Federal Court

Cour fédérale

Date: 20140108

Docket: T-229-12

Citation: 2014 FC 19

Ottawa, Ontario, January 8, 2014

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

GENOVEVA WATZKE, RALPH WATZKE
AND JEFFREY WATZKE (A MINOR)

Applicants

and

MINISTER OF CITIZENSHIP &
IMMIGRATION CANADA,
CITIZENSHIP & IMMIGRATION
CASE MANAGEMENT BRANCH,
THE ATTORNEY GENERAL OF CANADA
AND STELLA HOLLIDAY

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is an application under section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 [FCA] for judicial review of a decision of a delegate of the Minister of Citizenship and Immigration [Officer], dated December 21, 2011 [Decision], which refused the application of Genoveva Watzke

and Ralph Watzke [Applicants] on behalf of Jeffrey Watzke [minor Applicant] for a Certificate of Citizenship [Certificate] under subsection 12(1) of the *Citizenship Act*, RSC, 1985 c C-29 [Act]. The Applicants request that this Decision be set aside and the Certificate be ordered to be issued to Jeffrey or, in the alternative, that the matter be sent back to be heard by a properly constituted tribunal for an in-person hearing.

BACKGROUND

[2] The minor Applicant was born in the Philippines on December 17, 2005. His mother, Genoveva Watzke [Ms. Watzke], is a citizen of the Philippines. The application for a Citizenship Certificate was based on the assertion that Ralph Watzke [Mr. Watzke], a Canadian citizen, is the child's father. This would make Jeffrey a Canadian Citizen under subsection 3(1) of the Act. Citizenship and Immigration Canada [CIC] found that there was insufficient proof that Mr. Watzke is Jeffrey's biological father, and therefore refused the application for a Citizenship Certificate.

[3] Mr. Watzke visited the Philippines from March 10, 2005 to March 25, 2005, approximately nine months before the minor Applicant's birth, and again from December 21, 2005 to January 9, 2006, shortly after Jeffrey's birth. The Applicants were married during the latter visit, on January 7, 2006. Mr. Watzke applied to sponsor both Ms. Watzke and Jeffrey to immigrate to Canada, but was informed that since it was claimed that Jeffrey was a Canadian Citizen, he could not be included in the sponsorship application. Rather, they would need to apply for a Citizenship Certificate.
Ms. Watzke arrived in Canada in April 2007, while Jeffrey apparently remained in the Philippines pending the outcome of the Citizenship Certificate application.

[4] It appears from the record that the Applicants first approached the Canadian embassy in Manila and were informed that DNA evidence would be required to show that Mr. Watzke was Jeffrey's father, since the birth had taken place at home under the care of a mid-wife and not in a hospital. They chose not to apply for the Certificate through the Manila embassy, but rather filed the application from inside Canada in June 2007, in the hopes it would receive more expeditious and favourable treatment. They claim to have feared that their application would be affected by corruption and ill-will from non-Canadian staff in the Manila embassy because they did not offer a bribe.

[5] In the event, officials in Canada consulted with officials at the Manila embassy regarding the application and were advised to request DNA evidence. This requirement was communicated to Mr. Watzke through a letter dated February 17, 2009, and was reiterated in further correspondence on July 23, 2009, June 1, 2010 and September 8, 2010. Mr. Watzke objected to the request for DNA evidence in a letter of June 30, 2010, arguing that it was unlawful and discriminatory. Thereafter he provided no further response. In December 2011, more than four years after the initial application was filed, the Respondent finalized its decision and informed the Applicants that the application had been denied.

