Date: 20080521

Docket: T-2295-05

Citation: 2008 FC 626

Ottawa, Ontario, May 21, 2008

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

DUANE EDWARD WORTHINGTON and HELEN CHARLOTTE WORTHINGTON

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application pursuant to section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, for judicial review of a decision dated November 25, 2005 by the former Minister of Citizenship and Immigration (the Honourable Joe Volpe) (the Minister) refusing Duane Edward Worthington's application for Canadian citizenship under subsection 5(4) of the *Citizenship Act*, R.S.C. 1985, c. C-29, (the Act). While both Duane Edward Worthington and his adoptive mother, Helen Charlotte

Worthington are listed as applicants on the record, for reasons of simplicity I will refer only to Duane Edward Worthington as "the applicant".

[2] The applicant requests:

1. The decision of the Minister dated November 25, 2005 be quashed and set aside;

2. An order in the nature of *mandamus* requiring the Minister of Citizenship and Immigration to recognize and grant Canadian citizenship to the applicant;

3. A declaration that the *Interim Measure* is unconstitutional by reason of its inconsistency with section 15 of the *Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the *Charter*); and

4. Costs on a solicitor-client basis.

Background

[3] The applicant, Duane Edward Worthington, is an American citizen, born in the U.S.A. on March 9, 1961. The applicant was adopted by Frank Edward Worthington and Helen Charlotte Worthington on March 20, 1962. The applicant's adoptive parents are residents of the U.S.A., but were both born in British Columbia. The applicant is currently serving a 425 month sentence in a medium security federal penitentiary in the U.S.A. for drug and weapons related offences committed in the U.S.A.

[4] In 2002, the applicant inquired as to the possibility of getting Canadian citizenship on the basis of his adoption by alleged Canadian parents. In response to his inquiry, the applicant was given an application form for a certificate of citizenship from outside of Canada under section 3 of the Act and an application form for a grant of citizenship under section 5 of the Act.

[5] On July 4, 2002, the applicant submitted an application under section 3 of the Act. On August 30, 2002, the applicant received a letter from the senior consular program officer (the program officer) informing him that his application under section 3 of the Act was not valid as he was the adoptive child of Canadian parents (section 3 is limited to naturally born children). The applicant was informed that the appropriate application was under subsection 5(1) of the Act.

[6] On September 11, 2002, the applicant submitted an application under subsection 5(1) of the Act. In a letter dated December 30, 2002 from Citizenship and Immigration Canada (CIC or the Department), the applicant was informed that the Department was unable to proceed with his application on the basis that this section was limited to permanent residents of Canada. Furthermore, the letter also contained a request that the applicant sign and date the enclosed request for withdrawal form in relation to his subsection 5(1) application. The applicant refused to withdraw his application and it was converted into a subsection 5(4) application. Subsection 5(4) applications are special grants of citizenship under the discretionary power of the Minister.

[7] On July 3, 2003, the then Minister of Citizenship and Immigration, the Honourable Denis Coderre, informed the applicant that his application under subsection 5(4) had been refused. This

decision was judicially reviewed by Madam Justice Layden-Stevenson of this Court in November 2004, and the matter was referred back for re-determination, with terms (*Worthington* v. *Canada (Minister of Citizenship and Immigration)*, 2004 FC 1546).

[8] The matter was reconsidered and in a letter dated November 25, 2005, the applicant was informed by the then Minister of Citizenship and Immigration, the Honourable Joe Volpe, that his application had been refused. This is the judicial review of that decision.

Minister's Reasons for Decision

[9] In a letter dated November 25, 2005, the Minister denied the applicant's application for citizenship under subsection 5(4) of the Act. As the decision and reasons were very brief, I have reproduced them below:

> This refers to your "Application for Canadian Citizenship Under Subsection 5(1)" of the *Citizenship Act*.
>
> After careful review, I have considered the criteria of the Interim Measure. However, I am not satisfied that the totality of the circumstances of the case warrant the exercise of my extraordinary discretion to refer your application to the Governor in Council for consideration pursuant to subsection 5(4) of the *Citizenship Act*.

Issues

[10] The applicant submitted the following issues for consideration:

1. What is the applicable standard of review?

2. Is the Minister's decision based on a discriminatory treatment of adopted children under the current citizenship law and policy applicable to adopted children?

3. Did the Minister violate principles of natural justice and fairness by using extrinsic evidence without giving the applicant an opportunity to address the evidence so obtained?

4. Did the Minister violate the applicant's legitimate expectation, principles of natural justice and his right to participate in the decision-making process by not informing the applicant of the discretionary nature of the power and unilaterally converting the application from a subsection 5(1) application into a subsection 5(4) discretionary application and by then relying on his discretion, which only came about as a result of his own unilateral action, in refusing the application? Did the Minister provide adequate reasons for refusal?

