Federal Court  Cour fédérale

Date: 20220214

Dockets: T-980-20
T-981-20

Citation: 2022 FC 193

Ottawa, Ontario, February 14, 2022

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

MATHILDE GROSSMANN-HENSEL, MAGNUS GROSSMANN-HENSEL BY THEIR LITIGATION GUARDIAN GERT STUART GROSSMANN-HENSEL

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr. Gert Stuart Grossmann-Hensel is the father and litigation guardian or representative for both the Minor Applicants, Mathilde Grossmann-Hensel and Magnus Grossmann-Hensel [collectively, the Applicants].

[2] In October 2018, Mr. Grossmann-Hensel applied, pursuant to subsection 5(4) of the *Citizenship Act*, RSC 1985, c C-29 [*Citizenship Act*], on behalf of his children for a discretionary grant of citizenship. On December 16, 2019, the Minister's Delegate [MD] denied the application [the Original Decision]. The Applicants sought reconsideration of that decision.

[3] By letter dated July 29, 2020, the MD affirmed the Original Decision [Reconsideration Decision]. The MD found it had not been demonstrated that the children met any of the statutory criteria upon which a discretionary grant of citizenship could be made.

[4] The Applicants have brought Applications for leave and for judicial review of the MD's decisions pursuant to subsection 22.1(1) of the *Citizenship Act*. They submit the MD breached procedural fairness by failing to consider the totality of their supporting documents. They also claim the MD unreasonably interpreted and applied subsection 5(4) of the *Citizenship Act* and in turn, unreasonably found subsection 3(3) of the *Citizenship Act* was not discriminatory. In granting leave, Justice Sébastien Grammond ordered the two Applications be heard together.

[5] For reasons explained below, I am not convinced Mr. Grossmann-Hensel has standing in these Applications and is struck from the style of cause. I am also not persuaded the MD committed any error warranting the Court's intervention. For the reasons that follow, the Applications are dismissed.

[6] It will be helpful to an understanding of the issues raised in these Applications to first provide a brief overview of the personal circumstances of the Applicants and highlight the evolution of relevant provisions in the *Citizenship Act*.

II. Background

A. *Mr. Grossmann-Hensel's Canadian citizenship*

[7] Mr. Grossmann-Hensel was born in Germany in 1971, his father a German national and his mother a Canadian. At the time of his birth, the *Canadian Citizenship Act*, SC 1946, c 15 [1947 *Citizenship Act*] was in force. Section 5 of the 1947 *Citizenship Act* provided that a child born outside of Canada to a foreign national father and a Canadian mother in wedlock, such as Mr. Grossmann-Hensel, did not acquire Canadian citizenship at birth.

[8] Amendments to the 1947 *Citizenship Act* came into force in 1977. These amendments eliminated distinctions based on the sex or marital status of the Canadian parent in the acquisition of Canadian citizenship by foreign-born children. All children born to a Canadian citizen abroad acquired Canadian citizenship at birth after the coming into force of the amendments (*Citizenship Act*, SC 1974-75-76, c 108, section 3 [1977 *Citizenship Act*]). Section 5

of the 1977 *Citizenship Act* also provided a process for the children of Canadian citizens born abroad prior to 1977 and who did not acquire citizenship under the 1947 *Citizenship Act* to apply to the Minister for a prospective grant of citizenship.

[9] In 1976, Mr. Grossmann-Hensel moved to Canada with his family. In 1987, his mother applied for citizenship on his behalf. Citizenship was granted by the Minister under paragraph 5(2)(b) of the 1977 *Citizenship Act*.

[10] In 1990, Mr. Grossmann-Hensel, now a Canadian citizen, went to the United States for post-secondary education. After completing his education in the United States, he worked abroad. He has not lived in Canada since 1990.

[11] In April 2009, *An Act to Amend the Citizenship Act*, SC 2008, c 14 [Bill C-37] came into force. The Bill C-37 amendments extended citizenship as of right to anyone born to a Canadian parent outside of Canada on or after January 1, 1947, where the Canadian parent had been unable to pass on citizenship at the time of the child's birth due to prior legislative distinctions that discriminated on the basis of sex or marital status.

[12] The Bill C-37 amendments also sought to protect the value of Canadian citizenship by limiting acquisition of citizenship by children born abroad to a Canadian parent to a single generation. Subsection 3(3) of the *Citizenship Act* now provides that a Canadian parent who was born abroad and derived their Canadian citizenship from their Canadian parent is not able to pass

citizenship to any of their children who are also born abroad [the one-generation abroad limitation]:

The Right to Citizenship **Persons who are citizens**	**Le droit à la citoyenneté** **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 :
[…]	[…]
(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;
[…]	[…]
(g) the person was born outside Canada before February 15, 1977 to a parent who was a citizen at the time of the birth and the person did not, before the coming into force of this paragraph, become a citizen;	g) qui, née à l'étranger avant le 15 février 1977 d'un père ou d'une mère ayant qualité de citoyen au moment de la naissance, n'est pas devenue citoyen avant l'entrée en vigueur du présent alinéa;
(h) the person was granted citizenship under section 5, as it read before the coming into force of this paragraph, the person would have, but for that grant, been a citizen under paragraph (g) and, if it was required, he or she took the oath of citizenship;	h) qui a obtenu la citoyenneté par attribution sous le régime de l'article 5, dans ses versions antérieures à l'entrée en vigueur du présent alinéa — et, si elle y était tenue, prêté le serment de citoyenneté — et qui, n'eût été cette attribution, aurait été une personne visée à l'alinéa g);
[…]	[…]
Not applicable — after first generation	

