Date: 20080515

Docket: T-1837-06

Citation: 2008 FC 614

Ottawa, Ontario, May 15, 2008

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

SHEON CHANG LEE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDMGENT

[1] Sheon Chang Lee (the "Applicant") applies for a judicial review of a decision made by a citizenship officer dated October 12, 2006, denying him a certificate of Canadian citizenship on the basis of section 3(2) of the *Citizenship Act*, R.S.C., 1985, c. C-29. This application is made pursuant to section 18.1 of the Federal Courts Act, R.S.C., 1985, c. F-7.

[2] For reasons that follow, I have decided that the application for judicial review does not succeed.

BACKGROUND

[3] The Applicant was born in Canada in 1979. At the time his father was a representative of the Malaysian Industrial Development Authority ("MIDA"), a quasi-governmental organization. In 1981, when the Applicant was three years old, the family moved back to Malaysia. They returned to Canada in 1987. The Applicant has remained in Canada since that time.

[4] The Applicant's parents are Malaysian citizens. At the time of the Applicant's birth, his father held the formal title of Vice-Consul as granted by the Malaysian government which he continued to hold until the family returned to Malaysia in 1981.

[5] When the family returned to Canada in 1987, the Applicant's father and all the members of the family, including the Applicant, entered Canada as permanent residents. However, the Applicant grew up believing he was a citizen of Canada because he had been born in Canada.

[6] The Applicant became involved in criminal activity when he was 18. In March 1999, he was arrested. In May 2000, the Applicant pled guilty to three charges: conspiracy to commit an indictable offence, trafficking in heroin, and possession of a prohibited weapon. He received a sentence of six years and nine months which expired in February 2007. Between his arrest and conviction, the Applicant was under house arrest for 13 months during which period he continued

his education at York University. The Applicant served 13.5 months in a minimum security prison before being released on parole.

[7] The Applicant says his criminal behaviour stemmed from issues relating to lack of confidence, low self-esteem, and immaturity. He does not excuse his behaviour which he sincerely regrets. While incarcerated he continued his studies by correspondence and spent time as a tutor assisting other inmates in subjects such as math and reading. After he was released from prison he completed an Honours B.A. in Economics and Business at York University, graduating *cum laude*. He entered the Masters in Financial Economics Program at the University of Toronto and completed his Masters Degree in December 2004 receiving a graduate award as the student with the best academic record. He is now in law school.

[8] A psychological report was provided by the Applicant which had been prepared by the same psychologist who had assessed the Applicant when he was released from prison. With respect to rehabilitation, the psychologist noted:

> I have absolutely no doubt that [the Applicant] made enormous gains both in his psychological and emotional maturity, and in his accomplishments in society. Since his coming in to trouble with the law as an immature teenager, with poor family relationships, little in the way of "street smart" experience and very poor judgement, he has made enormous strides in all spheres.
>
> Indeed, [the Applicant's] academic gains alone would be considered remarkable for any person of his age; but for him to accomplish this much under the circumstances he has faced and is still facing is all the more rare.
>
> Since his incarceration, [the Applicant] has matured into an adult and has demonstrated good judgement, hard work, goal-directed behaviour, good character, and social maturity. I noted in my 2001 report that the Applicant had a low risk of re-offending, among the very lowest I have encountered in over 25 years of forensic work and well over 1000 assessments. This opinion is based on formal, actuarial, risk assessment procedures, reflecting the most current and widely accepted risk

> assessment instruments. I believe that my opinion has been further substantiated by the official five years of experience we now have with [the Applicant] since my last report, and I have even great confidence in that assessment of risk and the assessment of his character and potential.

[9] As a result of the Applicant's criminal conviction, Immigration officials contacted him and advised that he was a permanent resident who was subject to removal. The Department of Citizenship and Immigration issued an inadmissibility report pursuant to section 44(1) of the *Immigration and Refugee Protection Act* S.C. 2001, c. 27 ("*IRPA*") dated September 14, 2004 against the Applicant. The inadmissibility report alleged that the Applicant is a permanent resident of Canada who is inadmissible because he was convicted in Canada of an offence punishable by a maximum term of imprisonment of at least 10 years. An inadmissibility hearing is yet to be held.

[10] On March 15, 2006 the Applicant submitted an application for a certificate of Canadian citizenship. In his application, the Applicant advised Citizenship officials of his family status, his belief that he was Canadian by virtue of being born in Canada, his criminal conviction and rehabilitation, the difficulties he would face both on separation from his family and fiancé and the further difficulties he would encounter on being removed to Malaysia because he does not speak Malay, he belongs to a minority group which is discriminated against, and he is unfamiliar with the Malaysian culture. In addition, the Applicant states he is asthmatic and the Malaysian climate would exacerbate his condition.