5. Should the Court set the Minister's decision aside, given the fact that it was arrived at by violating principles of natural justice and by reliance on irrelevant considerations?

6. Is the evidence attached to the supplementary affidavit of Rosemarie Redden (relied on by the respondent) inadmissible?

[11] The respondent submitted the following issue for consideration:

1. Is the applicant's affidavit of Sonia Kociper in violation of Rule 81 of the *Federal Courts Rules*, S.O.R. 98-106, section 1 and therefore should be assessed with caution and accorded minimal weight?

[12] I would rephrase the issues as follows:

Preliminary Issues

1. Is the evidence attached to the supplementary affidavit of Rosemarie Redden inadmissible?

2. Does the applicant's affidavit of Sonia Kociper violate Rule 81 of the *Federal Courts Rules*, above?

Judicial Review Issues

3. What is the appropriate standard of review?

4. Did the Minister breach procedural fairness by considering extrinsic evidence without giving notice to the applicant?

5. Did the applicant have a legitimate expectation that the Minister would notify him of the discretionary nature of a decision under subsection 5(4) of the Act? Was this legitimate expectation violated?

6. Did the Minister breach procedural fairness by failing to provide adequate reasons for his decision?

7. Did the Minister breach the requirements of procedural fairness in failing to inform the applicant of the case to be met?

8. Did the Minister err in exercising his discretion to deny the applicant's application for citizenship under subsection 5(4) of the Act?

Constitutional Issues

9. Does the Department's *Interim Measure* violate section 15 of the *Charter*?

10. Can it be saved under section 1 of the *Charter?*

11. What is the appropriate remedy?

Costs

12. Should the applicant be awarded costs on a solicitor-client basis?

[13] I will be summarizing the parties' submissions under the following headings:

Preliminary Issues

Judicial Review Issues

Constitutional Issues

Costs

Applicant's Submissions

Preliminary Issues

[14] The applicant submitted that the evidence attached to the supplementary affidavit of Rosemarie Redden is not admissible if the respondent intends to rely on it for the purpose of arguing that the applicant failed to fulfill the criteria stated therein. This evidence was not before the Minister when he made his decision as it is not in the certified tribunal record.

[15] The applicant submitted that the respondent takes issue with the applicant's underlying affidavit of Sonia Kociper as being hearsay. The applicant submitted that all statements contained in the affidavit are based on personal knowledge arrived at by reviewing documentary exhibits and are

backed by supporting documentation attached to the affidavit as exhibits. The applicant submitted that there is no violation of Rule 81 of the *Federal Courts Rules*, above.

Judicial Review Issues

[16] With regards to the appropriate standard of review, the applicant submitted that questions of mixed law and fact are reviewable on a standard of reasonableness *simpliciter*. The applicant submitted that the standard of review for the application of *Charter* principles and issues involving procedural fairness is correctness.

[17] The applicant alleged that the respondent relied on extrinsic evidence. The applicant submitted that in obtaining a copy of the applicant's U.S. District Court file (from U.S. authorities) and in doing so at the last minute, the Department breached the requirements of procedural fairness as the applicant did not have a chance to respond to the evidence.

[18] As to the argument of legitimate expectation, the applicant submitted that provisions in the *Interim Measure* provided the applicant with a legitimate expectation that he would be informed that the power to grant citizenship under subsection 5(4) was discretionary in nature and that he was required to provide all the evidence required to meet the basic requirements concerning adoption. The applicant submitted that when a public authority has promised to follow a certain procedure, they should act fairly and implement its promise (*Bendahmane* v. *Canada (Minister of Citizenship and Immigration)*, [1989] 3 F.C. 16 (F.C.A.)). The applicant submitted that failure to respect this

requirement is detrimental to the applicant as he did not have the opportunity to present the required evidence. The applicant also submitted that even if this Court believes that the applicant must have known of the discretionary nature of the power, the Minister still had a duty to inform.

[19] The applicant submitted that the Minister's decision breaches procedural fairness as it provides inadequate reasons for the decision. The applicant noted in the case of *Abu* v. *Canada (Minister of Citizenship and Immigration)* 2005 FC 565, which held that reasons are not really reasons at all if they essentially consist of a mere statement of conclusion without any analysis to back it up. The applicant submitted that the Minister's statement as to "the totality of the circumstances" leaves the applicant in the unenviable position of not knowing why the application was rejected.

[20] The applicant also submitted that the Minister failed to inform him of the "case to be met" in order to satisfy the Minister that there were sufficient grounds to warrant granting citizenship under subsection 5(4). The applicant submitted that this is a breach of procedural fairness (*Suresh* v. *Canada (Minister of Citizenship and Immigration),* [2002] 1 S.C.R. 3). The applicant alleged that it would be wrong for the respondent to argue that the "case to be met" was to satisfy the Minister of either "special unusual hardship" or "services of an exception value" as those criteria are to be considered by the GIC, not the Minister. Furthermore, the applicant submitted that the Minister cannot arbitrarily deny citizenship once the requirements are met.