(3) Paragraphs (1)(b), (f) to (j), (q) and (r) do not apply to a person born outside Canada	**Inapplicabilité après la première génération**
(a) if, at the time of his or her birth, only one of the person's parents was a citizen and that parent was a citizen under paragraph (1)(b), (c.1), (e), (g), (h), (o), (p), (q) or (r) or both of the person's parents were citizens under any of those paragraphs;	(3) Les alinéas (1)b), f) à j), q) et r) ne s'appliquent pas à la personne née à l'étranger dont, selon le cas :
[…]	a) au moment de la naissance, seul le père ou la mère avait qualité de citoyen, et ce, au titre des alinéas (1)b), c.1), e), g), h), o), p), q) ou r), ou les deux parents avaient cette qualité au titre de l'un de ces alinéas;
	[…]

[13] Following the Bill C-37 amendments, paragraph 3(1)(h) of the *Citizenship Act* establishes that Mr. Grossmann-Hensel had derived his Canadian citizenship from his mother as of right upon birth in 1971.

[14] Mr. Grossmann-Hensel married abroad in 2009 and he has two children with his now ex-wife, an Australian national. Mathilde was born on October 17, 2011, and Magnus was born on November 6, 2014. Both children were born in France and currently reside in the United Kingdom, as do their parents. The children are citizens of Germany and Australia but do not have citizenship in France or the United Kingdom.

B. *The 2014 application for proof of citizenship*

[15] In 2014, Mr. Grossmann-Hensel applied for a citizenship certificate on behalf of Mathilde. In a decision dated October 21, 2016, the application was refused on the basis that Mathilde did not meet the legislative requirements of the *Citizenship Act* and was not a Canadian citizen. The decision letter forms part of the Certified Tribunal Record in Court Docket T-980-20.

[16] In refusing the application, the Citizenship Officer relied on section 3 and in particular paragraph 3(1)(b) and subsection 3(3) of the *Citizenship Act*. The Citizenship Officer found that paragraph 3(3)(a) limits citizenship by descent to the first generation born outside of Canada (as highlighted in the Respondent's submissions, the MD misidentified the relevant provision as being subparagraph 3(3)(b)(ii)). Because Mathilde was born outside Canada to a Canadian parent who had also been born outside Canada, the Officer concluded the one-generation abroad limitation applied and Mathilde failed to meet the requirements for citizenship. Mr. Grossmann-Hensel did not seek reconsideration or judicial review of that decision.

III. Decisions under Review

A. *The Original Decision*

[17] Subsection 5(4) of the *Citizenship Act* vests a discretion in the Minister to grant citizenship in special cases:

Special cases	**Cas particuliers**
5 (4) Despite any other provision of this Act, the Minister may, in his or her discretion, grant citizenship to any person to alleviate cases	5 (4) Malgré les autres dispositions de la présente loi, le ministre a le pouvoir discrétionnaire d'attribuer la citoyenneté à toute personne

of statelessness or of special and unusual hardship or to reward services of an exceptional value to Canada.	afin de remédier à une situation d'apatridie ou à une situation particulière et inhabituelle de détresse ou de récompenser des services exceptionnels rendus au Canada.

[18] The Applicants identified two issues in submissions supporting the request that the Minister grant Mathilde and Magnus citizenship under subsection 5(4) of the *Citizenship Act*. The first was whether the discretion provided for in subsection 5(4) should be exercised in favour of granting citizenship to the two children. The second was whether the one-generation abroad limitation violates Mr. Grossmann-Hensel's rights under sections 6 and 15 of the *Canadian Charter of Rights and Freedoms*, Part 1of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [the *Charter*].

[19] The MD identified the issue as being "whether the Applicants are deserving of a discretionary grant of citizenship under subsection 5(4) of the Citizenship Act in order to alleviate a case of statelessness, special or unusual hardship or to reward services of an exceptional value to Canada." Specifically, the MD addressed: (1) whether subsection 3(3) is discriminatory, and (2) the children's connections to Canada flowing from their father's connection to Canada and the contribution the Applicants' extended family members had made to Canada. In addition, the MD considered the best interests of the children [BIOC].

[20] The MD noted a discretionary grant of citizenship may be considered where a case falls within one or more of the three situations enumerated at subsection 5(4) of the *Citizenship Act*: statelessness, cases of special and unusual hardship, or to reward cases involving services of an

exceptional value to Canada. The MD noted subsection 5(4) applications are to be considered on a case-by-case basis and the onus rests with the applicant to demonstrate at least one of the required criteria are met and explain why they should receive a discretionary grant.

[21] The MD concluded the children were not stateless, had not experienced special or undeserved hardship and had not provided services of exceptional value to Canada warranting a discretionary grant of citizenship.

(1) The MD finds subsection 3(3) of the *Citizenship Act* is not discriminatory

[22] In addressing the argument that the one-generation abroad limitation as set out at subsection 3(3) is discriminatory, the MD first noted the 2016 decision refusing a citizenship certificate on this basis was not challenged by way of an application for leave and for judicial review in this Court. The MD disagreed with the assertion that Mr. Grossmann-Hensel's citizenship is inferior or that the subsection 3(3) resulted in unusual hardship, which could only be alleviated by a grant of citizenship under subsection 5(4). The MD noted Bill C-37 sought to protect the value of Canadian citizenship, citizenship is a creature of federal statute and the one-generation abroad limitation is applicable to anyone in the Applicants' situation – that is, it is neutral on its face. The MD found there is no denial of equal treatment based on immutable characteristics and that any distinction between the Applicants and children born in Canada is based on specific circumstances and not discriminatory grounds.