DECISION UNDER REVIEW

[6] Mr. Watzke was advised of the refusal of Jeffrey's application through a letter of December 21, 2011, signed by Stella Holliday, an Analyst in the Case Management Branch of CIC. The relevant paragraphs are as follows:

> For the purposes of determining citizenship by birth outside Canada to a Canadian parent (derivative citizenship), the present citizenship

> policy only recognizes genetic parents (parents who have a parental genetic link to the child concerned). In all cases where there is information suggesting a parent, through whom a claim of derivative citizenship is made, is not the genetic parent, DNA evidence is requested.
>
> On February 17, 2009, my colleague at the Citizenship Processing Centre, Denise Aucoin, wrote to you requesting that you provide DNA evidence. It was explained that this information was needed in order to make a decision. On September 8, 2010, she wrote to you again stating that if she did not hear from you within 60 days, a decision would be made based on the documentation on hand. No reply has been received to date.
>
> Since you indicated you would not comply with this request for DNA evidence after the first letter and did no reply to the second, I must make a decision based on the information before me.
>
> As you have been unable to demonstrate a parental genetic link with the child, the application for a citizenship certificate for your child has been refused.

[7] Ms. Holliday's notes in CIC's Global Case Management System [GCMS] from the same date, which also form part of the decision, read in part as follows:

> Client's father applied for citizenship certificate. Application refused this date. Dec. 21/11. Parentage in question, Ralph Frank Watzke, shown as father on B.C. [Birth Certificate] refused to provide DNA as requested to document parentage which was in question due to home birth in Philippines, etc. Citizenship refusal letter attached in GCMS file…

[8] There are other notes in the GCMS and other documents in the file which, as part of the record before the final decision maker, can properly be seen as forming part of the justification for the Decision made: N*ewfoundland and Labrador Nurses' Union v Newfoundland and Labrador*

(Treasury Board), 2011 SCC 62 at para 15 [*Newfoundland Nurses*]. These will be referred to below as required. Of particular relevance in understanding the request for DNA evidence is the following paragraph from a letter of CIC to Mr. Watzke on 17 February 2009:

> Applications for proof of Canadian citizenship filed for children living outside of Canada are usually filed through the Canadian embassy closest to where the child resides. When an application is received that was *not* filed through an Embassy, we are required to contact our Embassy for advice on the documentation and information that has been provided. We have contacted our Embassy responsible for the Philippines, and upon review of the case, they have advised us to request DNA evidence to establish biological parentage between the Canadian parent and the child.

ISSUES

[9] The following issues arise in this proceeding:

a. Was the requirement for DNA evidence unreasonable?

b. Did the Officer fail to consider material evidence in a manner that makes the Decision unreasonable?

c. Was there a breach of procedural fairness?

d. Do the Officer's conduct or the reasons offered for the Decision give rise to a reasonable apprehension of bias?

STANDARD OF REVIEW

[10] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where

this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[11] In a case reviewing a similar decision by a citizenship officer, *Azziz v Canada (Minister of Citizenship and Immigration)*, 2010 FC 663 [*Azziz*], Justice Martineau stated the following:

> 27 Having analyzed the standard of review based on the usual tests, I am of the opinion that the correctness standard applies to the questions of law raised in this case, while the reasonableness standard applies to the findings of fact regarding which the analyst has recognized expertise. The questions of procedural fairness or bias are subject to the standard of correctness.
>
> 28 In this respect, an analyst's decision concerning the sufficiency of the evidence submitted by an applicant to confirm the citizenship of a person is reasonableness *(Worthington v. Canada (Minister of Citizenship & Immigration) (2008)*, 2008 CF 409, (sub nom. *Worthington v. Canada*) [2009] 1 F.C.R. 311 (F.C.) at paragraph 63) …

[12] In my view, the issue at the heart of the current application is the sufficiency of the evidence submitted by the Applicants to confirm Jeffrey's citizenship, which is reviewable on a standard of reasonableness.

[13] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at para 47,

and *Canada (Minister of Citizenship and Immigration) v Khosa,* 2009 SCC 12 at para 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[14] Issues of procedural fairness will be analyzed on a standard of correctness: *Canadian Union of Public Employees (C.U.P.E.) v Ontario (Minister of Labour)*, 2003 SCC 29 at para 100; *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at para 53.