[11] The Applicant argues that he was entitled to a certificate of Canadian citizenship by virtue of section 3(1) of the *Citizenship Act* which provides that persons born in Canada are entitled to Canadian Citizenship. The Applicant further submitted that the exception pertaining to children of

diplomats in section 3(2) of the *Citizenship Act* did not apply to him because his father, although holding the title of Vice-Consul, did not perform diplomatic functions. The Applicant also asked Citizenship officials to consider an exemption in regards to his situation on the basis of section 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982 being Schedule B to the *Canada Act*, 1982 (*"Charter"*).

[12] On October 12, 2006, the Citizenship Officer informed the Applicant that he was not eligible for a Canadian citizenship certificate. The Citizenship Officer referred to Section 3(2)(a) of the *Citizenship Act* which states that a child does not qualify for citizenship, if at the time of birth, neither parent is a citizen or a permanent resident and either parent is a diplomat, consular official or in the employ of a foreign government. The Citizenship Officer found that the Applicant's father, at the relevant time, was in the employ of a foreign government.

DECISION UNDER REVIEW

[13] The Citizenship Officer referred to the provisions of the *Citizenship Act*, in particular section 3(1) which stipulates a person is a citizen if born in Canada after February 14, 1977 and section 3(2) which relates to the children of foreign diplomats. The Officer wrote that section 3(2) of the *Act*:

> stipulates that 3(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:
>
> a) a diplomatic or consular officer or other representative or employee in Canada of a foreign government;
>
> b) an employee in the service of a person referred to in paragraph (a);
>
> (emphasis by the Citizenship Officer)

[14] The Officer confirmed that the Applicant was born in Canada after February 14, 1977,but found that neither of his parents were Canadian citizens or lawfully admitted to Canada as permanent residents and that the Applicant's father was employed by a foreign government holding the office of Vice-Consul for the Malaysian government at the time of the Applicant's birth. The Officer did not make reference to the Applicant's section 7 *Charter* request.

[15] In result, the Officer advised the Applicant that he did not acquire a Canadian citizenship as a result of his birth in Canada pursuant to section 3(1)(a) because he was subject to the exclusion outlined in paragraph 3(2) of the *Citizenship Act*.

RELEVANT STATUTORY FRAMEWORK

[16] The relevant provisions of the *Citizenship Act* provide:

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;
(*b*) the person was born outside Canada after February 14, 1977 and at the time of his birth one of his parents, other than a parent who adopted him, was a citizen;	*b*) née à l'étranger après le 14 février 1977 d'un père ou d'une mère ayant qualité de citoyen au moment de la naissance;
(*c*) the person has been granted or acquired citizenship pursuant to section 5 or 11 and, in the case of a person who is fourteen years of age or over on the day that he is granted citizenship, he	*c*) ayant obtenu la citoyenneté — par attribution ou acquisition — sous le régime des articles 5 ou 11 et ayant, si elle était âgée d'au moins quatorze ans, prêté le serment de citoyenneté;

has taken the oath of citizenship;

(*c.1*) the person has been granted citizenship under section 5.1;

(*d*) the person was a citizen immediately before February 15, 1977; or

(*e*) the person was entitled, immediately before February 15, 1977, to become a citizen under paragraph 5(1)(*b*) of the former Act.

Not applicable to children of foreign diplomats, 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

(*a*) a diplomatic or consular officer or other representative or employee in Canada of a foreign government;

(*b*) an employee in the service of a person referred to in paragraph (*a*); or

(*c*) an officer or employee in Canada of a specialized agency of the United Nations or an officer or employee in Canada of any other international organization to whom there are granted, by or under any Act of Parliament, diplomatic privileges and immunities certified by the Minister of Foreign Affairs to be equivalent to those granted to a person or persons referred

c.1) ayant obtenu la citoyenneté par attribution au titre de l’article 5.1;

d) ayant cette qualité au 14 février 1977;

e) habile, au 14 février 1977, à devenir citoyen aux termes de l’alinéa 5(1)*b*) de l’ancienne loi.

Inapplicabilité aux enfants de diplomates étrangers, etc.

(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) agent diplomatique ou consulaire, représentant à un autre titre ou au service au Canada d’un gouvernement étranger;

b) au service d’une personne mentionnée à l’alinéa *a*);

c) fonctionnaire ou au service, au Canada, d’une organisation internationale — notamment d’une institution spécialisée des Nations Unies — bénéficiant sous le régime d’une loi fédérale de privilèges et immunités diplomatiques que le ministre des Affaires étrangères certifie être équivalents à ceux dont jouissent les personnes visées à l’alinéa *a*).

L.R. (1985), ch. C-29, art. 3; 1995, ch. 5, art. 25; 2007, ch. 24, art. 1.

to in paragraph (*a*).

R.S., 1985, c. C-29, s. 3; 1995, c. 5, s. 25; 2007, c. 24, s. 1.