[23] The MD concluded the change in the law does not, in this instance, lead to statelessness or result in special or unusual hardship such that a discretionary grant of citizenship under subsection 5(4) is warranted.

(2) The children's connection to Canada is minimal

[24] The MD then addressed the submissions that the children were deserving of a discretionary grant of citizenship on the basis that their father, having spent his childhood in Canada, has a significant connection to Canada, and that they are members of a prominent family which has made significant contributions to Canadian business, politics, philanthropy and culture. The MD noted subsection 5(4) of the *Citizenship Act* does not require an assessment of an applicant's connection to Canada but considered these submissions nonetheless.

[25] The MD noted the submissions focussed on Mr. Grossmann-Hensel's connection to Canada and the contributions of the children's extended family to Canada, not their own. The MD acknowledged this was understandable given their young age, but also noted there was no evidence the children had knowledge of Canada or an understanding of the significance of citizenship. The MD also noted the lack of evidence indicating the children had visited Canada or had a connection to Canada beyond their family members. The MD found they did not have a stronger connection to Canada than France, their place of birth, or the United Kingdom, their place of residence. The MD concluded the children's "minimal connection" to Canada was not a basis for granting citizenship.

(3) BIOC

[26] While not a factor specifically identified in subsection 5(4), the MD concluded that in rendering a decision as to whether to grant citizenship on a discretionary basis, the impact of that decision on the best interests of the children deserved attention and consideration. The MD noted the children are not stateless, they live with their parents outside Canada and they are able to travel freely on their Australian passports. The MD concluded the children would not suffer special or unusual hardship by not being granted Canadian citizenship and that they are eligible to apply for permanent residence and ultimately citizenship.

B. *The Reconsideration Decision*

[27] In seeking reconsideration, the Applicants made a number of further submissions: (1) the Applicants' family could not have anticipated the Bill C-37 amendments; (2) where Applicants are children, family connections and a family's contributions to Canada should be considered in assessing whether a discretionary grant of citizenship is warranted; (3) the Minor Applicants have no permanent status in either France or the United Kingdom, they could lose the right to live in the United Kingdom if they leave for more than six months and they no connection to either Germany or Australia, their countries of citizenship; and (4) the Applicants have travelled to Canada to visit family, the only country to which they have a true connection. The Applicants further argued that subsection 5(4) of the *Citizenship Act*, properly interpreted, provides for a general exception that may apply where a grant of citizenship has been refused for any reason under the *Citizenship Act*.

[28] In addressing the request for reconsideration, the MD concluded there was discretion to reconsider the Original Decision, relying on *Canada (Citizenship and Immigration) v Kurukkal*, 2010 FCA 230. The MD then addressed the submissions made.

(1) Anticipating the change in the Law

[29] The MD rejected the argument that a different route to citizenship for Mr. Grossmann-Hensel might have been pursued in 1987 had there been knowledge of the Bill C-37 amendments at the time. The MD found that paragraphs 3(1)(g) and (h) of the *Citizenship Act* deemed Mr. Grossmann-Hensel to be a Canadian citizen on the day he was born regardless of the means of grant previously relied on under section 5 of the *Citizenship Act*. The MD noted it is not open to a person who is a Canadian citizen by birth to apply for and obtain a grant of citizenship.

(2) Specific grounds enumerated at subsection 5(4)

[30] The Delegate then noted subsection 5(4) is meant for special cases and is not intended to be used to circumvent the usual citizenship grant process. The MD rejected the Applicants' submission that they need not meet one or more of the criteria set out in subsection 5(4), noting the jurisprudence relied upon to support this point was not applicable to their circumstances. The MD further noted the Original Decision considered and addressed submissions alleging the first generation limitation on citizenship by descent is discriminatory.

(3) Services of exceptional value provided by family members not a basis to award the Applicants

[31] The MD noted the Applicants' argument that they should be rewarded based on their family's contributions to Canada was new. In their original application, they had submitted the family's contributions were evidence of a strong connection to Canada. The MD found that family contribution was not a basis for granting citizenship because a discretionary grant is intended to award an individual for exceptional services, not to award individuals for the accomplishments of their relatives. A discretionary grant of citizenship was not available on this basis as the Applicants had not demonstrated services of their own, which might be considered of an exceptional value to Canada.

(4) Connection to Canada

[32] In considering the submissions relating to the Applicants' connection to Canada, the MD noted this had been considered in the Original Decision, that the connection had been found to be "modest at best" and, in any event, connection to Canada was not a basis for granting citizenship. The Delegate found that evidence provided on reconsideration indicating Mathilde had visited Canada once in 2013 and had been granted travel authorization to enter Canada in 2018 was not sufficient to alter the decision refusing a discretionary grant of citizenship.

IV. Preliminary Matters – amendments to the style of cause and clarifying the Records in the two Applications

[33] The Respondent requests the style of cause be amended to reflect the proper Respondent, the Minister of Citizenship and Immigration. The Applicants do not oppose the requested amendment. I am satisfied the Minister of Citizenship and Immigration is the proper Respondent and the style of cause is so amended.

[34] In written submissions, counsel for Applicants advise the Applicants' surname has been misspelled in the Notice of Applications as Grossman-Hensel. The correct spelling is Grossmann-Hensel. The style of cause is amended to reflect the correct spelling of the Applicants' surname.

[35] For clarity purposes only, I note the Certified Tribunal Records [CTR] relating to the two decision have been filed on the incorrect court docket numbers. The CTR relating to the December 16, 2019 decision (the Original Decision) has been filed on Court Docket T-980-20 instead of T-981-20. Similarly, the CTR relating to the July 29, 2020 decision (the Reconsideration Decision) has been filed on Court Docket T-981-20 instead of T-980-20.