[21] And finally, the applicant submitted that the provisions of the Act confer a duty on the Minister and as such, his decision cannot be exercised in an entirely discretionary manner without regard to the criteria in the *Interim Measure*. The applicant noted that if the legitimacy of the adoption has been met, then the Minister must, in accordance with the *Interim Measure*, grant citizenship under subsection 5(4) of the Act. The applicant submitted that this argument is consistent with the text of Bill C-14.

Constitutional Issues

[22] The applicant submitted that the *Interim Measure* is discriminatory because it puts adoptive children of Canadian parents at the mercy of the Minister's discretion. In routing citizenship applications from adoptive children through subsection 5(4) of the Act, these children are subject to an oath requirement and discretionary process. The applicant submitted that the interest affected by the impugned legislation is the ability of children genuinely adopted abroad to become full members of Canadian society. The applicant noted the already disadvantaged societal position of adoptive children, stating that they are seen as "second best". The applicant further submitted that adoption has already been established as an analogous ground. Moreover, the differential treatment at issue is without question discriminatory. With regards to the justification of this discrimination, the applicant submitted that there is no rational connection in requiring only adoptive children of Canadian parents to swear an oath and rely on the Minister's discretion in order to acquire Canadian citizenship.

Costs

[23] The applicant requested that costs be award on a solicitor client basis due the respondent's wasteful motions and delay tactics and also because the Department was already instructed, in *McKenna* v. Canada, [1999] 1 F.C. 401 that the policy was discriminatory. The applicant submitted that this Court should adopt the same reasoning as in *Koehler* v. *Warkworth Institution* (1991), 45 F.T.R. 87 (T.D.), whereby the Federal Court made an award of costs on a solicitor-client basis, payable forthwith, as the tribunal had denied the applicant natural justice despite having been instructed on the law in that area by the Court three months earlier.

Respondent's Submissions

Preliminary Issues

[24] The respondent provided no written arguments on the admissibility of Rosemarie Redden's evidence.

[25] The respondent submitted that it is plain and obvious that the affidavit of Sonia Kociper, an associate lawyer at the firm retained by the applicant, is not confined to the associate's personal knowledge as required by Rule 81 of the *Federal Courts Rules*, above. The information in the affidavit is fundamentally hearsay in nature, and as such should be assessed with caution and accorded minimal weight.

Judicial Review Issues

[26] With regards to the appropriate standard of review, the respondent submitted that the question of whether the Minister acted within his discretionary power is reviewable on a standard of patent unreasonableness. The respondent submitted that a ministerial recommendation under subsection 5(4) is a quintessential exercise of executive prerogative in which the executive is possessed of unique expertise.

[27] The respondent went on to address the requirements of procedural fairness in general terms. The respondent submitted that the requirements of procedural fairness are heavily dependent on the context, including the characteristics of the decision maker, the subject matter a tribunal considers, the function being performed, the statute in question, the particular facts of the case being decided, the expectations of the person challenging the decision, and the effect of the decision on an individual concerned (*Knight* v. *Indian Head School Division No. 19*, [1990] 1 S.C.R. 653). The respondent submitted that the decision at hand involves complete ministerial discretion; the Minister is not adjudicating. The respondent further submitted that the context, facts and circumstances of this case warrant a very low, minimal or marginal level of procedural fairness.

[28] The respondent also submitted that the applicant's criminal record does not constitute extrinsic third party information of which the applicant had no knowledge. The respondent noted that it was the applicant that voluntarily shared the existence of a criminal record and incarceration with the respondent in his application. The criminal record was from a public source, was on the

record at the time the subsection 5(4) application was presented to the Minister and was fully within the knowledge and possession of the applicant. The respondent submitted that the applicant was not denied the opportunity to make submissions as to the criminal record; in fact, it was the applicant that raised the issue in his correspondence with the Department during the application process..

[29] As to the applicant's argument that a legitimate expectation arose, the respondent submitted that this is not so. The respondent noted that the doctrine of legitimate expectation is a purely procedural doctrine, whereas the expectation alleged is substantive. Moreover, administrative departmental policy guidelines, such as the *Interim Measure,* do not afford an applicant the right to a particular outcome (*Reference Re Canada Assistant Plan*, [1991] 2 S.C.R. 525; *Legault* v. *Canada (Minister of Citizenship and Immigration)*, [2002] 4 F.C. 358; *Guay* v. *Lafleur*, [1965] S.C.R. 12).