ISSUES

[17] The issues in this proceeding are:

1. Did the Citizenship Officer violate principles of procedural fairness in considering the information provided by the Canadian Border Services Agency ("CBSA") without notice to the Applicant?
2. Does the communication between the CBSA Officer and the Citizenship Officer prior to the decision give rise to a reasonable apprehension of bias?
3. Did the Citizenship Officer err in concluding that the Applicant came with the ambit of section 3(2) of the *Citizenship Act*?
4. The *Charter* Arguments:
    i. Does the Citizenship Officer have jurisdiction to consider the *Charter*?
    ii. If the Citizenship Officer does not have jurisdiction to consider the *Charter*, does this Court?
    iii. Does section 3(2)(a) of the *Citizenship Act* offend section 7 or 15 of the *Charter*?

STANDARD OF REVIEW

[18] The proper standard of review for denial of procedural fairness is correctness. If procedural fairness is breached the impugned decision will be set aside (*Hamzai v. Canada (Minister of Citizenship and Immigration,* 2006 FC 1108 at para. 15).

[19] Procedural fairness also requires that there be no reasonable apprehension of bias. The consequence of finding a reasonable apprehension of bias is that the hearing and any subsequent order is void (*Newfoundland Telephone Company v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623 at paras. 39, 40).

[20] The correct interpretation of section 3(2) of the *Citizenship Act* is a question of law and must be reviewed on the standard of correctness (*Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100 at para. 37).

ARGUMENT AND ANALYSIS

Did the Citizenship Officer violate principles of procedural fairness in considering the information provided by the Canadian Border Services Agency without notice to the Applicant?

[21] The Applicant submits that the provision of correspondence and documents by the CBSA Officer to Citizenship officials without notice to the Applicant was a breach of procedural fairness.

[22] In an email dated May 18, 2006, the CBSA Officer advised Citizenship officials that the Applicant was born in Canada but to a foreign diplomat and therefore had no right to Canadian citizenship by virtue of his birth. The email also advised that the Applicant had been convicted of trafficking in heroin and had been sentenced to a term of six years and nine months plus three months pre-trial custody. The CBSA Officer requested being advised which Citizenship officer was assigned to the case so documentation from CBSA files could be forwarded.

[23] Following the email, the CBSA Officer wrote a letter dated June 13, 2006 to the Citizenship Officer charged with the file, attaching the following documents:

- A letter from the High Commission of Malaysia dated July 19, 2004
- Documentation from the Canadian Office of Protocol and their publication "Diplomatic Corps and Other Representatives in Canada" from February 1978 to June 1982
- The Applicant's record of landing
- Report under section 44(1) of *IRPA*
- Conviction Certificate

[24] The CBSA Officer's June 13th letter to the Citizenship Officer indicated that the Applicant's father was a diplomat at the time of the Applicant's birth as confirmed by the letter from the High Commission of Malaysia and a publication from the Canadian Office of Protocol. The CBSA Officer also expressed the view that the Canadian Immigration Officer in Malaysia would not have accepted an application for permanent residence for the Applicant if he was under the belief that the Applicant was a Canadian citizen.

[25] The Applicant submits that the fact that the Citizenship Officer obtained information from the CBSA Officer without giving notice to the Applicant was a breach of procedural fairness. The Applicant does not dispute he had copies of the documents submitted by the CBSA Officer. His argument is that had he known the Citizenship Officer was considering those documents, he would have made submissions to dispel any concerns (*Bhagwandass v. Canada (Minister of Citizenship and Immigration)*, 2001 FCA 49 at para. 21). The Applicant also relies on *Haghighi v. Canada (Minister of Citizenship and Immigration)*, [2000] 4 F.C. 407 at para. 37). In that case, the Federal Court of Appeal concluded that, within the context of a H&C proceeding, an applicant had a right to

comment on a the report of a Post Claim Determination officer notwithstanding the report contained information the applicant was aware of.

[26] The Applicant further submits that the CBSA letter, separate and apart from the accompanying documentation, constituted extrinsic evidence as it contained submissions to the merits of the Applicant's citizenship application which was relied upon and considered by the Citizenship Officer. Thus it was a breach of procedural fairness to deny the Applicant the opportunity to comment on the CBSA letter (*Batica v. Canada (Minister of Citizenship and Immigration*, 2006 FC 762 at paras. 13-15).

[27] The Respondent submits that the central issue was whether the Applicant's father was a diplomatic or consular officer or other representative or employee of a foreign government of Canada at the time of the Applicant's birth. The Citizenship Officer was required to make a determination in order to fulfill her responsibilities and required information to ascertain the Applicant's father's position at the relevant time.

[28] The Respondent submits the CBSA officer provided information which the CBSA was statutorily entitled to provide. The Respondent relies on section 5(2) of the *Canadian Border Services Agency Act*, S.C. 2005 c.38 ("*CBSA Act*") which states:

> The Agency may provide support, through the provision of services, to departments and agencies for which the Minister is responsible, in accordance with agreements or arrangements entered into with those departments and agencies.

[29] The Respondent contends that the documents provided were either publicly available or in the alternative, if they were private, were shared for the purpose for which the information was

obtained or compiled by the institution for use consistent with that purpose. The documents, according to the Respondent, were originally provided for the purpose of determining the Applicant's immigration status in Canada and as such were shared for a use consistent with that purpose.