V. Issues

[36] The parties have identified numerous issues which I have framed as follows:

A. Does Mr. Grossmann-Hensel have standing in these Applications?

B. Did the MD breach procedural fairness by failing to consider the entire application?

C. Did the MD reasonably interpret subsection 5(4) of the *Citizenship Act* in considering the Applicants' connections to Canada?

D. Did the MD reasonably find paragraph 3(3)(a) of the *Citizenship Act* is not discriminatory?

VI. Standard of Review

[37] In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the majority of the Supreme Court of Canada set out a revised framework for determining the standard of review with respect to the merits of an administrative decision. Administrative decisions are to be presumptively reviewed on the reasonableness standard unless either legislative intent or the rule of law requires otherwise (*Vavilov* at paras 10 and 17). There is no basis for derogating from the presumption that reasonableness is to be adopted in reviewing the merits of the MD's decision.

[38] In determining whether a decision is reasonable, a reviewing court must consider "the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome" to determine whether the decision is "based on an internally coherent and rational chain of analysis" and is "justified in relation to the facts and law that constrain the decision maker." (*Vavilov* at paras 83 and 85; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at paras 2 and 31 [*Canada Post*]). A reasonable decision is one that is justified, transparent and intelligible (*Vavilov* at para 99).

[39] In conducting a reasonableness review, the reviewing court is to take a "reasons first" approach (*Canada Post* at para 26). The reviewing court must begin its inquiry into the reasonableness of the decision "by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion" (*Vavilov* at para 84). The reasons must be read holistically and contextually in light

of the record as a whole and with due sensitivity to the administrative setting in which they were given (*Vavilov* at paras 91-94 and 97). However, "it is not enough for the outcome of a decision to be justifiable [...] the decision must also be justified" (*Vavilov* at para 86).

[40] Before a decision can be set aside on the basis that it is unreasonable, the reviewing court must be satisfied that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100). An assessment of the reasonableness of a decision must be robust, but it must remain sensitive to and respectful of the administrative decision maker (*Vavilov* at paras 12-13).

[41] In considering issues of fairness, the approach to be taken by a reviewing court has not changed following *Vavilov* (*Vavilov* at para 23). It has generally been held that correctness is the standard to be applied to issues of fairness (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43). However, the Federal Court of Appeal has confirmed that questions of procedural fairness are not truly decided according to any particular standard of review. Rather, procedural fairness is more a legal question to be answered by the reviewing court; the court must be satisfied that the procedure was fair having regard to all of the circumstances (*Lipskaia v Canada (Attorney General)*, 2019 FCA 267 at para 14; *Canadian Airport Workers Union v International Association of Machinists and Aerospace Workers*, 2019 FCA 263 at paras 24-25; *Perez v Hull*, 2019 FCA 238 at para 18; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54). No deference is owed to the decision maker on issues of procedural fairness.

[42] The parties agree that constitutional questions are reviewable on a correctness standard (*Vavilov* at para 17). However, the Respondent argues the constitutional question raised by the Applicants is not properly before the Court. The Respondent submits that, instead, the issue is whether the MD's refusal of the subsection 5(4) citizenship application is consistent with the *Charter* and its values. Does the decision disproportionately and unreasonably limit a *Charter* right? This question, the Respondent argues, is to be considered against a reasonableness standard of review using the framework identified by the Supreme Court of Canada in *Doré v Barreau du Québec*, 2012 SCC 12 [*Doré*]. I agree with the Respondent that the constitutional question is not properly before the Court and address this issue below.

VII. Analysis

A. *Mr. Grossmann-Hensel does not have standing*

[43] The Respondent relies on *Chinenye v Canada (Citizenship and Immigration)*, 2015 FC 378 [*Chinenye*] in submitting Mr. Grossmann-Hensel is not properly a party to these Applications because he is not directly affected by the subsection 5(4) decision under review.

[44] The Applicants take the position that Mr. Grossmann-Hensel is directly affected by the Applications as they impact upon his right to pass on his citizenship. In the alternative, the Applicants rely on *Mfudi v Canada (Citizenship and Immigration)*, 2019 FC 1319 [*Mfudi*] and *Reducto v Canada (Citizenship and Immigration)*, 2020 FC 511, in submitting Mr. Grossmann-Hensel should be added as a necessary party under Rule 104(1)(b) of the *Federal Courts Rules*,

SOR/98-106, because he is the children's father and his presence is necessary to ensure that the matters in the proceeding are properly determined.

[45] In my view, Mr. Grossmann-Hensel is not properly a party to these Applications.

[46] Section 18.1(1) of the *Federal Courts Act*, RSC 1985, c F-7 [*Federal Courts Act*], provides that an application for judicial review may be brought by anyone directly affected by the matter for which relief is being sought:

18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.	18.1 (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.

[47] The test to be used in determining whether a party is directly affected is "whether the matter at issue directly affects the party's rights, imposes legal obligations on it, or prejudicially affects it directly" (*Mfudi* at para 7, citing *Douze v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1337 at para 15).

[48] The decision made under subsection 5(4) of the *Citizenship Act* to refuse a discretionary grant of citizenship to the Applicants does not directly affect Mr. Grossmann-Hensel.

[49] I recognize that Mr. Grossmann-Hensel, as the children's father, has an obvious interest in the issues raised, but he is not directly affected in a manner that would provide him with standing. As has been held in the immigration context, the effect of a negative citizenship

decision on a family member is not enough to meet the directly affected threshold set out in s 18.1(1) of the *Federal Courts Act (Chinenye* at para 17). While the subsection 5(4) request was triggered by a prior decision that found Mr. Grossmann-Hensel's children did not acquire citizenship at birth, that is not the decision before the Court in this instance. Without expressing any view on the merits of the argument that Mr. Grossmann-Hensel has a right to pass down citizenship to his children, these Applications do not engage those issues.