[30] With regards to the adequacy of reasons, the respondent submitted that there is no obligation on the Minister to provide reasons for the exercise of discretion under subsection 5(4) of the Act. The respondent submitted that the case at hand does not constitute an exception to the general rule that the duty of fairness does not require reasons for administrative decisions. The decision of the Minister is subject to limited review by this Court (*Baker*, [1999] 2 S.C.R. 817). The respondent further submitted that even if the Court finds there was a duty to give reasons, the obligation was to merely show 'some degree of reasoning or analysis' or the 'general substance' of his reasons (*Knight*, above). The respondent submitted that this was satisfied by the November 25, 2005 letter as it explained that the decision was made with regard to the 'totality of the circumstances'.

Furthermore, the memorandum to the Minister can be understood to provide further reasons for the Minister's decision.

[31] The respondent further submitted that the applicant was not denied a meaningful opportunity to address the criteria set out by the Department under the *Interim Measure*. The respondent submitted that there was a need for the applicant to submit documentation as to the *bona fide* of his adoption and the applicant did so. The Minister's discretionary power under subsection 5(4) is personal and of a very special nature.

[32] The respondent submitted that the Minister properly exercised his discretion in making his decision. The respondent noted that Parliament did not burden the executive with any legislative standards on how the GIC should exercise its discretion under subsection 5(4) of the Act. The respondent alleged that the applicant's interpretation of the *Interim Measure* is false. There is no guarantee to citizenship under this provision, but yet an opportunity for a discretionary grant (*Guay*, above). The *Interim Measure* could not bind the Minister in the exercise of his discretion, nor could it create substantive rights to citizenship. Subsection 5(4) of the Act is a residual power given to the Minister to "alleviate" cases of special and unusual hardship on broad grounds including political expediency to persons who do not have either a right or a qualified right to obtain citizenship under the Act.

[33] The respondent submitted that it was clearly open to the former Minister to consider the applicant's unique and specific circumstances. It was not patently unreasonable for the former

Minister to determine that the desire of a person currently serving a lengthy term of imprisonment to apply for citizenship in order to possibly do his time in Canada, with whatever benefit that might include, is not “special and unusual hardship” that warranted the exercise of his extraordinary discretion.

Constitutional Issues

[34] The respondent provided a number of reasons as to why the *Charter* challenge should be dismissed. Firstly, the respondent submitted that the applicant relies on events that took place in 2004 and repeats arguments raised and dealt with in the first application for judicial review heard by Madam Justice Layden-Stevenson. Secondly, in making the section 15 argument, the applicant wrongly relies on *McKenna*, above. The respondent submitted that *McKenna*, above dealt with discrimination under the *Canadian Human Rights Act* and not a constitutional challenge to the *Citizenship Act*. Moreover, it did not deal with the provision for discretionary grants of citizenship under section 5(4) of the Act. The respondent submitted that the *Interim Measure* is a department policy that does not bind the Minister’s exercise of discretion under section 5(4) of the Act. And finally, the respondent argued that *Charter* arguments cannot be made in a factual or legal vacuum or without proper notice of a constitutional question. The respondent submitted that the applicant is essentially attempting to reargue his challenge to paragraph 3(1)(e) of the Act which was already raised in the companion judicial review application. The respondent noted that the constitutional challenge was not identified in the applicant’s notice of application in the present case, nor was there an issuance of a notice of constitutional question in this file. As such, the applicant is not

entitled to now raise it. The Court should refrain from dealing with *Charter* issues raised in an application for judicial review where it is unnecessary to do so (*Baker*, above).

Costs

[35] The respondent submitted that the applicant has not determined that they are entitled to costs on a solicitor-client basis. The respondent submitted that they have been responding to the underlying judicial review application in a diligent manner. The respondent submitted that the applicant's submissions contain several erroneous and inaccurate assertions against the respondent.

Analysis and Decision

Preliminary Issues

1. Is the evidence attached to the supplementary affidavit of Rosemarie Redden inadmissible?

[36] With regards to the applicant's submissions concerning the evidence attached to the supplementary affidavit of Rosemarie Redden, I am of the opinion that the applicant is not taking issue with the admissibility of the evidence, but yet the uses to which it can be put. I assure the applicant that this Court in judicially reviewing the decision of the Minister fully understands that only those documents contained in the certified tribunal record are to be considered as the information before the decision maker at the time the decision was made.

2. Does the applicant's affidavit of Sonia Kociper violate Rule 81 of the *Federal Courts Rules*, above?

[37] The respondent submitted that the applicant's supporting affidavit of Sonia Kociper, an associate at the law firm representing the applicant, violates Rule 81 of the *Federal Courts Rules*, above. I should mention that the determination of this issue is not detrimental to this application for judicial review as the majority of the information provided in Sonia Kociper's affidavit is also found in the affidavit of Duane Edward Worthington and the certified tribunal record. Nonetheless, I feel the need to address the argument raised by the respondent.