[30] The Respondent distinguishes *Haghighi*, above, from the case at bar. In *Haghighi*, the Federal Court of Appeal had set out a mandatory process in H&C applications where the decision-maker relies on the opinion of a third party. The Respondent asserts that this same duty has not been afforded to other processes where no outside opinion was relied on (*Zolotareva v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1274 at para. 24). Additionally, the Respondent argues that *Haghighi*, above, was made in the context of a discretionary H&C decision. In this case, section 3(2) of the *Citizenship Act* does not allow for the exercise of discretion by the Citizenship Officer.

[31] Finally, the Respondent submits there was no extrinsic evidence of facts unknown to the Applicant and the Applicant was not denied an opportunity to participate in the decision-making process in a meaningful manner.

[32] On review of the material before the Citizenship Officer, it is clear that the Applicant was aware that the diplomatic status of his father would be determinative in his case. The Applicant, through his counsel, made submissions acknowledging that the Applicant's father was admitted to Canada with a diplomatic passport and was registered as Vice-Consul, but stressed his function was not that of a diplomatic or consular officer.

[33] In *Chen v. Canada (Minister of Citizenship and Immigration)*, [2002] 4 F.C. 193 at paras. 33-36, Justice Dolores Hansen made the following comments in regard to the distinction between extrinsic and non-extrinsic evidence:

> The broad principle I take form Mancia is as follows. Extrinsic evidence must be disclosed to an applicant. Fairness, however, will not require the disclosure of non-extrinsic evidence, such as general country conditions reports, unless it was made available after the applicant filed her submissions and it satisfies the other criteria articulated in that case.
>
> In my view, both of these "rules" shares a single underlying rationale. Fairness requires that documents, reports, or opinions of which the applicant is not aware, nor deemed to be aware, must be disclosed.
>
> The underlying rationale for the rule established in Mancia, in my opinion, survives Haghighi and Bhagwandass. The principle of those cases, generally stated, is that the duty of fairness requires disclosure of a document, report or opinion, if it is required to provide the individual with a meaningful opportunity to fully and fairly present her case to the decision maker.
>
> Therefore, while it is clear that the distinction between extrinsic and non-extrinsic evidence is no longer determinative of whether the duty of fairness requires disclosure, the rationale behind the rule in Mancia remains. I arrive at this conclusion because even in recent jurisprudence, applying the post-Baker framework for defining the duty of fairness, the overriding concern with respect to disclosure is whether the document, opinion, or report is one of which the individual is aware or deemed to be aware.

[34] In my opinion, given that the Applicant was aware of the CBSA documents in question, the Applicant was not denied an opportunity to make a full presentation. The Applicant's submissions to the Citizenship Officer clearly indicate he focussed on the issue raised by section 3(2) of the *Citizenship Act* and the status of his father. The CBSA letter refers to information in the possession of the Applicant. It addresses questions the Applicant himself has addressed in his submissions to

the Citizenship Officer although not his submission that the MIDA was a non-governmental organization.

[35] I find that the Applicant was not deprived of a meaningful opportunity to make submissions concerning his father's status at the time of the Applicant's birth. I conclude that the Citizenship Officer did not breach the Applicant's right to procedural fairness.

Does the communication between the CBSA Officer and the Citizenship Officer prior to the decision give rise to a reasonable apprehension of bias?

[36] The Applicant submits that the correspondence between the two officials initiated by the CBSA Officer made without the Applicant's knowledge and consent gives rise to a reasonable apprehension of bias. The Applicant argues that there is nothing in the procedure for an application for citizenship which allows for such a correspondence. In the alternative, if the citizenship procedure does allow for such correspondence, it has to be made openly and not through 'secret' emails. Further, the Applicant argues that the CBSA Officer sought to pressure the Citizenship Officer to make a quick decision.

[37] The Applicant relies on *Geza v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 124 at paras. 60-61, which found that undisclosed emails, among other factors, exchanged between senior members of management, one of whom participated in Refugee Protection hearings was enough to establish a reasonable apprehension of bias. The Applicant admits that the level of procedural fairness in *Geza*, above, was higher because it involved a hearing before a quasi-judicial body. Nonetheless, the Applicant submits that he is entitled to a hearing before an impartial tribunal

and the communication between the CBSA Officer and Citizenship Officer undermined that impartiality.

[38] The Respondent argues that section 5(2) of the *CBSA Act* allows the CBSA to provide support, through the provision of services, to departments and agencies for which the Minister is responsible, in accordance with the agreements entered into with those departments and agencies. Further, section 8(2) of the *Privacy Act*, R.S.C., 1985, c. P-21, allows for the sharing of personal information between government departments, if the information is used for the purpose for which the information was compiled or obtained.