[50] Nor am I convinced that Mr. Grossman-Hensel is a necessary party to the Applications pursuant to Rule 104(1)(b).

[51] In *Air Canada v Thibodeau*, 2012 FCA 14, the Federal Court of Appeal stated the test for joinder at paragraph 11: "[t]he only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action, and the question to be settled therefore must be a question in the action which cannot be effectually and completely settled unless he is a party." Mr. Grossmann-Hensel has not demonstrated that his involvement as a party is required to effectually and completely determine the issues raised in relation to the subsection 5(4) decisions.

[52] I am satisfied Mr. Grossmann-Hensel has no standing in these matters. Therefore, it will be ordered that the Applicant Gert Stuart Grossmann-Hensel be struck from the style of cause.

B. *There was no breach of procedural fairness*

[53] The Applicants advise that a comprehensive 399-page package of documents supported their application for a discretionary grant of citizenship. The CTR provided in respect of the Original Decision includes only the first 169 pages of the package and the Applicants note the Respondent has certified the CTR as produced to be a true copy of the original tribunal record.

[54] The Applicants submit a failure to consider the entire record amounts to a breach of procedural fairness and is a sufficient ground to overturn the MD's decision. The Respondent submits there was no breach of procedural fairness.

[55] A deficient or incomplete CTR will result in an administrative decision being set aside where the evidence missing from the certified record is particularly material to the finding under review (*Machalikashvili v Canada (Minister of Citizenship and Immigration)*, 2006 FC 622 at para 9; *Ilori v Canada (Citizenship and Immigration)*, 2021 FC 627 at para 9; *Togtokh v Canada (Citizenship and Immigration)*, 2018 FC 581 at para 16).

[56] In this instance, the documentation the Applicants report is missing from the CTR has been included as part of the Applicants' Record (Exhibit "A" to the Affidavit of Rachel Maher) and consists of the following:

A. Select excerpts from a publication detailing the Applicants' family history in Canada between 1850 and 2010 (pages 170-179);

B. Citizenship - Legislation, Senate Debates, Reports (pages 180 – 310);

C. Citizenship – Relevant Case Law and Articles (pages 311 – 399).

[57] Where, as here, the missing portions of the CTR are otherwise available, the Court is in a position to assess the materiality of the missing documentation.

[58] Although the CTR does not include pages 170-399 of the Applicants' package of documents, the MD's decision addresses and grapples with the information contained therein. For example, the MD's decision recognizes and addresses the substantial family contribution to Canadian politics, business and philanthropy, specifically referencing family member service to Canada in both World Wars, in the Canadian Senate, and in support of numerous charitable foundations supporting Canadian hospitals and universities. Similarly, the decision addresses relevant legislative provisions, the underlying legislative aims of Bill C-37 and refers to relevant jurisprudence. The Applicants have not pointed to any prejudice or material unfairness arising from the absence of pages 170-399 of their submissions from the CTR.

[59] In the circumstances, I am satisfied the information contained in pages 170 – 399 was considered and addressed by the MD. The missing documentation has not resulted in any material unfairness and therefore I find there has been no breach of procedural fairness on these facts.

C. *Did the MD reasonably interpret subsection 5(4) or otherwise err in assessing the Applicants' connections to Canada?*

(1) The Applicants' submissions

[60] The Applicants rely on section 12 of the *Interpretation Act*, RSC 1985, c I-21, and the decision of the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd (Re*), [1998] 1 SCR 27 [*Rizzo*]. They argue that, properly interpreted, subsection 5(4) provides discretion to grant citizenship to individuals who have a deserving claim to citizenship but might otherwise be disqualified due to unforeseen or unanticipated circumstances. They submit this interpretation reflects the purpose and intent of Parliament and allows for a harmonious reading of subsection 5(4) within the broader *Citizenship Act*.

[61] The Applicants submit it is unreasonable to interpret subsection 5(4) as limiting consideration of a discretionary grant of citizenship to only those circumstances where an applicant has first satisfied one of the three legislated conditions: statelessness, cases of special and unusual hardship, or to reward cases involving services of an exceptional nature to Canada. They submit this interpretation is unduly narrow, inconsistent with the purpose and intent of the legislation and contrary to the intent of Parliament. They submit the MD further erred in finding a minor applicant must satisfy one of the three legislated requirements without relying on the circumstances and contributions of family members. In failing to consider family connections to Canada and failing to recognize the loss of family heritage as a special hardship under subsection 5(4), the MD fettered their discretion by refusing the application. In summary, it is argued that

the MD's failure to consider Mr. Grossmann-Hensel's connection to Canada and the extensive contributions of the Applicants' extended family to Canada was unreasonable.

[62] The Applicants further submit that requiring the Applicants to first establish they satisfy one of the three legislated requirements for a discretionary grant of citizenship is contrary to the children's best interests. The MD's narrow approach failed to consider the loss to the Applicants of their heritage despite generations of family presence in and contribution to Canada.

(2) The Respondent's submissions

[63] The Respondent does not take issue with the Applicants' view that the MD was required to adopt a broad interpretation to subsection 5(4) and that the discretion granted is broad but not unlimited.

[64] The Respondent submits the MD's interpretation of subsection 5(4) as requiring the Applicants to demonstrate they satisfy one of the three legislated conditions for a discretionary grant of citizenship was reasonable. The Respondent further submits "special and unusual hardship" means something more than the denial of citizenship itself and it is reasonably open to the MD to conclude special and unusual hardship has not been established where reliance is placed on a family connection as opposed to a personal connection to Canada. The Respondent submits the Applicants' arguments relating to family connection and contribution were considered and the Applicants' position on judicial review amounts to a disagreement with the MD's weighing of the evidence.