[38] The general requirement of Rule 81 is that affidavits be confined to the personal knowledge of the deponent. In *Moldeveanu* v. *Canada (Minister of Citizenship and Immigration)* (1999), 1 Imm. L.R. (3d) 105, the Federal Court of Appeal held that facts which do not appear on the record and which are within the knowledge of the applicant cannot be put in evidence by the affidavit of a third person who has no personal knowledge of those facts. This would simply violate the requirement of personal knowledge.

[39] The applicant is aware of this requirement. In fact, in *Worthington*, above, Madam Justice Layden-Stevenson of this Court held at paragraph 26:

> The supporting affidavit is that of a solicitor from the law firm representing the applicants. While that is not necessarily fatal to an application for judicial review, in this instance it results in a clear violation of Rule 8 [*sic*] of the *Federal Court Rules, 1998*, SOR/98-106, as am.(the Rules). The deponent does not have personal

> knowledge of much of the information that he has sworn to in the affidavit.

[40] Having reviewed the affidavit of Sonia Kociper, I am of the opinion that the situation before this Court is the same as above.

[41] Consequently, I agree with the respondent that the affidavit shall be assessed with caution and overall accorded minimal weight.

Judicial Review Issues

3. What is the appropriate standard of review?

[42] Questions of procedural fairness are reviewable on a standard of correctness. With regards to the "reasonability" of the overall decision of the Minister, we must apply the standard of review analysis to determine the appropriate standard of review. In my opinion, the most convincing factors in the present case are the expertise of the decision maker, the purpose of the provision and the nature of the problem. The Minister of Citizenship and Immigration is responsible for issues of citizenship in Canada, including the granting of citizenship under discretionary powers. This consideration warrants a high degree of deference. The purpose of subsection 5(4) is to give the Minister a residual, highly discretionary power to grant citizenship in situations where the person would otherwise not qualify for citizenship under the Act. This also warrants a high degree of deference. And finally, the nature of the question at issue is one of pure fact. Whether or not to grant

citizenship under subsection 5(4) is a highly discretionary decision entrusted to the Minister of Citizenship and Immigration. In light of these considerations, I am of the opinion that the appropriate standard of review is the most deferential standard of reasonableness (*Dunsmuir* v. *New Brunswick*, 2008 SCC 9).

4. Did the Minister breach procedural fairness by considering extrinsic evidence without giving notice to the applicant?

[43] The applicant submitted that by obtaining a copy of the applicant's criminal record from U.S. authorities, the Department breached the duty of procedural fairness owed in that the applicant could not respond to the evidence. The respondent submitted that the applicant was aware the evidence existed and even notified the Department of its existence, and as such, the document in question does not constitute extrinsic third party information of which the applicant had no knowledge.

[44] In *Kaur* v. *Canada (Minister of Citizenship and Immigration)* 2005 FC 1192, this Court held at paragraph 20:

> The term "extrinsic evidence" is usually used in respect of specific evidence of which the applicant was not aware that is used to rebut evidence already before the tribunal.

[45] In *Mancia* v. *Canada (Minister of Citizenship and Immigration)*, (1997) 125 F.T.R. 297, it was held that there is no obligation on the part of an officer to disclose information that is available

from a public source prior to the date of any submission by the applicant. In the case at hand, the applicant was aware of his criminal record and the fact that it was public information as of the date of his application. In fact, his application form dated September 11, 2002, the applicant stated:

> […] I am currently serving a 425 month sentence in a medium security federal facility, for criminal No. 96-124 from the U.S.D.C. of the southern District of Iowa. (This information is available to the public, and is filed in Des Moines, Iowa clerk of the court.)

In light of this, I am of the view that there was no breach of procedural fairness.

5. Did the applicant have a legitimate expectation that the Minister would notify him of the discretionary nature of a decision under subsection 5(4) of the Act? Was this legitimate expectation violated?

[46] The applicant submitted that he had a legitimate expectation that he would be informed that decisions under subsection 5(4) are discretionary and that he needed to provide the necessary documentation to prove that his adoption was bona fide. The applicant relied on an excerpt of the *Interim Measure* which provides:

> As soon as an application is received, a citizenship officer in the Case Management Branch shall be responsible for contacting the person concerned, by mail, to inform the person of the possibility of obtaining citizenship through the discretionary power of the Governor in Council provided for in subsection 5(4). The person shall be informed that this power is discretionary, and shall be required to provide all the evidence required to meet the basic requirements concerning adoption. [Emphasis added]

[47] The Supreme Court of Canada in *Canadian Union of Public Employees*, [2003] S.C.J. No. 28 at paragraph 131, provided the following articulation of the doctrine of legitimate expectation:

> The doctrine of legitimate expectation is "an extension of the rules of natural justice and procedural fairness": *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at p. 557. It looks to the conduct of a Minister or other public authority in the exercise of a discretionary power including established practices, conduct or representations that can be characterized as clear, unambiguous and unqualified, that has induced in the complainants (here the unions) a reasonable expectation that they will retain a benefit or be consulted before a contrary decision is taken. To be "legitimate", such expectations must not conflict with a statutory duty. See: *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170; *Baker*, *supra*; *Mount Sinai*, *supra*, at para. 29; *Brown and Evans*, *supra*, at para. 7:2431. Where the conditions for its application are satisfied, the Court may grant appropriate procedural remedies to respond to the "legitimate" expectation.