[39] The test for apprehension of bias was set out by Justice Grandpré of the Supreme Court of Canada in *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369 at 394:

> the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information…[T]hat test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through –conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly"

[40] The legal notion of a reasonable apprehension of bias implies circumstances that give rise to a belief by a reasonable and informed observer that the decision-maker has been influenced by some improper consideration. Similarly, a belief that a decision-maker is not independent goes to the improper surrender of freedom as to how disputes should be decided.

[41] The Federal Court of Appeal in *Geza*, above, at para. 57, stated that "in determining propriety, the legitimate interest of the agency in the overall quality of its decision cannot be ignored". A reasonable observer would conclude that the Citizenship Officer requires confirmation of information provided and would necessarily have to obtain that information from other agencies.

[42] The informal tone of the emails is one engendered by the form of communication rather than from any undue closeness between officials of two separate agencies. The formality of the June 13, 2006 letter confirms the official nature of the communications between the two officials.

[43] The content of the emails does not present the appearance of bias due to any undue pressure by the CBSA Officer to have the Citizenship application decided quickly. The CBSA Officer's initial May 18, 2006 email inquires about the application and indicates documentation will be forwarded from CBSA files. The Citizenship Officer's May 19, 2006 reply indicates that the Department is following its standard procedures. The October 10, 2006 email by the CBSA Officer is more in the nature of a follow up inquiry to her earlier June 13, 2006 letter. There is no appearance of bias in the Record that would cause a reasonable person to conclude that the CBSA Officer unduly influenced or pressured the Citizenship Officer to make a decision, or that the Citizenship Officer was unduly influenced.

Did the Officer err in concluding that the Applicant came within the ambit of section 3(2) of the Citizenship Act?

[44] The Applicant argues that the Citizenship Officer erred in simply asserting that the Applicant falls within section 3(2) of the *Citizenship Act* while not providing any reasons for this negative decision (*Toro v. Minister of Employment and Immigration*, [1981] 1 F.C. 652 at 653).

The Applicant submits that the issue in front of the Citizenship Officer was, whether at the time of the Applicant's birth, his father was a diplomatic or consular officer or other representative or employee in Canada of a foreign government. The Applicant argues that notwithstanding that his father was registered as a consular official at the time of his birth, he adduced evidence to demonstrate that his father was not engaged in consular functions and therefore section 3(2) of the *Citizenship Act* should not apply.

[45] The Applicant states that a functional and purposive approach should be taken when interpreting section 3(2) of the *Citizenship Act*. This approach was taken by the Supreme Court of Canada in *Medovarski v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51, Chief Justice McLachlin in interpreting provisions of the *IRPA* held, for the Court, at paragraph 8:

> The words of this statute, like any other, must be interpreted having regard to the object, text and context of the provision, considered together: E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87. In interpreting s. 196 to determine whether it eliminates appeals for permanent residents for whom a stay from an order for removal had been granted, I consider the purpose of the *IRPA* and its transitional provisions, the French and English text of s. 196, the legislative context of s. 196, and the need to interpret the provision to avoid an absurd, illogical or redundant result.

[46] In following the guidance provided by the Supreme Court, the Applicant states that in interpreting section 3(2) of the *Citizenship Act*, it is important to first understand its purpose. The Applicant notes that a parent need not have legal status in Canada for child born here to obtain citizenship. The Applicant argues then that the purpose of the provision cannot be to deny citizenship to children of persons who are not permanent residents or citizens of Canada. On the contrary, according to the Applicant, the purpose of the provision is related to international relations and to the role and function of a diplomat in representing his country. Continuing with the analysis,

the Applicant submits that when deciding whether section 3(2) should be applied to a particular individual it is necessary to consider the person's actual function and not his nominal title.

[47] The Applicant maintains that his father was an employee of a non-governmental organization as demonstrated by the evidence before the Citizenship Officer. The Applicant submits that the Citizenship Officer's reasons do not disclose why she determined that the Applicant's father was diplomatic official despite this evidence. The Applicant claims that the Citizenship Officer's reasons fail to consider the totality of the evidence and therefore the Citizenship Officer erred in law.

[48] The Applicant argues that section 3 of the *Citizenship Act* deals with the conferring of citizenship. Its purpose is to ensure that persons who have an important connection to Canada, that is persons who are born here, have a right to citizenship. Subsection 3(2) is an exception to the general rule, and based on the rules of statutory interpretation should be interpreted narrowly. In *Brossard (Town) v. Quebec*, [1988] 2 S.C.R. 279 at para. 56, the Supreme Court of Canada reaffirmed that statutory exceptions which take away rights that otherwise benefit from a liberal and broad interpretation should be read narrowly.

[49] The principles of statutory interpretation require that both the English and French text be examined. The English and French texts of section 3(2)(a) of the *Citizenship Act*,, for ease of reference, are set out below:

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 (*a*) a diplomatic or consular officer or other representative or employee in Canada of a foreign government;	(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*) agent diplomatique ou consulaire, représentant à un autre titre ou au service au Canada d'un gouvernement étranger;

The French version of section 3(2) of the *Citizenship Act* denies citizenship to a child of a diplomat as well as persons working in the service of a foreign government. In English, the child of an "employee" of a foreign government is excluded from citizenship. The Applicant submits that regardless of the word used, the concept itself is clear: the person must be in the actual employ of the government or be its representative. The Applicant argues that in this case his father maintained that he was neither an employee nor a representative of his government and so the section 3(2) exception should not apply.