[65] The Respondent further submits the BIOC analysis was reasonable and commensurate with the submissions made.

(3) The MD reasonably interpreted subsection 5(4) and did not err in assessing the children's connections to Canada or their best interests

(a) *Interpretation of subsection 5(4)*

[66] Section 5(4) of the *Citizenship Act* is set out earlier in these reasons, but for ease of reference it is helpful to repeat it here:

Special cases	**Cas particuliers**
5 (4) Despite any other provision of this Act, the Minister may, in his or her discretion, grant citizenship to any person to alleviate cases of statelessness or of special and unusual hardship or to reward services of an exceptional value to Canada.	5 (4) Malgré les autres dispositions de la présente loi, le ministre a le pouvoir discrétionnaire d'attribuer la citoyenneté à toute personne afin de remédier à une situation d'apatridie ou à une situation particulière et inhabituelle de détresse ou de récompenser des services exceptionnels rendus au Canada.

[67] In interpreting a statutory provision, the words of a statute must be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the given law, the object of the law, and the intention of Parliament (*Vavilov* at para 117, citing *Rizzo* at para 21 and *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at para 26, both quoting E. Driedger, *Construction of Statutes* (2nd ed 1983), at p 87).

[68] Administrative decision makers need not necessarily engage in a formalistic statutory interpretation, but, whatever form the interpretive analysis takes, the interpretation must be consistent with the text, context and purpose of the provision (*Vavilov* at paras 119-120).

[69] The Applicants have argued the MD's interpretation of subsection 5(4) is inconsistent with the purpose and context of the provision. I am not persuaded that this is so.

[70] The text of subsection 5(4) is not ambiguous; it provides a discretion to grant citizenship "to any person to alleviate cases of statelessness or of special and unusual hardship or to reward services of an exceptional value to Canada." The text does not suggest the enumerated circumstances are illustrative or otherwise can be expanded upon, as the Applicants appear to argue. As noted in *Vavilov*, "[w]here… the words used are 'precise and unequivocal', their ordinary meaning will usually play a more significant role in the interpretation exercise" (*Vavilov* at para 120, citing *Canada Trustco Mortgage Co v Canada*, 2005 SCC 54 at para 10).

[71] Nor does the broader context support the Applicants' position that the MD's interpretation was unreasonable. The Delegate did consider context in interpreting the breadth of discretion provided by subsection 5(4). The MD outlined the legislative history of the relevant provisions, noted why the changes provided for in the 1977 *Citizenship Act* were considered necessary, detailed the objectives of the one-generation abroad limitation contained in Bill C-37 and described the intended purpose of subsection 5(4). The MD noted subsection 5(4) is "intended for special cases, with each case being considered on its own merits."

[72] The Applicants argue the parliamentary record discloses significant opposition to the one-generation abroad limitation. In this regard, I note Parliament did not choose to amend the legislation despite the concerns reflected within the parliamentary record the Applicants placed before the MD. I am therefore unable to conclude it was unreasonable for the MD to have not expressly addressed these submissions. A decision maker need not address every argument or issue raised (*Vavilov* at para 128).

[73] The Applicants also argues that the then-responsible Minister's lobbying for the one-generation abroad limitation stated, in various forums, that the intent of the limitation was to ensure those receiving citizenship have a true connection to Canada.

[74] The MD was not unaware of this. The MD noted in the Original Decision that Bill C-37 "sought to protect the value of citizenship by limiting it to the first generation born abroad putting an end to the possibility of Canadian citizenship being passed down indefinitely to people who have little or no connection to Canada." The MD then considered whether special and unusual hardship arising from the Applicants' connections to Canada warranted a discretionary grant of citizenship under subsection 5(4).

[75] The MD's interpretation of subsection 5(4) did not exclude from consideration the Applicants' connections and attachments to Canada. Instead, the MD engaged in a consideration of the Applicants' evidence and submissions in this regard. The MD found the submissions and evidence related to the experience of the Applicants' extended family and father and that the

Applicants' personal connections to Canada were "modest at best." This conclusion is consistent with the evidence.

[76] The Applicants argue that the MD's interpretation and application of subsection 5(4) ignores the Applicants' family lineage. They submit family lineage establishes a true connection to Canada, relying on *Tully v Canada (Citizenship and Immigration)*, 2020 FC 547 [*Tully*].

[77] *Tully* does not consider subsection 5(4). The Court's comments respecting family lineage in that case were cited as "a point of interest," with Justice Susan Elliott noting that "I do not believe Mr. Tully was making submissions that lineage could trump the provisions of the *Citizenship Act*" (*Tully* at paras 67 and 70). I also note that reference is made in *Tully* to a strong personal attachment arising from visits to Canada as a child and continued annual visits as a father (at para 76). There is no similar evidence of a strong personal attachment in this instance. *Tully* is of no assistance in considering the reasonableness of the MD's interpretation and application of subsection 5(4).

[78] The Applicants also submit the MD's interpretation of subsection 5(4) has the effect of barring or it making it impossible for a minor applicant to obtain a discretionary grant of citizenship despite provisions in the *Act* that allow a minor applicant to do so. The MD's interpretation has no such effect. Minor applicants may well satisfy the criteria prescribed at section 5(4). That such circumstances may be rare does not render the MD's interpretation of subsection 5(4) unreasonable.