[15] To the extent that the Applicants' allegations regarding discriminatory views and approaches on the part of CIC raise the issue of a reasonable apprehension of bias, Justice Martineau's analysis on the standard of review in *Azziz*, above, is also instructive on this point:

> 29 With regard to the question of apprehension of bias on the part of an administrative decision-maker, the appropriate answer is that which would be given by "an informed person, viewing the matter realistically and practically — and having thought the matter through". The apprehension of bias "must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information" (*Committee for Justice & Liberty v. Canada (National Energy Board)* (1976), [1978] 1 S.C.R. 369 (S.C.C.) at page 394, Grandpré J., dissenting; see also *R. v. Valente (No. 2)*, [1985] 2 S.C.R. 673 (S.C.C.) at page 685).

STATUTORY PROVISIONS

[16] The following provisions of the Act are applicable in these proceedings:

Definitions	**Définitions**
2. (1) In this Act,	2. (1) Les définitions qui

suivent s'appliquent à la présente loi.

[…]

[…]

"child"

« enfant »

« enfant »

"child"

"child" includes a child adopted or legitimized in accordance with the laws of the place where the adoption or legitimation took place;

« enfant » Tout enfant, y compris l'enfant adopté ou légitimé conformément au droit du lieu de l'adoption ou de la légitimation.

Persons who are citizens

Citoyens

3. (1) Subject to this Act, a person is a citizen if

3. (1) Sous réserve des autres dispositions de la présente loi, a qualité de citoyen toute personne :

[…]

[…]

(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;

[…]

[…]

Application for certificate of citizenship

Demandes émanant de citoyens

12. (1) Subject to any regulations made under paragraph 27(i), the Minister shall issue a certificate of citizenship to any citizen who has made application therefor.

12. (1) Sous réserve des règlements d'application de l'alinéa 27i), le ministre délivre un certificat de citoyenneté aux citoyens qui en font la demande.

[…]

[…]

Regulations	**Règlements**
27. The Governor in Council may make regulations	27. Le gouverneur en conseil peut, par règlement :
(a) prescribing the manner in which and the place at which applications are to be made and notices are to be given under this Act and the evidence that is to be provided with respect to those applications and notices;	a) fixer les modalités des demandes et avis prévus par la présente loi, le lieu où ils doivent se faire ou se donner et préciser les éléments de preuve à produire à leur appui;
[…]	[…]

[17] The following provisions of the *Citizenship Regulations*, SOR/93-246 [Regulations] are applicable in these proceedings:

10. An application by a citizen for a certificate of citizenship made under subsection 12(1) of the Act shall be	10. La demande présentée par un citoyen en vertu du paragraphe 12(1) de la Loi en vue d'obtenir un certificat de citoyenneté doit :
(a) made in prescribed form; and	*a)* être faite selon la formule prescrite;
(b) filed with the Registrar, together with	*b)* être déposée auprès du greffier, accompagnée des documents suivants :
(i) evidence that establishes that the applicant is a citizen, and	(i) une preuve établissant que le demandeur est un citoyen,
(ii) two photographs of the applicant of the size and type shown on a form prescribed under section 28 of the Act.	(ii) deux photographies du demandeur correspondant au format et aux indications figurant dans la formule prescrite en application de l'article 28 de la Loi.
[…]	[…]

28. Notwithstanding anything in these Regulations, a person who makes an application under the Act shall furnish any additional evidence in connection with the application that may be required to establish that the person meets the requirements of the Act and these Regulations.	28. Malgré les autres dispositions du présent règlement, la personne qui présente une demande en vertu de la Loi doit fournir toute preuve supplémentaire qui pourrait être nécessaire pour établir qu'elle remplit les conditions prévues dans la Loi et le présent règlement.

ARGUMENT

Applicants

[18] The Applicants argue that this application does not turn on matters of fact, but rather on the interpretation of the law, and specifically whether the Respondents were "required to accept the validity of an official document issued by the Republic of the Philippines Office of the Civil Registrar, being a Certificate of Live Birth of [the minor Applicant]." The Applicants say this is the sole issue in this proceeding.

[19] In addition to this argument regarding the substance of the Decision however, the Applicants say that CIC did not treat them fairly and failed to provide them with any procedural safeguards, including full disclosure and the opportunity to cross-examine on any evidence alleged against them. They also allege that there was an abuse of process in that the Officer took irrelevant considerations into account, fettered her discretion and used that discretion for an improper purpose.