[50] The Applicant further argues that when applying the principles of statutory interpretation, the Citizenship Officer was required, but failed, to consider the actual function carried out by the Applicant's father to determine whether or not he was in fact either an employee or a representative of the Malaysian government. The Applicant submits that based on the evidence before the Citizenship Officer, the only reasonable answer was that the Applicant's father would not fit within the ambit of the section 3(2) exclusion. The Citizenship Officer, according to the Applicant, was required to do more than a review of the formal status of the father and should have considered whether or not the Applicant's father carried out diplomatic functions.

[51] The Applicant submits that the function of a consular official as contained in the *Vienna Convention on Consular Relations*, which forms Schedule II of the *Foreign Missions and International Organizations Act*, S.C. 1991, c.41 above, consists of, *inter alia*, protecting in the receiving State the interests of the sending State and of its nationals, both individuals and bodies corporate, within the limits prescribed by international law. Further a "'consular officer' means any person, including the head of a consular post, entrusted in that capacity with the exercise of consular function". Similarly, Article 1 of the *Vienna Convention of Diplomatic Relations*, which forms Schedule I of the *Foreign Missions and International Organizations Act*, above, states that the functions of a diplomatic mission consists of, *inter alia*, "representing the sending State in the receiving State". The Applicant argues that the focus of consular and diplomatic functions is on the protection and representation of interests of the sending State. In the case at bar, the Applicant maintains that as his father was employed by a non-governmental organization, no State interests were being represented.

[52] The Applicant argues that if the Citizenship Officer had undertaken a functional analysis, it would have been apparent, notwithstanding his father's diplomatic passport, that his father was not involved in diplomatic or consular functions. Rather, the Applicant's father was involved in the promotion of trade on behalf of a non-governmental organization. While in Malaysia, the Applicant's father was not an employee of the government, but rather a quasi-governmental organization. The Applicant submits that his father's colleague in Boston, employed in the same capacity, was not given diplomatic status and this supports his contention that his father was not a diplomat.

[53] The Applicant maintains that based on the totality of evidence before her, the Citizenship Officer erred in finding that the Applicant fit within section 3(2) of the *Citizenship Act*.

[54] The Respondent argues that the *Citizenship Act* is explicit by virtue of section 3(2) that the statutory right to citizenship does not apply to persons who, at the time of their birth neither of their parents was a citizen or permanent resident of Canada and either of the parents was: (a) a diplomatic officer or (b) a consular officer or (c) other representative in Canada of a foreign government or (d) an employee in Canada of a foreign government. Section 3(2)(a) must be given its ordinary common sense meaning, which refers to the understanding that spontaneously emerges when words are read in their immediate context.

[55] The Respondent argues that to employ the interpretation of section 3(2)(a) as advocated by the Applicant would be to put too much strain on the conventions of language. The interpretation given to a legislative provision must be plausible and "must still respect the actual words which express the legislative intention" (Sullivan and Driedger on the *Construction of Statutes*, 4th edition, at 35).

[56] The Respondent highlights that the Citizenship Officer's decision was based on the evidence submitted:

(a) the Applicant was born in Canada in 1979;

(b) At the time of his birth in Canada, neither of his parents were Canadian citizens or lawfully admitted to Canada as permanent residents;

(c) The Applicant's father was an employee of MIDA in 1979;

(d) His role was to promote the activities of MIDA and the interests of the Malaysian government, specifically, investment from Canada to Malaysia;

(e) He came to Canada with a diplomatic passport; and

(f) Evidence from Malaysian authorities indicates that he was registered as Vice-Consul

[57] Based on the above, the Citizenship Officer found that the Applicant's father was employed by a foreign government in Canada. As a result, the Officer concluded that the Applicant fell within the ambit of section 3(2) of the *Citizenship Act*. The Respondent argues that the reasons of the Citizenship Officer were not deficient; in fact, they are explicit, based as they are on the finding that the Applicant's father was employed by a foreign government and in possession of a diplomatic passport.

[58] The Respondent also notes that the Applicant originally submitted to the Citizenship Officer that his father was employed by a quasi-governmental organization. However, in material filed with this Court, he characterizes his father's employer as a non-governmental body (see Tribunal Record at 6; Tribunal Record at 12; Tribunal Record at 20). The functional duties of the Applicant's father, according to the Respondent, are irrelevant. The Applicant's father was a representative and an employee of the Malaysian government. At the relevant time, he held a diplomatic passport, was Vice-Consul and represented the interests of the Malaysian government in promoting foreign investment into Malaysia. All amount to sufficient facts to place the Applicant within the ambit of section 3(2) of the *Citizenship Act*.