[79] The Applicants in turn rely on *Worthington v Canada (Citizenship and Immigration)*, 2008 FC 626 [*Worthington*] to advance their view that they need not demonstrate they satisfy one of the three circumstances enumerated in subsection 5(4).

[80] As the Respondent notes, *Worthington* addresses significantly different circumstances. In that case, the requirement to demonstrate special or unusual hardship or services of an exceptional value to Canada was found to be contrary to the purpose of a valid "Interim Measure" addressing citizenship for children adopted abroad (*Worthington* at paras 56-57). In the decision, Justice John O'Keefe addresses the interpretation of subsection 5(4), stating:

> [55] The purpose of [subsection 5(4)] 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.
>
> [Emphasis added.]

[81] *Worthington* is not inconsistent with the MD's interpretation of subsection 5(4).

[82] A contextual and purposive analysis does not suggest an interpretation of subsection 5(4) that is inconsistent with the textual reading of that provision. The MD reasonably interpreted the subsection as requiring the Applicants to demonstrate they satisfy one of the three enumerated circumstances in seeking to obtain a discretionary grant of citizenship.

[83] That being the case, I will turn to the Applicants' arguments that the MD unreasonably concluded a refusal of a discretionary grant of citizenship would not result in special and unusual hardship arising from the Applicants' family heritage and family connection to Canada. I will also address the Applicants' argument that the MD unreasonably concluded they were unable to rely on "services of exceptional value" provided to Canada by their extended family members.

(b) *Hardship and services of exceptional value*

[84] What constitutes "special and unusual hardship" under subsection 5(4) has not been developed to the same degree as the meaning of "hardship" under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27. This was noted by Justice James Russell in *Ayaz v Canada (Citizenship and Immigration)*, 2014 FC 701, where he states:

> [50] The jurisprudence on "special and unusual hardship" under s. 5(4) of the *Act* is not as well developed as, for example, the jurisprudence on the meaning of hardship under s. 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27. While there is no firmly established test for "special and unusual hardship" under s. 5(4) of the Act, in my view, the following remarks by Justice Walsh in *Re Turcan* (T-3202, October 6, 1978, FCTD), as quoted by him in *Naber-Sykes (Re)*, [1986] 3 FC 434, 4 FTR 204 [*Naber-Sykes*] remain valid and serve as a good starting point:
>
> > The question of what constitutes "special and unusual hardship" is of course a subjective one and

> Citizenship Judges, Judges of this Court, the Minister, or the Governor in Council might well have differing opinions on it. Certainly the mere fact of not having citizenship or of encountering further delays before it can be acquired is not of itself a matter of "special and unusual hardship", but in cases where as a consequence of this delay families will be broken up, employment lost, professional qualifications and special abilities wasted, and the country deprived of desirable and highly qualified citizens, then, upon the refusal of the application because of the necessarily strict interpretation of the residential requirements of the Act when they cannot be complied with due to circumstances beyond the control of the applicant, it would seem to be appropriate for the Judge to recommend to the Minister the intervention of the Governor in Council […]

[85] Neither the mere absence of citizenship nor the delay in obtaining citizenship will normally be sufficient to establish special and unusual hardship. However, the consequences of a denial of the absence of citizenship or delay in obtaining that citizenship are factors that will be relevant in considering special or unforeseen hardship. Where a decision maker considers these factors in the exercise of the broad discretion granted by subsection 5(4), a court will not ordinarily intervene:

> [52] In *Linde v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 739, [2001] FCJ No 1085, which also dealt with absences due to employment obligations, Justice Blanchard reviewed some of the jurisprudence on this question, which emphasized the discretionary nature of the decision. Unless the citizenship judge fails to take into account some relevant factor (see *Khat (Re)*, [1991] FCJ No 949, 49 FTR 252), or acted with bias or improper motive (see *Kalkat*, above; *Akan v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 991 at para 11, 170 FTR 158), there is generally no basis for a court to interfere. With respect to the case before him, Justice Blanchard observed:

> [24] I am satisfied that the Citizenship Judge in this case did indeed take into account the relevant factors in the exercise of his discretion pursuant to subsection 15(1) of the Act. The applicant has not shown that the Citizenship Judge ignored any evidence before him, or erred in any way in determining that there was no unusual hardship which would result under subsection 5(4) of the Act... (*Ayaz* at para 52)

[86] In this instance, the MD did consider and address the arguments made and the evidence presented. In doing so, the nature of Mr. Grossmann-Hensel's connection to Canada was considered, as was the presence of family in Canada including the Applicants' maternal grandmother. The Delegate also recognized the significant contribution to Canada of the Applicants' extended family over generations. However, the MD found the submissions and evidence lacking as they failed to demonstrate the Applicants had any personal connection to Canada.

[87] The MD acknowledged that, for minors, the opportunity to demonstrate such a connection might be limited but also noted the absence of any age appropriate evidence describing the Applicants' general knowledge of Canada, the responsibilities of citizenship and the limited evidence of visits to Canada.

[88] In pursuing reconsideration of the original decision, the only additional evidence provided in this regard were Electronic Travel Authorizations for the Applicants authorizing travel to Canada by air and a 2013 entry stamp in Mathilde's passport. The MD addressed this evidence but found it was not persuasive and did not alter their Original Decision.

[89] The MD reasonably concluded the Applicants' family heritage and connection to Canada did not establish they would suffer from special or unusual hardship as a result of a refusal to grant citizenship under subsection 5(4).

[90] The argument that the Applicants should benefit from the services and contribution to Canada made by extended family members was a new issue raised on reconsideration. The MD noted this but nonetheless addressed the submissions, concluding a discretionary grant of citizenship is intended to recognize the exceptional services rendered by an applicant, not the services rendered by a family member. While the Applicants disagree with the MD's conclusion in this regard, that disagreement does not render the decision unreasonable.