[48] Based on the above articulation, I believe the following requirements must be met to prove that the applicant had a legitimate expectation:

1. A promise was made by a Minister or other public authority in the exercise of a discretionary promise;
2. The promise was procedural in nature and not substantive;
3. The promise was to be clear, unambiguous and unqualified;
4. There was reliance on the promise;
5. The reliance on the promise was to the detriment of the person asserting a legitimate expectation; and
6. The promise was not in conflict with a statutory duty.

[49] In my opinion, all of these requirements have not been met. In particular, I am not convinced that on the facts of this case that the applicant relied on this promise to his detriment. The applicant's reliance on the promise that he would be notified did not produce any detrimental effect. With regards to the notification that the decision under subsection 5(4) was discretionary, I fail to understand how being notified that a decision is discretionary creates reliance to the detriment of the applicant. Whether informed or not, there was nothing that the applicant could have done to change the type of decision and therefore there was no reliance to his detriment. As to the notification that the applicant would have to produce documentation to meet the basic requirements concerning adoption, once again I am not convinced that reliance on the notification caused a detrimental effect. In fact, it appears that by the time the application for citizenship was converted into a subsection 5(4) application, the respondent was already satisfied that the applicant had provided sufficient documentation in relation to the validity of his adoption. As such, I find that no legitimate expectation existed. I would not grant the judicial review on this ground.

6. Did the Minister breach procedural fairness by failing to provide adequate reasons for his decision?

[50] The applicant submitted that in rendering his decision, the Minister failed to provide the applicant with adequate reasons. The respondent submitted that the contents of procedural fairness depend on a number of factors and that in the case at hand, there was no requirement for the Minister to provide reasons. In the alternative, the respondent submitted that if there was a duty to

provide reasons, the Minister's letter and the memorandums to the Minister satisfied this duty (*Baker*, above).

[51] It is well accepted that the contents of procedural fairness are variable and must be determined in the specific context of each individual case (*Knight*, above). The Supreme Court of Canada in *Baker*, above at paragraph 23, discussed the factors that should be considered in assessing the contents of procedural fairness. These include the nature of the decision being made, the nature of the statutory scheme, the importance of the decision to the individual affected, the legitimate expectations of the person challenging the decision, and the choices of procedure made by the agency.

[52] In the case before the Court, the important significance of the issue to the applicant favours the requirement of written reasons. However, the scheme for citizenship applications under subsection 5(4) is far from an adjudicative process. Nonetheless, I am of the opinion that written reasons were required by the Minister, but the comprehensiveness of those reasons was very minimal. In *Ozdemir* v. *Canada (Minister of Citizenship and Immigration)* (2001), 282 N.R. 394 (F.C.A), the Federal Court of Appeal held that it is inappropriate to require administrative officers to give as detailed reasons for their decision as may be expected of an administrative tribunal that renders its decision after an adjudicative hearing. In the case at hand, I find that the reasons provided by the Minister were adequate. The Minister stated that in light of the criteria in the *Interim Measure*, the totality of the circumstances did not warrant a grant of citizenship under subsection

5(4). Albeit very minimal, the adequacy of the reasons was met. I would not allow the judicial review on this ground.

7. Did the Minister breach the requirements of procedural fairness in failing to inform the applicant of the case to be met?

[53] The applicant submitted that the Department's unilateral decision to convert his subsection 5(1) application into a subsection 5(4) application violated the requirements of procedural fairness as the applicant was not informed of the case to be met for a grant of citizenship under subsection 5(4). The respondent submitted that the applicant had already met the requirement of providing documentation as to the validity of his adoption and as such, was aware of the case to be met.

[54] In considering whether or not the applicant was informed of the case to be met, I find it important that we first consider the section in question. Subsection 5(4) of the *Citizenship Act* reads:

> 5.(4) In order to alleviate cases of special and unusual hardship or to reward services of an exceptional value to Canada, and notwithstanding any other provision of this Act, the Governor in Council may, in his discretion, direct the Minister to grant citizenship to any person and, where such a direction is made, the Minister shall forthwith grant citizenship to the person named in the direction.