[20] The rules established under the Act and the Regulations, as reflected in the application form, specifically request an official government-issued birth certificate, which was duly provided, the Applicants say. Nowhere is there any provision in law requiring DNA evidence or any provision

allowing such a demand to be made. The demand was therefore entirely unlawful. It is clear from the Regulations that other evidence relating to a child's birth can only be required if a birth certificate is unobtainable. The reason given for the dismissal of authentic documentation here was that the child was "born at home," which is arbitrary, capricious and purely speculative. There is nothing in the Certificate of Live Birth that states whether the birth took place at home or not; it only states that it was attended by a midwife. Furthermore, the Officer based her Decision on unspecified "policy", which is contrary to law.

[21] Based on the principle of comity, documents issued by a foreign government, including identity documents, are presumed to be valid and should be accepted as evidence of their contents unless there is some valid reason to doubt their authenticity, the Applicants argue. It is a reviewable error to discount their validity without evidence to support such a finding: *Rasheed v Canada (Minister of Citizenship and Immigration)*, 2004 FC 587 at para 19; *Azziz*, above; *Ramalingam v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 7241 (FC) (Order of January 8, 1998 in matter IMM-1298-97) (FC); *Gur, Jorge P.* (1971), 1 IAC 384 (IAB). It is not Canada's place to criticize the manner in which people lawfully give birth in other countries. In the Philippines, the Applicants submit, midwives are highly respected health professionals who are licensed and regulated by the government and adhere to high ethical and professional standards.

[22] Here, the Officer stated that DNA evidence is requested "[i]n all cases where there is information suggesting a parent… is not the genetic parent," but at no time did CIC disclose to the Applicants the existence of any such information. They therefore breached the duty of full disclosure and the duty to hear both sides (*audi alteram partem*), which is a breach of procedural

fairness, and likely based the Decision on secret evidence, the Applicants argue. The Officer could only reject the official documents based on solid evidence, not secret alleged evidence or mere "information suggesting". The onus is on the Respondents to prove that the documentation is fake, which they are extremely unlikely to be able to do.

[23] The only reason given for the DNA demand and the refusal to accept the birth certificate was that the child was born at home and not in a hospital. This, the Applicants assert, is highly discriminatory and racist, and is not consistently applied among countries. Rather, it is applied frequently to poor or "dark-skinned" countries and rarely to prosperous or "white" countries. It disproportionately affects applicants born in the Philippines, where a high percentage of births take place at home. It is thus contrary to subsection 15(1) of the *Canadian Charter of Rights and Freedoms*, Part I of *The Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11 [Charter], and section 3 of the *Canadian Human Rights Act*, RSC, 1985, c H-6. It also contravenes the mobility rights set out in subsection 6(1) of the *Charter*.

[24] There is nothing in the Act, Regulations, or published policies of CIC (which in any case do not have the status of law) stating that a birth certificate showing the birth to be attended by midwife is in any way invalid or not to be accepted. The applicable policy states that "DNA testing is an acceptable way to establish parentage in cases in which the documentary evidence is insufficient or impossible to find": *CP 3 Establishing Applicant's Identity, Policy and procedures for DNA testing, 5.1*. Here, sufficient documentation is available and DNA evidence has no proper role. The invented rule against recognizing birth certificates for midwife-attended births is a pretext for discrimination on the basis of country of origin, and is blatantly racist and discriminatory, the

Applicants argue. A decision based upon such a policy is wholly arbitrary and capricious. It also exhibits bias, and cannot be permitted to stand.

[25] The Officer also completely ignored the Applicants' expressed concerns regarding apparent corrupt practices in the Canadian embassy in Manila, the Applicants say. Specifically, they allege that the initial demand for DNA evidence was due to malicious retaliation by a non-Canadian employee at that embassy because of the Applicants' failure to provide a bribe. That rejection was therefore motivated by an improper and unlawful purpose.