(c) *BIOC*

[91] Finally, I am satisfied the MD was alert to the fact that the Applicants were minors whose interests were directly engaged and required consideration in assessing the request against the statutory criteria. In conducting this analysis, the MD noted that the Applicants were living with their parents outside Canada and that they could travel freely on their Australian passports. The MD also noted other options remained available to obtain Canadian citizenship.

[92] In summary, the MD grappled with the issues raised and the decisions are internally coherent and exhibit a rational chain of analysis.

[93] The MD's interpretation and application of subsection 5(4) is justified, transparent and intelligible.

D. *Did the MD reasonably find paragraph 3(3)(a) of the Citizenship Act is not discriminatory?*

[94] The Applicants submit the MD erred in concluding that paragraph 3(3)(a) of the *Citizenship Act* as amended by Bill C-37, the one-generation abroad limitation, is not discriminatory. The Applicants argue that birth abroad is an immutable characteristic with the resultant disadvantage of a foreign-born Canadian being unable to pass citizenship to their children who are also born abroad. The Applicants argue the distinction the legislation draws between citizens born abroad and those born or naturalized in Canada is arbitrary. The Applicants also note Ms. Grossmann-Hensel's niece, who was born abroad prior to the Bill C-37 amendments coming into force, is a Canadian citizen, highlighting the arbitrary nature of the one-generation abroad limitation. It is submitted that paragraph 3(3)(a) violates subsection 15(1) of the *Charter* and it is not saved by section 1.

[95] The Respondent submits the constitutionality of paragraph 3(3)(a) of the *Citizenship Act* is not properly before the Court. The Applicants are seeking judicial review of decisions made under subsection 5(4); paragraph 3(3)(a) was not determinative of the decisions in issue.

[96] I agree with the Respondent that the constitutional issue is not properly before the Court for two reasons. First, the issues raised in the two Applications before me relate to decisions under subsection 5(4) of the *Citizenship Act*. Although the subsection 5(4) applications for a discretionary grant of citizenship follow a determination that the Applicants are not citizens due to the operation of paragraph 3(3)(a) of the *Citizenship Act*, paragraph (3)(3)(a) was not determinative of the applications for citizenship. In this respect, the Respondent's view that a

challenge to paragraph 3(3)(a) should have been advanced in an application for leave and for judicial review of the decision refusing a citizenship certificate is persuasive. Secondly, the alleged *Charter* breach is framed as a breach of Mr. Grossmann-Hensel's rights. I have already determined Mr. Grossmann-Hensel is not a necessary party to these proceedings and he does not have standing.

[97] The MD did consider subsection 3(3) of the *Citizenship Act* in response to the Applicants' argument that subsection 3(3) is discriminatory and that this should inform the MD's exercise of discretion under subsection 5(4). The MD rejected this argument, finding subsection 3(3) is not discriminatory.

[98] In concluding the one-generation abroad limitation is not discriminatory, the MD noted its purpose (to protect the value of citizenship). The MD further concluded the provision did not deny citizenship based on an immutable characteristic such as race or religion but instead applied equally and universally to all persons born abroad in the second generation after April 17, 2009. Distinctions that arose between children born in Canada or to naturalized citizens flowed from the specific circumstances of each case, not a recognized or analogous ground of discrimination. The MD also noted that no obvious discrimination arose from the application of the neutral law in this instance.

[99] The MD's analysis is consistent with that adopted in *Tully*, where it was held paragraph 3(3)(a) did not violate section 15 of the *Charter*. In *Tully*, it was argued that paragraph 3(3)(a) discriminated on the basis of the enumerated ground of national origin. The Court held the

provision did not make a distinction based on national origin because "it applies regardless of country of origin... the country of origin is not part of the examination of whether paragraph 3(3)(a) applies" (*Tully* at para 57). Therefore, the Court found no *Charter* breach (*Tully* at para 61).

[100] The MD's conclusions engaged a consideration of the values reflected in section 15 of the *Charter* and in doing so the MD concluded those values were not engaged. This conclusion was both reasonable and supported by a rational chain of analysis.

[101] Having concluded the MD reasonably found that *Charter* rights or values were not engaged, I need not pursue an assessment of whether the decision reflects a proportionate balancing between any *Charter* protections in play and the objectives of the legislation (*Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at para 58, citing *Doré* at para 57 and *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 at para 39).

VIII. Conclusion

[102] I am satisfied there was no breach of procedural fairness and the MD's decision was reasonable. The Applications are dismissed.

[103] The parties have not identified a question of general importance for certification, and I am satisfied none arises.

JUDGMENT IN T-980-20 AND T-981-20

THIS COURT'S JUDGMENT is that:

1. The style of cause is amended with immediate effect to:
    a. Name the Minister of Citizenship and Immigration as the Respondent;
    b. Reflect the correct spelling of the Applicants' surname as "Grossmann-Hensel."
2. The Applicant, Gert Stuart Grossmann-Hensel is struck from the style of cause.
3. The Applications are dismissed.
4. No question of general importance is certified.

"Patrick Gleeson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-980-20 AND T-981-20
STYLE OF CAUSE:	MATHILDE GROSSMANN-HENSEL, MAGNUS GROSSMANN-HENSEL BY THEIR LITIGATION GUARDIAN GERT STUART GROSSMANN-HENSEL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	BY VIDEOCONFERENCE
DATE OF HEARING:	AUGUST 18, 2021
JUDGMENT AND REASONS:	GLEESON J.
DATED:	FEBRUARY 14, 2022

APPEARANCES:

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