[55] The purpose of the statement appears to be to allow the Minister, in cases of special and unusual hardship or in cases where there is a need to reward services of an exceptional value to Canada, to grant citizenship notwithstanding any other provisions of the Act. My understanding of the section is that usually an applicant must show that one of the above circumstances is present;

however, in the case of persons adopted outside of Canada by Canadians residing abroad, this is not the case as the *Interim Measure* provides other requirements. While I agree with the respondent that the *Interim Measure* is a departmental policy and not a formal law, it nonetheless is accessible to the public and the Supreme Court has held such document to be of great assistance to the Court (*Legault* v. *Canada (Minister of Citizenship and Immigration)*, [2002] 4 F.C. 358 (C.A.)). The guideline criteria for applications under subsection 5(4) in the *Interim Measure* includes that the applicant must establish that a legal and full adoption took place after December 31, 1946, that an adoptive parent was a Canadian citizen at the time of the adoption, and that the applicant was less than 18 years of age at the time of the adoption.

[56] In my opinion, it appears that in the case of persons adopted outside of Canada by Canadians residing abroad, there is no need to present evidence of special and unusual hardship or services of an exceptional value to Canada. This interpretation is supported by the decision in *Frankowski* v. *Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1253, wherein the Court at paragraph 11 held:

> Having regard to the more general subsection 5(4), it is true that it applies to alleviate cases of special and unusual hardship or to reward service of an exceptional nature to Canada. However, subsection 5(4) may apply whenever, for any reason provided in the Act, a grant of citizenship has been refused. In other words, it may apply to anyone subject to a negative determination under the Act.

[57] Furthermore, it would be contrary to the *Interim Measure's* purpose of facilitating grants of citizenship to persons adopted by Canadians abroad, if in addition to proving the validity of the

adoption, they also had to show special and unusual hardship or services of an exception value to Canada.

[58] As such, I believe that the only case to be met was the requirement outlined in the *Interim Measure* and the applicant was already aware of these requirements from his previous applications. As such, I believe that procedural fairness was not breached on this ground.

8. Did the Minister err in exercising his discretion to deny the applicant's application for citizenship under subsection 5(4) of the Act?

[59] The applicant submitted that the Minister erred in deciding to deny the applicant's application under subsection 5(4) of the Act. The respondent submitted that the Minister's power under subsection 5(4) is purely discretionary and is subject to very limited review by this Court. The appropriate standard of review for this issue is reasonableness.

[60] In my view, the Minister's decision was reasonable. The applicant noted that the departmental recommendation to the Minister recommended that citizenship be granted. I agree. However, the memorandum to the Minister outlined both reasons for and against granting citizenship. The Minister is not bound by the recommendation. While recommendations must be considered by the Minister, the ultimate decision lies with the Minister. The Minister's discretion under subsection 5(4) is personal in nature, and is qualified in that it cannot be exercised in an

unreasonable manner. I am of the view that the decision was reasonable and as such, I would not allow the judicial review on this ground.

Constitutional Issues

9. Does the Department's *Interim Measure* violate section 15 of the *Charter*?

[61] It appears that the applicant is challenging the Department's *Interim Measure* on the basis that it violates section 15 of the *Charter*. In *Timberwest Forest Corp.* v. *Her Majesty the Queen in Right of Canada*, 2007 FCA 389, the Federal Court of Appeal held at paragraph 3 of its decision:

> With respect to the constitutionality of Notice 102, I also agree with O'Keefe J. that it is not the role of the courts to determine the constitutionality of policies. Furthermore, the appellant did not challenge the validity of any provision of the Act nor of the list of goods established pursuant to that Act.

[62] In my opinion, the same principle applies to the present case. The Department's *Interim Measure* is a departmental policy and it is not the role of the courts to determine the constitutionality of policies. Moreover, if the applicant sought to challenge the constitutional validity of subsection 5(4) of the Act, notice should have been given under section 57 of the *Federal Courts Act*, above. As submitted by the respondent, this was not done in the present case and as such, I will not address the constitutional issues raised. In light of my finding above, there is no reason to address issues 10 and 11.

Costs

12. Should the applicant be awarded costs on a solicitor-client basis?

[63] Since the applicant was not successful in his application for judicial review, I will not address his request for costs on a solicitor-client basis.

[64] The application for judicial review is therefore dismissed with costs to the respondent.

JUDGMENT

[65] **IT IS ORDERED that** the judicial review is dismissed with costs to the respondent.

"John A. O'Keefe"

Judge

ANNEX

Relevant Statutory Provisions

The relevant statutory provisions are set out in this section.