[59] The Respondent relies on *Solis v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 407 at para. 4, for the proposition that the term "citizen" has no meaning apart from statute. It is a creature of federal statute law. As such, the Citizenship Officer has no discretion to look behind the Applicant's father's job title. Once the father was determined to be a person described under section 3(2) of the *Citizenship Act*, there was no room to reach a conclusion different than what was reached in this case. Further, the Respondent argues that the Applicant has not cited any authority for the contention that the officer could perform a "review of the status of the father".

[60] The Respondent argues that it is irrelevant whether MIDA Officers in the U.S.A. are not given diplomatic passports. The facts of this case are that the Applicant's father was given a diplomatic passport and did hold the position of Vice-Consul.

[61] The Citizenship Officer had the Applicant's submissions that his father did not perform the duties of a diplomat or consular official and the father's contract of employment. However, the Officer also had the documents from the Canadian Office of Protocol and the letter from the High Commission of Malaysia in Ottawa which both indicated that, at the time of the Applicant's birth, the Applicant's father held the position of Vice-Consul.

[62] Further, on the family's return to Canada in 1987, the Applicant was admitted as a permanent resident. This would not have been possible if the Applicant was a Canadian citizen. The Applicant's father could have addressed the issue of the Applicant's citizenship at that time but did not.

[63] It is my opinion that the Applicant has not submitted any persuasive evidence to show that his father was not a diplomat during the relevant time. The Citizenship Officer did not err in her interpretation of the statute.

The Charter Arguments:

i. *Does the Citizenship Officer have jurisdiction to consider the Charter?*

ii. *If the Citizenship Officer does not have jurisdiction to consider the Charter, does this Court?*

iii. *Does section 3(2)(a) of the Citizenship Act offend section 7 or 15 of the Charter?*

[64] Despite the submissions made by the Applicant to the Citizenship Officer that his situation engages section 7 and 15 of the *Charter* and the constitutionality of section 3(2) of the *Citizenship Act*, the Citizenship Officer does not have jurisdiction to consider *Charter* and constitutional grounds. The Applicant does not submit any authority or case law to show otherwise.

[65] Notwithstanding that the Citizenship Officer does not have jurisdiction to consider *Charter* and constitutional issues, this Court is not precluded from doing so on judicial review (*Gwala v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 792, at paras. 3-4 (F.C.A.); see also *Raza v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J No. 1826 at para. 30).

[66] The Applicant argues that a denial of citizenship engages section 7 of the *Charter* because it puts him at risk of deportation which will result in severe state-imposed psychological stress. This

stress will be a result of the fact that the Applicant for a major portion of his life believed he was a Canadian citizen, and has strong ties to Canada: his parents and twin brothers are here and his fiancée, also a Canadian citizen is here. He is a stranger to Malaysia. In addition, having been convicted of an offence in Canada, upon his return to Malaysia, the Applicant claims he could be imprisoned for two years.

[67] The Applicant relies on *Blencoe v. British Columbia (Human Rights Commission),* [2000] 2 S.C.R. 307 which held that section 7 of the *Charter* is engaged in circumstances where severe state-imposed psychological stress results from a determination by government officials. The Applicant also refers to *Taylor v. Minister of Citizenship and Immigration* 2006 FC 1053 where the Federal Court accepted that that loss of citizenship engages an individual's rights to "liberty" and "security of person".

[68] Notwithstanding the significance of citizenship, the short answer is that the denial of citizenship is not synonymous with deportation. The Applicant's section 7 *Charter* rights, if applicable, would be engaged if a deportation is crystallized. This is a decision that has not yet been made and has no fixed certainty.

[69] The Applicant will have, at the very least, an opportunity to make an application to remain on humanitarian and compassionate grounds if he is confronted with an Immigration inadmissibility decision. The Applicant may then, if he chooses, argue that deportation, if that is the ultimate decision of the Minister, engages his section 7 *Charter* rights.

[70] The Applicant has failed to demonstrate that there exists for him a real or imminent deprivation of life, liberty or security of the person arising from the Citizenship Officer's decision. (*R v. White*, [1999] 2 S.C.R. 417). The only imminent consequence that the Applicant will be subject to is that he is not entitled to Canadian citizenship by virtue of his birth.

[71] The Applicant also submits that denial of citizenship to him, under section 3(2) of the *Citizenship Act*, violates section 15(1) of the *Charter*. Under section 3(1) of the *Citizenship Act* those born in Canada after February14, 1977 are Canadian citizens. The Applicant, despite being born in Canada in November 1979, is denied the right to citizenship based on the diplomatic title his father held at the time of his birth.

[72] The test for whether a statute offends section 15(1) of the *Charter* was set out in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120 at para. 110:

> [i]t is now clearly established that the analysis proceeds in three stages with close regard to context. At the first stage the claimant must show that the law, program or activity imposes differential treatment between the claimant and others with whom the claimant may fairly claim equality. The second stage requires the claimant to demonstrate that this differentiation is based on one or more of the enumerated or analogous grounds. The third stage requires the claimant to establish that the differentiation amounts to a form of discrimination that has the effect of demeaning the claimant's human dignity. The "dignity" aspect of the test is designed to weed out trivial or other complaints that do not engage the purpose of the equality provision. In Law, supra, the Court stated, at para. 51:
>
> It may be said that the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.