Respondent

[26] The Respondent argues that the Officer who dealt with the application had reasonable grounds to request additional evidence that Mr. Watzke is a biological parent of Jeffrey, including DNA evidence, and the decision to refuse the application was therefore reasonable.

[27] Entries in the certified record show that the Officer was concerned that Mr. Watzke might not be Jeffrey's biological father because of the fact that the child was born at home, the age of the mother, and the absence of proof that Mr. Watzke had contact with Ms. Watzke before they married on 7 January 2006. The officer also pointed out that the documentation provided in support of the application was inadequate to prove citizenship.

[28] The Certificate of Live Birth submitted as part of the Applicant's Record in the current proceeding does not identify a father. Rather, a remark added later records the subsequent marriage of the child's parents, the Applicants. Thus, the Applicants' argument that CIC should have

accepted this document as valid does not assist them: there is no reason to doubt that the document is valid, in the sense that it records Jeffrey's birth on 17 December 2005, but the form does not name a father, and that alone is sufficient reason to request additional information from the Applicants. While an additional remark added to the birth certificate after the couple's marriage identifies Mr. Watzke as a parent, this does not necessarily imply that he is a biological parent. The delay in recording Mr. Watzke as Jeffrey's father supports the Officer's concerns, the Respondent argues.

[29] The document provided by the Applicants in support of the application for a Citizenship Certificate and described by them in this proceeding as a birth certificate is not in fact a birth certificate. Rather, it is a print-out of information from the Register of Births, which lists Mr. Watzke as Jeffrey's father. The Applicants have not explained how that information was conveyed to the registry, who reported it, or when.

[30] Even if the documents unequivocally identified Mr. Watzke as Jeffrey's biological father, a citizenship officer charged with administering the Act and the Regulations may challenge the truth of their contents, the Respondents argue.

[31] Neither in his correspondence to CIC objecting to the request for DNA evidence nor in his affidavit in this proceeding does Mr. Watzke state that he is a biological parent of Jeffrey, nor has he presented any additional evidence to support that conclusion despite repeated requests from CIC. Mr. Watzke was well aware of the Officer's concerns regarding whether he was a natural rather than adoptive parent of Jeffrey, but provided no further evidence or information, including

photographs of him and Ms. Watzke prior to their marriage, information about Ms. Watzke's pregnancy, or even a statement that he is in fact a biological parent.

[32] Regarding the Applicants' submission that the request for DNA evidence amounts to procedural unfairness, the Respondent says that the evidence submitted by the Applicants was uncertain enough to warrant that request. *M.A.O. v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1406 [*M.A.O.*] establishes that there may be circumstances in which DNA evidence is necessary. Considering the uncertainty about pre-marriage contact between the Applicants, the delay in recording Mr. Watzke as the father, and the lack of any detailed explanation of the unusual circumstances, this case is one of those relatively rare cases in which DNA evidence is a reasonable step to ensure an applicant is entitled to citizenship under the Act.

ANALYSIS

[33] Both sides adjusted and developed their written arguments at the oral hearing of this application in Regina. The Applicants have raised a wide range of issues for review. In my view, however, the dispositive issue is whether the Officer was unreasonable in rejecting the certificate issued by the Office of the Civil Registrar as evidence that Jeffrey qualified for derivative citizenship under subsection 3(1)*(b)* of the Act, or whether in rejecting that certificate, the Officer relied upon information and factors unavailable to the Applicants in a way that renders the Decision procedurally unfair.

[34] As the letter of December 21, 2011 from the Officer to Mr. Watzke makes clear, under subsection 3(1)*(b)*

> the present citizenship policy only recognizes genetic parents (parents who have a parental genetic link to the child concerned). In

> all cases where there is information suggesting a parent, through whom a claim of derivative citizenship is made, is not the genetic parent, DNA evidence is requested.

[35] In the present case, the application was refused because Mr. Watzke was “unable to demonstrate a parental genetic link with the child ….”

[36] The letter to Mr. Watzke of September 8, 2010, reaffirmed that

> the documentation you have provided to establish biological parentage between you and the child is not acceptable for citizenship purposes. Therefore, in lieu of acceptable documentary evidence, we will accept the results of a DNA analysis carried out by a laboratory accredited by the Standards Council of Canada (SCC) for DNA testing.

