeed this is what the Court of Appeal affirms at paragraphs 3 and 4 of its judgment from the Bench. At Trial Division Justice Boswell came to the same conclusion by applying the Supreme Court of Canada's 2009 decision in *Greater Vancouver Transportation Authority v Canadian Federation of Students*, [2009 SCC 31](#) where at paragraphs 58 to 65 the Supreme Court sets out how to delineate between internal administration policy (not law) and binding law. That the Manual provisions are publicly available and purport to establish an identifiable obligation of general application places them within the realm of law under the *Greater Vancouver Transportation Authority*.

The line between 'interpretive policy' and 'binding law' is a fine one and it can be difficult to clearly distinguish between these categories. That so much can be decided on such a fine line, can be troubling at times where a delegate of Parliament or a legislature attempts to subvert the legislative process by implementing general obligations via policy directives or, alternatively, where the judiciary seems to venture into policymaking by casting a wide legal net. This case is perhaps one example of the former. In my view the trouble with this case is indeed magnified by the suggestion in the emails that the Minister wanted this obligation implemented regardless of his legislative authority to do so.

All would have been fine had Parliament or the Governor in Council enacted the requirement for removing the niqab while taking the Oath. Indeed the Harper government has recently proposed exactly that, but the [Oath of Citizenship Act](#) died on the Order Paper with the dissolution of Parliament in August. Should the Conservatives form the next federal government, it seems certain this Bill will return to Parliament and be enacted into law. The law versus policy aspect of this issue will then no longer be relevant, however it will likely be replaced by a challenge to the new legislation under section 2(a) of the Charter as an alleged infringement of the freedom of religion. Stay tuned.

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