The *Citizenship Act*, R.S.C. 1985, c. C-29:

5.(1) The Minister shall grant citizenship to any person who	5.(1) Le ministre attribue la citoyenneté à toute personne qui, à la fois :
(a) makes application for citizenship;	a) en fait la demande;
(b) is eighteen years of age or over;	b) est âgée d'au moins dix-huit ans;
(c) is a permanent resident within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act, and has, within the four years immediately preceding the date of his or her application, accumulated at least three years of residence in Canada calculated in the following manner:	c) est un résident permanent au sens du paragraphe 2(1) de la Loi sur l'immigration et la protection des réfugiés et a, dans les quatre ans qui ont précédé la date de sa demande, résidé au Canada pendant au moins trois ans en tout, la durée de sa résidence étant calculée de la manière suivante :
(i) for every day during which the person was resident in Canada before his lawful admission to Canada for permanent residence the person shall be deemed to have accumulated one-half of a day of residence, and	(i) un demi-jour pour chaque jour de résidence au Canada avant son admission à titre de résident permanent,
(ii) for every day during which the person was resident in Canada after his lawful admission to Canada for permanent residence the person	(ii) un jour pour chaque jour de résidence au Canada après son admission à titre de résident permanent;

shall be deemed to have accumulated one day of residence;

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

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

(f) is not under a removal order and is not the subject of a declaration by the Governor in Council made pursuant to section 20.

(1.1) Any day during which an applicant for citizenship resided with the applicant's spouse who at the time was a Canadian citizen and was employed outside of Canada in or with the Canadian armed forces or the federal public administration or the public service of a province, otherwise than as a locally engaged person, shall be treated as equivalent to one day of residence in Canada for the purposes of paragraph (1)(c) and subsection 11(1).

(2) The Minister shall grant citizenship to any person who

(a) is a permanent resident within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act, and is the minor child of a citizen if an

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

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

f) n'est pas sous le coup d'une mesure de renvoi et n'est pas visée par une déclaration du gouverneur en conseil faite en application de l'article 20.

(1.1) Est assimilé à un jour de résidence au Canada pour l'application de l'alinéa (1) c) et du paragraphe 11(1) tout jour pendant lequel l'auteur d'une demande de citoyenneté a résidé avec son époux ou conjoint de fait alors que celui-ci était citoyen et était, sans avoir été engagé sur place, au service, à l'étranger, des forces armées canadiennes ou de l'administration publique fédérale ou de celle d'une province.

(2) Le ministre attribue en outre la citoyenneté :

a) sur demande qui lui est présentée par la personne autorisée par règlement à représenter celui-ci, à l'enfant mineur d'un citoyen qui est résident permanent au sens du

application for citizenship is made to the Minister by a person authorized by regulation to make the application on behalf of the minor child; or

paragraphe 2(1) de la Loi sur l'immigration et la protection des réfugiés;

(b) was born outside Canada, before February 15, 1977, of a mother who was a citizen at the time of his birth, and was not entitled, immediately before February 15, 1977, to become a citizen under subparagraph 5(1)(b)(i) of the former Act, if, before February 15, 1979, or within such extended period as the Minister may authorize, an application for citizenship is made to the Minister by a person authorized by regulation to make the application.

b) sur demande qui lui est présentée par la personne qui y est autorisée par règlement et avant le 15 février 1979 ou dans le délai ultérieur qu'il autorise, à la personne qui, née à l'étranger avant le 15 février 1977 d'une mère ayant à ce moment-là qualité de citoyen, n'était pas admissible à la citoyenneté aux termes du sous-alinéa 5(1)b)(i) de l'ancienne loi.

(3) The Minister may, in his discretion, waive on compassionate grounds,

(3) Pour des raisons d'ordre humanitaire, le ministre a le pouvoir discrétionnaire d'exempter :

(a) in the case of any person, the requirements of paragraph (1)(d) or (e);

a) dans tous les cas, des conditions prévues aux alinéas (1)d) ou e);

(b) in the case of a minor, the requirement respecting age set out in paragraph (1)(b), the requirement respecting length of residence in Canada set out in paragraph (1)(c) or the requirement to take the oath of citizenship; and

b) dans le cas d'un mineur, des conditions relatives soit à l'âge ou à la durée de résidence au Canada respectivement énoncées aux alinéas (1)b) et c), soit à la prestation du serment de citoyenneté;

(c) in the case of any person who is prevented from understanding the significance of taking the oath of citizenship

c) dans le cas d'une personne incapable de saisir la portée du serment de citoyenneté en raison d'une déficience

by reason of a mental disability, the requirement to take the oath.

mentale, de l’exigence de prêter ce serment.

(4) In order to alleviate cases of special and unusual hardship or to reward services of an exceptional value to Canada, and notwithstanding any other provision of this Act, the Governor in Council may, in his discretion, direct the Minister to grant citizenship to any person and, where such a direction is made, the Minister shall forthwith grant citizenship to the person named in the direction.

(4) Afin de remédier à une situation particulière et inhabituelle de détresse ou de récompenser des services exceptionnels rendus au Canada, le gouverneur en conseil a le pouvoir discrétionnaire, malgré les autres dispositions de la présente loi, d’ordonner au ministre d’attribuer la citoyenneté à toute personne qu’il désigne; le ministre procède alors sans délai à l’attribution.

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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