[37] In the earlier letter of July 23, 2009 to Mr. Watzke, further elaboration of the issue was provided:

> For children who are born in the Philippines, we require an original or true certified copy of a Birth Certificate issued directly by the National Statistics Office (NSO). The current series is printed on a blue-green security paper with a barcode/numerical series at the left bottom portion of the page. However, because your son was born at home, this document has not been requested. The birth certificate you have provided is not acceptable for citizenship purposes.
>
> Before we are able to proceed, we require acceptable evidence of the child/parent relationship in order to establish that you are the biological father. In the absence of acceptable documentation, it is our policy to accept the results of DNA analysis carried out by an approved laboratory. Therefore, as noted in our previous letter, if you wish for us to proceed with this application, we will accept the results of a DNA analysis carried out by an approved laboratory. A list of the accredited laboratories that offer this service in Canada is

> once again included with this letter, and their results are recognized by Citizenship and Immigration Canada. Please note that you are responsible for covering the cost related to the administration of any testing. The Government of Canada assumes no responsibility with regard to the results.

[38] The reason for requesting DNA evidence in this case is set out in the letter to Mr. Watzke of February 17, 2009:

> Applications for proof of Canadian citizenship filed for children living outside Canada are usually filed through the Canadian Embassy closest to where the child resides. When an application is received that was *not* filed through an Embassy, we are required to contact our Embassy for advice on the documentation and information that has been provided. We have contacted our Embassy responsible for the Philippines, and upon review of the case, they have advised us to request DNA evidence to establish biological parentage between the Canadian parent and the child.

[39] An internal e-mail of February 23, 2009, provides the rationale behind the decision to require DNA testing [emphasis added]:

> Apparently, the parents previously went to the Embassy in Manila to submit an application for proof of citizenship for this child. At that time, they had been informed by Embassy staff that DNA testing would be required <u>because the child was born at home</u>. The Embassy passed this information on to us here at CPC-Sydney, and a file note was added to GCMS on **April 18, 2007**. This would have been approximately 7 months before we received this new current application in Sydney, **November 20, 2007**, *filed by the father from Inside Canada*.

[40] So the rationale for requiring DNA testing in the present case was that "the child was born at home." This is why no consideration is given to the certificate from the Municipal Civil Registrar and why, as the letter of July 23, 2009 makes clear, a Birth Certificate was not even requested in this

case. Neither the Municipal Civil Registrar certificate or a birth certificate would suffice in this case because Jeffrey was born at home.

[41] The reason why a DNA requirement is needed for a child born at home is not articulated in the Decision or the record. There is no evidence that the reason for this requirement was ever explained to the Applicants or that it was publically available in the policy manual or elsewhere. There is no indication that the Applicants were advised that subsection 3(1)*(b)* could be satisfied in any other way than through DNA testing. They were told that, because Jeffrey was born at home, even a certified copy of a Birth Certificate would not suffice. However, Justice Noel pointed out in *Martinez-Brito*, Overseas Processing Manual 1 (OP 1 Procedures) states at 5.10 (emphasis added): "**A DNA test to prove relationship is a last resort**. When documentary submissions are not satisfactory evidence of a bona fide relationship, officers may advise applicants that positive results of DNA tests by a laboratory listed in Appendix E are an acceptable substitute for documents."

[42] There is no way for me to tell from the record why the DNA requirement has been imposed, and upon what authority, by the Embassy in Manila and adopted by CPC-Sydney.

[43] Without this information, the Decision lacks the intelligibility and transparency required by para 47 of *Dunsmuir* in order to render it reasonable. In addition, because the rationale and the legal justification for the DNA requirement were never explained to the Applicants, they had no opportunity to argue or explain why it should not be applied to them, or the opportunity to offer alternative evidence that could, reasonably speaking, suffice to satisfy subsection 3(1)*(b)* of the Act. This was procedurally unfair. The Court has warned against an oppressive and unyielding

requirement of DNA testing: see *M.A.O.*, above, at paras 83-84; *Canada (Minister of Public Safety and Emergency Preparedness) v Martinez-Brito*, 2012 FC 438 [*Martinez-Brito*] at paras 46-50.

[44] As in *M.A.O.* and *Martinez-Brito*, above, the Officer in this case failed to consider, much less offer, alternatives to DNA testing as a means of establishing the parent-child relationship. In very similar fashion to the correspondence at issue in those cases (see *M.A.O.*, above, at para 81; *Martinez-Brito*, above, at paras 43-44), the Officer's June 1, 2010 letter to Mr. Watzke left the Applicants with no alternative if they wished to proceed with the application:

> As explained in our previous correspondence, DNA test results will be required in order for to [sic] establish biological parentage between you and your son…
>
> Please advise us in writing as soon as possible as to whether or not you intend to submit the required documentation that will allow us to proceed with the application. **If we do not receive a reply from you within 90 days of the date of this letter, the case will be closed.**
>
> [Emphasis in original]

I follow my colleagues Justice Heneghan and Justice Noel in concluding that this unexplained insistence on DNA testing, without regard to any alternatives and leaving the Applicants with no choice but to proceed with it, resulted in a breach of procedural fairness in this case: *Martinez-Brito*, above, at para 50; *M.A.O.*, above, at paras 83-84.

[45] The Applicants also raise the issue of the "genetic link" requirement applied in this case to subsection 3(1)*(b)* of the Act. Justice Blanchard recently dealt with this issue extensively in *Kandola v Canada (Minister of Citizenship and Immigration)*, 2013 FC 336 [*Kandola*]:

> 31 The Minister argues that since the Bill C-14 amendments, foreign-born children adopted after February 14, 1977, by Canadian

citizens have access to citizenship in the same way as biological children born abroad to Canadian citizens. He argues that by expressly providing for adopted children, Parliament intended the term "parent" in the *Act* to be narrowly interpreted as a blood relation between parent and child. Otherwise, the amendment to allow adoptive parents to pass on derivative citizenship to their children would be redundant. The Minister therefore argues that Parliament intended the more traditional and restrictive definition of "parent" based on the concept of *jus sanguinis*, and any changes to this definition would require legislative amendment.

32 The Minister's argument is not without merit. However, it fails to take into account an important consideration, namely that Parliament saw fit to define the term "child" in the Act. Section 2 of the *Act* provides: "In this Act, 'child' includes a child adopted or legitimized in accordance with the law of the place where the adoption or legitimating took place;" In so defining "child," Parliament provides insight into what meaning it intended for the lawful parents of such a child.

33 In the instant case, the record establishes that the Applicant's guardian, a Canadian citizen, and her Indian birth mother are married and are registered as the Applicant's parents. They are listed as her parents on her Indian birth certificate. Absent evidence to the contrary, the record is sufficient to establish this relationship under Indian law. There appears to be no dispute on this point. For the purposes of the application, I am satisfied that the Applicant is the legitimized child of her birth mother and her Canadian legal guardian under Indian law.

34 As a legitimized child, the Applicant is therefore included in the definition of "child" for the purposes of the *Act*. Had she been an adopted child, the Minister would have been required, on application, to grant her citizenship pursuant to section 5.1 of the *Act*. The question then is whether she should be subjected to a different treatment on the basis that she is legitimized and not adopted. In my view, for the following reasons, she should not be.

35 Had Parliament intended to treat a legitimized child differently than an adopted child with respect to how the term "parents" is defined for the purposes of paragraph 3(1)*(b)*, it would have expressly done so and not included a legitimized child in the same definition. Both are defined as a "child" for the purposes of the *Act*.

36 The courts have used the definition of "child" to discern the intended meaning of "parent" in statutes that do not expressly define "parent" because the concepts are "correlative," or naturally linked. (See: *Ogg-Moss v. The Queen*, [1984] 2 S.C.R. 173). Chief Justice Laskin considered the correlative nature of these terms in *Gingell* at page 95. The learned Chief Justice stated that the proper starting point in determining the meaning of the word "parent" in a particular statutory provision is to consider the meaning of "child" as used in the same Act.

37 In the instant case, the terms parent and child are "correlative". If a minor child is "adopted" or "legitimized," a parent/child relationship necessarily flows from this event. Because of the nature of the relationship, which is essentially about nurturing and dependency, it would be incongruous to recognize a child in such circumstances but not the parent of the child.

38 On the basis of the definition of "child" in the *Act* and given the correlative nature of the terms "parent" and "child", it would be inconsistent with the object and scheme of the *Act* not to recognize the parent of that same child as a "parent" for the purposes of the *Act*. If Parliament intended asymmetry between these "correlative" terms, it would have legislated a specific definition for "parent." It did not.

39 Moreover, the Minister's interpretation of the *Act* is inconsistent with the wording of the *Act*. The definition of "child" in section 2 of the *Act* includes children who are adopted or legitimized. Paragraph 3(1)*(b)* of the *Act* states that someone born abroad who "at the time of his birth one of his parents, <u>other than a parent who adopted him</u>, was a citizen" (emphasis added). By excepting only an adoptive parent from this provision under the *Act*, an inference arises from the legislation that any other type of parent (genetic or legitimized) is sufficient to satisfy paragraph 3(1)*(b)*. If it were Parliament's intent to exclude legitimized parents as well, it needed to do so expressly.

40 Further, legitimation renders adoption impossible. The Minister does not dispute this. Consequently, if legitimation of a Canadian parent by a foreign process does not result in either a "parent" or "adoptive parent" relationship with the child and precludes adoption, obtaining Canadian citizenship for the child is not possible except by ministerial discretion or the citizenship process designed for foreign nationals. In my view, such a result would render meaningless the "legitimation" portion of the definition of child and have a discriminatory effect against legitimized children

> who are not genetically linked to their parents. The *Act* cannot be interpreted in this way.
>
> 41 I therefore construe the term "parent" in paragraph 3(1)*(b)* of the *Act* to include the lawfully recognized parents of a legitimized child in accordance with the laws of the place where the legitimation took place: in this instance, India. The above interpretation is consistent with the words of an Act, read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. The Minister's restrictive interpretation of the term "parent" is not.
>
> 42 Since one of the Applicant's parents, her legal guardian, is a Canadian citizen by operation of paragraph 3(1)*(b)* of the *Act*, the Applicant's application cannot be denied by reason of the lack of a genetic link with her Canadian parent.
>
> 43 For the above reasons, I conclude that the Citizenship Officer erred in his interpretation of the *Act* by requiring such a genetic link thereby refusing to consider parents by legitimation to be parents for the purposes of paragraph 3(1)*(b)* of the *Act*.

[46] Justice Blanchard’s decision in *Kandola*, above, is presently on appeal to the Federal Court of Appeal. Should it be upheld, then the genetic link requirement imposed in the present case would clearly be a reviewable error and the Decision would require reconsideration from this perspective also. However, quite apart from the significance of *Kandola*, I am convinced that reviewable error occurred in this case on the basis of unreasonableness and procedural unfairness as set out above. Consequently, the case must be returned for reconsideration by a different officer.

[47] As a result of the errors in this case, Jeffrey has already been separated from his parents for a considerable period of time. Hence, these issues should be addressed in a timely manner and with a view to the best interests of this child. I do not feel it is necessary to impose a Court order to this effect, and rely upon the Respondents’ usual sense of responsibility to set matters right in a timely

way. No request for *mandamus* was made in this application. However, should unreasonable delays jeopardize Jeffrey's interests, the Applicants are at liberty to seek the further assistance of the Court.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is allowed. The Decision is quashed and the matter is returned for reconsideration by a different officer.
2. The Applicants shall have their costs for this application.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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PLACE OF HEARING: REGINA, SASKATCHEWAN

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APPEARANCES:

Ralph Watzke	SELF-REPRESENTED
Michael Brannen	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Ralph Watzke	SELF-REPRESENTED
William F. Pentney Deputy Attorney General of Canada Saskatoon, Saskatchewan	FOR THE RESPONDENTS