[73] The requirements of section 3(2)(a) and (c) of the *Citizenship Act* do impose differential treatment between the Applicant and others with whom he may fairly claim equality. The first step of the section 15 test is met.

[74] To succeed on the second step of the section 15 test, the Applicant must demonstrate that the differential treatment is based on an enumerated or analogous ground. The case at bar must proceed under an analogous ground analysis as the status of a child of a foreign diplomat is not an enumerated ground. For a claim to based on analogous ground, it must be immutable, that is, not susceptible to change. The Applicant argues that the employment status of a parent at the time of birth is something outside of the control of the child, and in that sense, it is immutable.

[75] This exact issue was dealt with for the first time recently by Justice Michel Shore. In the May 2007 decision of *Al-Ghamadi v. Canada (Minister of Foreign Affairs and International Trade)*, [2007] F.C.J. No. 758, Justice Shore held that section 3(2) of the *Citizenship Act* does not offend section 7 or 15(1) of the *Charter*. Justice Shore in *Al-Ghamdi*, above at para. 58, states:

> Although immutability of the characteristic is a strong indicator, immutability on its own is not necessarily sufficient. The Courts have recognized that the hallmark of the analogous grounds is that they protect a discrete and insular minority or a group that has been historically discriminated against.

[76] Thus even if this Court views the status of the Applicant as a result of his father's employment as immutable, it cannot be said, and the Applicant has not offered, how his status as a child of an individual enjoying diplomatic immunity is a characteristic that would be associated with having suffered historical discrimination.

[77] On the last step of the section 15 *Charter* test, assuming that that the characteristic of the Applicant being the child of diplomat is analogous to an enumerated ground, it is clear that the

distinction does not have the effect of demeaning the Applicant's dignity. Justice Shore in *Al-Ghamdi*, above, at para. 65, states:

> The only individuals covered in paragraphs 3(2)(*a*) and (*c*) of the *Citizenship Act* are children of individuals with diplomatic status. These are necessarily individuals who enter Canada under special circumstances and without any of the normal procedures. Most importantly, while in Canada, they are granted all of the immunities and privileges of diplomats; it is untenable to maintain that the treatment could offend their "essential human dignity" viewed in this context.

[78] Section 3(2) of the *Citizenship Act* cannot be seen to violate the essential human dignity of the Applicant through the imposition of disadvantage, stereotyping, or political or social prejudice. As a result, and in accordance with Justice Shore's decision in *Al-Ghamdi*, above, the Applicant's section 15 *Charter* claim must fail.

[79] I also note that this judicial review does not exhaust the Applicant's remedies. The *IRPA* provides a means to ensure that his rights are not violated during the process by which his right to remain in Canada is considered. The Applicant is a permanent resident of Canada. Before a permanent resident is deported certain procedures need to take place. First, an inadmissibility report is authored; second, if the Minister is of the opinion that the report is well-founded, the case is referred to the Immigration Division for an admissibility hearing (the Applicant's case is at this stage). Third, the Immigration Division shall only issue a removal order against the Applicant, if it is satisfied that the Applicant is inadmissible. Once the removal order is in force, the Applicant will lose his permanent residence status. Fourth, if the Applicant loses his permanent residence status, he has the option of making an application to stay in Canada based on H&C grounds. The Applicant may also make an application for pre-removal risk assessment. In addition, the Federal Court has judicial review jurisdiction each step of the way.

[80] The Applicant has not demonstrated that his section 7 rights have been violated as a result of the denial of citizenship. Nor has the Applicant demonstrated that the decision infringes his section 15 rights.

Conclusion

[81] The Applicant was not denied procedural fairness by not being given notice that the Citizenship Officer considered documents provided by the CBSA that the Applicant was aware of and had addressed in his submissions to the Officer. Nor was there a reasonable apprehension of bias arising from the exchanges between the Citizenship Officer and the CBSA Officer whose exchange of information was within the scope of their respective duties.

[82] The Citizenship Officer's interpretation of section 3(2) of the *Citizenship Act* is in accordance with the legislation. The Officer is not required to go behind the plain words of the *Citizenship Act* and the Applicant's father's official status.

[83] The Applicant's section 7 *Charter* rights were not engaged in the process of considering the Applicant's eligibility for citizenship. Nor has the Applicant demonstrated that the Citizenship Officer's decision infringed his section 15 *Charter* rights.

[84] The application for judicial review does not succeed.

JUDGMENT

THIS COURT ORDERS that:

1. This application for judicial review is dismissed.

"Leonard S. Mandamin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Lorne Waldman	FOR THE APPLICANT
Janet Chisholm Negar Hashemi	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Waldman & Associates Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT