Federal Court Cour fédérale

**Date: 20200206**

**Docket: T-863-18**

**Citation: 2020 FC 215**

**Ottawa, Ontario, February 6, 2020**

**PRESENT: Mr. Justice Pentney**

**BETWEEN:**

**THAI TRAN**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## JUDGMENT AND REASONS

[1] Thai Tran was born in Vietnam and came to Canada in April 1990. He obtained Canadian citizenship, but it was revoked because he was found to have obtained it by false representation by knowingly concealing a material circumstance, namely failing to disclose that he had been charged with a criminal offence before he completed the citizenship process. He now seeks to overturn that decision.

[2] This case has a rather lengthy history, and it is necessary to review this in some detail. The issues in this case revolve around the legal implications of several key events, which will be considered following a review of the chronology.

[3] In addition, the Applicant brought a preliminary motion to seek disclosure of materials for which Cabinet confidence had been claimed. The motion for further disclosure was dismissed, and these reasons amplify the brief oral decision that I delivered at the hearing.

## I. Context

[4] The Applicant was born in Vietnam in March 1971. He came to Canada in April 1990, and was granted permanent resident status. In October 1995, he applied for Canadian citizenship and his criminal and security clearances were obtained in December 1995.

[5] On March 2, 1996, the Applicant was charged with trafficking cocaine. On June 11, 1996, he was interviewed by a Citizenship Judge regarding his citizenship application. The Applicant could not read, write, or speak English, so he was assisted by a translator. During the interview, he declared that he had not been subject to any criminal proceedings since filing his citizenship application. The Applicant claims this was due to a mistake by the translator, and the translator has sworn an affidavit to confirm this.

[6] Although the notice to appear to take the citizenship oath specifies that citizenship will not be granted to anyone who is charged with an indictable criminal offence at the time of the oath, and requires that this be disclosed to a citizenship officer, the Applicant did not indicate

that he was facing a criminal charge. The Citizenship Judge approved his application and, on June 17, 1996, the Applicant took the citizenship oath and became a Canadian citizen.

[7] On April 4, 1997, the Applicant was convicted of trafficking in a narcotic contrary to subsection 4(1) of the *Narcotics Control Act*. He was sentenced to two years' imprisonment as well as a fine.

[8] Based on this, on December 14, 2000, the Minister of Citizenship and Immigration (the Minister) notified the Applicant of her intention to make a Report to the Governor in Council seeking revocation of his citizenship because he obtained it by false representation or fraud or by knowingly concealing material circumstances, contrary to section 10 of the *Citizenship Act*, RSC 1985, c 29 [the *Act*]. After one failed attempt to serve the Applicant with the Notice, a process server succeeded in serving it on May 30, 2001.

[9] On July 17, 2001, the Applicant's lawyer requested that the matter be referred to the Federal Court, pursuant to section 18 of the *Act*. Two years later, on July 2, 2003, the Applicant and the Minister agreed to settle the matter before the Federal Court by way of a consent judgment. As will be discussed below, the Applicant takes issue with the admissibility of the settlement agreement. For the purposes of the chronology, it suffices to note that the matter was resolved, and an Order was entered declaring that the Applicant had obtained his citizenship by false representation or fraud or by knowingly concealing material circumstances. This did not have the effect of revoking his citizenship, because this requires further steps by the Minister, including seeking an Order in Council.

[10] The Applicant applied for a Citizenship Certificate (Proof of Citizenship) on April 20, 2005, and he was issued a Canadian citizenship certificate in October 2005. On June 23, 2009, the Minister sought to contact the Applicant through his counsel, in order to serve him with a preliminary Report to the Governor in Council seeking revocation of his citizenship. The lawyer advised that he was unable to contact the Applicant, and a process server was also unable to locate him. The Minister sought the assistance of the Royal Canadian Mounted Police (RCMP) in November 2009, but they were also unsuccessful in locating him. By September 2010, the RCMP ended their efforts.

[11] On March 17, 2011, the Applicant applied for another Citizenship Certificate (Proof of Citizenship), and declared his residential address on that form. A process server was hired to serve the Notice on the Applicant but was unable to do so. The process server swore an affidavit that the residential address declared by the Applicant was an empty commercial building.

[12] On March 7, 2012, the Minister signed the Report of the Minister to the Governor in Council, seeking revocation of the Applicant's citizenship. By Order in Council dated May 31, 2012, the Applicant's citizenship was revoked for the first time. On January 14, 2013, the Applicant's passport was seized when he entered Canada; he indicated to Canada Border Services Agency officers that he was not aware that his citizenship had been revoked.

[13] The Applicant commenced an application for judicial review to challenge the revocation decision. This was settled on consent; the Minister agreed to a consent judgment quashing the revocation, because the Minister's Report had not been included in the record, which was filed before the Court, since it had been treated as a Cabinet confidence. The Minister agreed that, without this report, the Court would not be in a position to conduct a meaningful judicial review

of the decision. Therefore, the citizenship revocation decision was quashed on December 20, 2013.

[14] The process of revocation began again on January 23, 2014, when the Minister sent a preliminary Report of the Minister to the Governor in Council to the Applicant by registered mail. The letter was returned as undeliverable. Efforts to serve the Applicant through his counsel of record were also unsuccessful, because he was no longer representing the Applicant. A process server was unable to locate the Applicant.

[15] On March 14, 2014, the Applicant again applied for a Citizenship Certificate (Proof of Citizenship) under section 3 of the *Act*. On this application, he indicated his address as that of his representative.

[16] After an attempt to deliver in March 2014, the preliminary Report was served on April 25, 2016. On that date, a Citizenship Certificate was also issued to the Applicant. On May 25, 2016, the Applicant's counsel provided submissions to the Minister on the preliminary Report, arguing that it was an abuse of process for the Minister to proceed with the revocation process, and that the matter should not proceed because of the six-year delay between the finding of misrepresentation in 2003 and the beginning of revocation in 2009.

[17] The Minister states that these submissions were considered and rejected. The Minister found that this was only the second revocation of the Applicant's citizenship, noting that the first one had been set aside on consent based on Minutes of Settlement, which had been negotiated with the Applicant and his representative. The settlement agreement stated that it did not preclude the Minister from reinstituting citizenship revocation proceedings against the Applicant.

The Minister also rejected the delay argument, because the Applicant had not demonstrated how the six-year time period had prejudiced him.

[18] The Report states that the Applicant was asking the Minister not to enforce the provisions of the *Act* "that are specifically designed to ensure that applicants for Canadian citizenship tell the complete truth about themselves during the application process, prevent those that do not meet the requirements of the [*Act*] from being granted citizenship, and maintain the integrity of Canada's citizenship program."

[19] Having considered the submissions, the Minister concluded by recommending that the Applicant's citizenship be revoked. Pursuant to the 2003 settlement agreement, which the Minister indicated is still binding, the Applicant would become a permanent resident of Canada if his citizenship was revoked, and he would therefore be subject to the provisions of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The Minister also noted that, pursuant to the settlement agreement, the Applicant could not be reported for misrepresentation under section 44 of *IRPA* unless he was subsequently convicted of an offence under an Act of Parliament after August 18, 1999.

[20] On December 1, 2017, an Order in Council was adopted, revoking the citizenship of the Applicant, pursuant to the *Act* as it stood on May 27, 2015. This forms the basis for the application for judicial review.

## II. Issues and Standard of Review

[21] The Applicant and Respondent are largely in agreement on the issues that arise in this case, although they have worded them differently. I would state the issues in the following way:

A. Do the amendments to citizenship revocation enacted by the *Strengthening Canadian Citizenship Act*, SC 2014, c 22 [*SCCA*] apply to this case, and if so, does *Hassouna v Canada (Citizenship and Immigration)*, 2017 FC 473 [*Hassouna*] have any bearing on this case?

B. What effect do the 2003 and 2013 settlements have on this proceeding, and in particular does issue estoppel prevent the Minister from proceeding with the revocation?

C. Should a stay of proceeding be issued because of unreasonable delay amounting to an abuse of process?

D. Does the Applicant's potential statelessness have any bearing on this proceeding?

[22] In addition, the Applicant brought a preliminary motion seeking disclosure of materials over which Cabinet confidence had been claimed by the Respondent, and this is addressed below.

[23] The standard of review for the substantive issues is reasonableness: *Valenzuela v Canada (Citizenship and Immigration)*, 2016 FC 879 at paras 15-20; *Oberlander v Canada (Attorney General)*, 2018 FC 947, [2019] 1 FCR 652 at para 81 [*Oberlander 2018*]; *Almuhaidib c Canada (Citoyenneté et Immigration)*, 2019 CF 1543 [*Almuhaidib*]. When this case was argued, the leading authority on reasonableness review was *Dunsmuir v New Brunswick*, 2008 SCC 9. Since then, the Supreme Court of Canada has updated and clarified the framework in *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[24] I find that *Vavilov* confirms that the standard of review that applies in this case is reasonableness. In the circumstances of this case, and considering in particular paragraph 144 of that decision, it is not necessary to ask for further submissions on either the standard of review or its application. As the Supreme Court of Canada concluded in the case of *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at para 24, "(n)o unfairness arises from this as the applicable standard of review and the result would have been the same under the *Dunsmuir* framework."

## III. Preliminary Issue – Disclosure of Cabinet Confidences

[25] In the disclosure package that was provided to the Court and the parties pursuant to Rule 17 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 [*Citizenship Rules*], the Assistant Clerk of the Privy Council provided copies of the Order in Council, dated December 1, 2017, that revoked the Applicant's citizenship, as well as the Report of the Minister to the Governor in Council. The cover letter for the disclosure package ends with the following statement by the Assistant Clerk: "Please note that our record also contains material submitted to the Governor in Council that constitute a confidence of the Queen's Privy Council for Canada and as such, cannot be disclosed because of their confidential nature."

[26] The Applicant brought a motion seeking access to the material. The original motion was brought pursuant to Rule 152 of the *Federal Courts Rules*, SOR/98-106 [the *Rules*], which deals with confidential material, and it was proposed that it be dealt with in writing. The Applicant also requested an adjournment of the hearing, so that the motion could be dealt with and the parties could file further submissions on the merits of the case, if needed, in light of the further

disclosure. Following some discussion, it was agreed that the motion would be dealt with at the outset of the hearing on the date which had been fixed.

[27] At the hearing, the Applicant clarified that he was requesting an Order for disclosure pursuant to Rule 17 of the *Citizenship Rules*. Rule 152 of the *Rules* would then be available to the Respondent, if it wanted to claim confidentiality, as is explained more fully below.

[28] The Applicant argued that disclosure was required pursuant to Rule 17 of the *Citizenship Rules*:

| **Obtaining Tribunal's Record** | **Production du dossier du tribunal administratif** |
|---|---|
| **17** Upon receipt of an order under Rule 15, a tribunal shall, without delay, prepare a record containing the following, on consecutively numbered pages and in the following order: | **17** Dès réception de l'ordonnance visée à la règle 15, le tribunal administratif constitue un dossier composé des pièces suivantes, disposées dans l'ordre suivant sur des pages numérotées consécutivement : |
| **(a)** the decision or order in respect of which the application for judicial review is made and the written reasons given therefor, | **a)** la décision, l'ordonnance ou la mesure visée par la demande de contrôle judiciaire, ainsi que les motifs écrits y afférents; |
| **(b)** all papers relevant to the matter that are in the possession or control of the tribunal, | **b)** tous les documents pertinents qui sont en la possession ou sous la garde du tribunal administratif, |
| **(c)** any affidavits, or other documents filed during any such hearing, and | **c)** les affidavits et autres documents déposés lors de l'audition, |
| **(d)** a transcript, if any, of any oral testimony given during the hearing, giving rise to the decision or order or other matter that is the subject of the application for judicial review, | **d)** la transcription, s'il y a lieu, de tout témoignage donné de vive voix à l'audition qui a abouti à la décision, à l'ordonnance, à la mesure ou à la question visée par la demande de contrôle judiciaire, |

| | |
|---|---|
| and shall send a copy, duly certified by an appropriate officer to be correct, to each of the parties and two copies to the Registry. | dont il envoie à chacune des parties une copie certifiée conforme par un fonctionnaire compétent et au greffe deux copies de ces documents. |

[29] The Applicant submits that since Rule 17 states that a tribunal "shall" disclose the record, and the material must include all "papers relevant to the matter that are in the possession or control of the tribunal," this must include the material for which Cabinet confidence is claimed. This is in contrast to Rule 317 of the *Rules*, the more general provision that governs disclosure of tribunal records in other judicial review proceedings, which is worded in a permissive fashion.

[30] In addition, the Applicant argued that without disclosure, the tribunal record would be incomplete and he would be denied a fair hearing. A very high duty of procedural fairness applies to these proceedings in light of the fact that they affect his vested rights as a Canadian citizen. In *Hassouna* the Court recognized the fundamental nature of the interests at play in a citizenship revocation proceeding and ruled that the *Canadian Bill of Rights*, SC 1960, c 44 [*Canadian Bill of Rights*] applies. The Applicant contends that the highest level of procedural fairness is required in such proceedings, and the failure to disclose the material would compromise the Court's ability to conduct the judicial review.

[31] Recognizing the likely desire to keep such materials confidential, the Applicant proposed that if an Order forcing disclosure was made, the Respondent could bring a confidentiality motion under Rules 151 and 152 of the *Rules*, so that only the Court and counsel for both parties would have access to this material. In this way, the fairness of the proceeding, as well as the confidentiality interests of the Respondent, would be satisfied.

[32] The Respondent argued that the motion could not succeed, in light of the provisions governing cabinet confidences in section 39 of the *Canada Evidence Act*, RSC 1985, c C-5 [*CEA*]. On the procedural fairness issue, the Respondent submitted that the Court and the parties had all of the necessary material to conduct a meaningful judicial review and the Applicant was not denied a fair hearing because of the lack of disclosure of this material. In *Oberlander v Canada (Attorney General)*, 2004 FCA 213 at paras 34-36 [*Oberlander 2004*], the Federal Court of Appeal ruled that the Minister's Report together with the Order in Council constitute the reasons for the Governor in Council decision. This material is before the Court in this case, and nothing more is required.

[33] At the hearing of this matter, the parties made submissions on this issue and I issued an oral ruling dismissing the motion, with reasons to follow. These are my reasons for dismissing the motion for further disclosure.

[34] This matter came before the Court in a somewhat unusual manner, compared to other claims of Cabinet confidence. Here, the obligation to disclose the tribunal record pursuant to Rule 17 of the *Citizenship Rules* only arose once leave to seek judicial review was granted. The Order granting leave set out the timelines for the parties, and this reflected the overall approach of the *Citizenship Rules* under which matters are to proceed in a summary way and without delay (see, to a similar effect, the instruction in paragraph 72(2)(d) of *IRPA* regarding applications for leave).

[35] The Applicant only learned of the claim of Cabinet confidence when the letter from the Assistant Clerk was provided, and at that time, he – like the Respondent – was operating under very tight timeframes. In order to gain access to the material, the Applicant brought a motion in

writing, pursuant to Rule 369 of the *Rules*. There was an exchange of correspondence, and a pre-hearing teleconference was convened by the Court to deal with the manner of proceeding.

[36] Although the Respondent did not file a certificate under section 39 of the *CEA*, it indicated it was prepared to do so, or to attempt to deal with the matter in a less formal manner as had been done in some previous cases. However, the Respondent also indicated that any such procedure would require time to be completed, and thus the schedule, which had been set in the Order granting leave, would need to be adjusted.

[37] In the end, the matter was argued before me as a motion for disclosure under Rule 17, on the understanding that if disclosure was ordered, the hearing on the merits of the judicial review would be adjourned so that the disclosure process could unfold and the parties could consider whether the file further materials.

[38] The leading case on the disclosure of Cabinet confidences in litigation between the government and private citizens is *Babcock v Canada (Attorney General)*, 2002 SCC 57 [*Babcock*]. That decision establishes that section 39 of the *CEA* governs such disclosure, and that this provision is constitutional; it also confirms that "Cabinet confidentiality is essential to good government" (at para 15), and that "[t]he British democratic tradition which informs the Canadian tradition has long affirmed the confidentiality of what is said in the Cabinet room, and documents and papers prepared for Cabinet discussions" (at para 18).

[39] In *Babcock*, it is emphasized that the decision to claim a Cabinet confidence rests with the Clerk of the Privy Council or a Minister of the Crown rather than with the judiciary. This is subject to the requirement that the certification of a document as a Cabinet confidence must be

done properly within the terms of the statute, but if this is done the Court must assess the matter without being able to examine the actual documents that are certified as Cabinet confidences (at para 40).

[40] One control over abuse of this authority is noted at paragraph 36:

> … Second, the refusal to disclose information may permit a court to draw an adverse inference. For example, in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, the Attorney General's refusal to disclose information relating to an advertising ban on tobacco, led to the inference that the results of the studies must undercut the government's claim that a less invasive ban would not have produced an equally salutary result. (para. 166, *per* McLachlin J.).

[41] In the case at bar, the Applicant submitted that disclosure should be ordered because Rule 17 requires it, and fairness demands it. The Applicant argued that Rule 17 superseded the procedure set out in section 39 of the *CEA*, but did not necessarily result in a complete waiver of confidentiality because the Respondent could move under Rule 152 for a confidentiality order that would limit disclosure of the material to the counsel and the Court. Citing no authority for this proposition, the Applicant based its claim on the need to ensure fairness in the proceeding.

[42] I am not persuaded by this argument. It is not clear why the lack of disclosure creates a situation in which the Court cannot conduct a judicial review, or denies the Applicant a fair hearing. This has not prevented prior judicial reviews of citizenship revocation decisions under the former process. Unlike the previous judicial review in this case, which was quashed on consent because key material had not been placed before the Court, here the Respondent has filed both the Order in Council and the Minister's Report to the Governor in Council. These

documents comprise the “reasons” for decision (*Oberlander 2004* at para 36; *Montoya v Canada (Attorney General)*, 2016 FC 827 at para 17 [*Montoya*]).

[43] In addition, the Applicant was able to file further documentation on this application, including any material which had previously been provided to the Minister. It is also significant that the Applicant did not challenge the claim that the documents were, in fact, Cabinet confidences, nor did he assert any improper purpose for the claim by the Respondent.

[44] Most importantly, recalling the admonition in *Babcock* and *RJR-MacDonald v Canada (Attorney General)*, [1995] 3 SCR 199 that an adverse inference could be drawn against the Respondent in relation to any material not disclosed, it is difficult to understand how the assertion of Cabinet confidence in this case amounts to a denial of procedural fairness. As I stated during the hearing, it was open to the Applicant to explain why such an adverse inference should be drawn here, based on the specific circumstances of this case. In the end, no such request was made.

[45] For all of these reasons, I dismissed the motion for disclosure pursuant to Rule 17 of the *Citizenship Rules*.

[46] One further comment is in order. One unfortunate consequence of the manner in which this came before the Court was that the Respondent did not file any material to describe the nature of the documents for which Cabinet confidence was claimed. Unlike the situation where a section 39 certificate is filed, there was no other information about the documents beyond the bare statement in the Assistant Clerk’s letter (for a discussion of the disclosure requirements under section 39, see *Babcock* at para 28; and *Tsleil-Waututh Nation v Canada (Attorney*

*General)*, 2017 FCA 128). As I noted at the hearing, this was regrettable and unnecessary; a better description of the material should have been provided.

## IV. Analysis

### A. *Do the amendments to citizenship revocation enacted by the SCCA apply to this case, and if so, does Hassouna have any bearing on this case?*

[47] The Applicant argues that the decision revoking his citizenship is invalid because as a matter of law, the provisions of the *SCCA* apply to it, but they were declared inoperative under the *Canadian Bill of Rights* by the decision of this Court in *Hassouna*. The Applicant submits that the Respondent's attempt to freeze the matter prior to the coming into force of the relevant provisions of the *SCCA* is invalid. In this case, the Applicant contends that the relevant date is either the date of the letter from the Minister to the Governor in Council (December 1, 2017), or the date that the Respondent invited him to make submissions (April 26, 2016). Either way, the provisions of the *SCCA* would apply to the revocation because they came into effect on May 28, 2015. However, these provisions were declared inoperative by *Hassouna*. Therefore, the revocation decision cannot stand.

[48] The Respondent submits that the transition provisions of the *SCCA* specify that this case is to be treated under the prior legislation. The revocation process against the Applicant began in 2000, and in 2003, the Federal Court issued a consent order, which declared that the Applicant had obtained his citizenship by fraud. The first Governor in Council decision revoking his citizenship was made in 2012, and was quashed on consent in 2013. The redetermination process began in January 2014 and continued until the current decision was made. This chronology

brings this case squarely within the terms of section 32 of the *SCCA*, which provides that in cases where the Minister "was entitled to make or had made a report" to the Governor in Council for revocation under section 10 of the former *Act*, the matter "is to be dealt with and disposed of in accordance with that Act, as it read immediately before" the new provision takes effect. This is part of an elaborate set of transition rules intended to govern these types of cases.

[49] In addition, the Minister points to section 33 of the *SCCA*, which states that the previous *Act* will apply to matters which were the subject of an Order of the Federal Court that set aside and referred back a citizenship revocation decision for redetermination. This is the situation here, and it is not relevant that the matter was set aside by consent judgment. The prior 2012 revocation had been set aside and referred back, and was in the process of being redetermined when the amendments came into force.

[50] In response, the Applicant submits that neither of these provisions applies. The Minister was not "entitled to make a report" under section 32 because the revocation had been quashed, and the previous report was therefore rendered a legal nullity. Section 33 also does not apply because there was no Order that remitted the matter back for redetermination; the Order of the Court simply quashed the previous decision.

[51] The Applicant also argues that he has been denied an oral hearing, and the clear intention of the new provisions in the *SCCA*, and the *Canadian Bill of Rights*, is that an oral hearing is required before a person's citizenship rights are revoked. If the transitional rules apply so as to prevent an oral hearing, they should be declared inoperative in accordance with *Hassouna*.

[52] The analysis of this issue involves two questions: (i) What was the legal status of the Applicant's citizenship revocation matter at the time the *SCCA* came into force? (ii) In light of this, how do the transition provisions of the *SCCA* apply? In simple terms, is this case to be dealt with under the provisions of the former *Act* or the *SCCA*? If the *SCCA* applies, does *Hassouna* mean that the decision must be quashed?

[53] The dispute between the parties about the legal status of the Applicant's citizenship revocation centres on the legal effect of the two previous settlements, and the resulting Orders of this Court. Related to this, the Applicant submits that the terms of the 2003 settlement are inadmissible, or at a minimum inapplicable, because this is an entirely new revocation proceeding. He says that he entered into the 2003 agreement on the understanding that the matter would be dealt with in a timely fashion. This did not happen. The revocation process that is governed by the 2003 settlement was quashed by the Court's Order in 2013, and this case involves an entirely new revocation process, which was launched in 2014. According to the Applicant, the terms of the prior settlement are irrelevant.

[54] I am not persuaded. The somewhat lengthy procedural history outlined earlier does not erase the fact that there are two valid Orders of this Court concerning citizenship revocation proceedings against the Applicant. These Orders remain in force, and have never been disturbed by an appeal or other judicial decision. Although not determinative on this question, the terms of the 2003 settlement remain a relevant consideration because they provide context for the 2013 Order of this Court.

[55] It is important to recall the sequence of events. The Minister gave the Applicant notice of the intention to recommend that his citizenship be revoked, as required by the *Act*. The

Applicant's counsel requested that the matter be referred to this Court, as permitted under section 18 of the *Act*. This would have allowed a full hearing into the facts of the matter (see *Canada (Citizenship and Immigration) v Houchaine*, 2014 FC 342 at paras 10-16 for a summary of the role of the Court in these types of proceedings). However, the matter was resolved on consent, and so the hearing did not proceed. Instead, an Order of this Court was issued by Justice Luc Martineau on July 28, 2003, indicating that the Minister had brought a motion in writing seeking an Order pursuant to paragraph 18(1)(b) of the *Act*, with the consent of the Applicant, and then Ordering that "the Defendant, Thai Tran, obtained Canadian citizenship by false representation or fraud or by knowingly concealing material circumstances."

[56] In entering into this agreement, and consenting to an Order in these terms, the Applicant would have been aware that this Order was final and could not be appealed, pursuant to subsection 18(2) of the *Act.*

[57] Although the Applicant has objected to the admissibility of the Minutes of Settlement that gave rise to this Consent Order, the latest Report of the Minister, which is challenged here, makes extensive reference to these Minutes. This Report also indicates that the Minister continues to be bound by the terms of the settlement that are to the benefit of the Applicant. The Applicant has not provided a legal basis to reject these Minutes and, in the circumstances of this case, I do not find any reason to do so.

[58] It is not necessary to quote the Minutes of Settlement in full. The essential point is that the Minutes reveal the bargain struck between the parties. The Applicant admits that when he obtained his citizenship he did not disclose material circumstances, namely that he had been convicted for unlawfully trafficking in cocaine. He also consents to "a decision by the Court

pursuant to s. 18(1)(b) of [the *Act*] that the Defendant, Thai Tran, obtained Canadian citizenship by false representation or fraud or by knowingly concealing material circumstances (the "Court Order")."

[59] In addition, the Applicant acknowledges that upon receipt of the Court Order, the Minister may proceed to make a Report to the Governor in Council recommending that his citizenship be revoked.

[60] The benefit to the Applicant from this settlement is the agreement of the Minister that if his citizenship was revoked, and he therefore reverted to the status of permanent resident under subsection 46(2) of *IRPA*, the Applicant "will not be reported under subsection 44(1) of the [*IRPA*] with respect to [his] April 4, 1997, conviction under subsection 4(1) of the *Narcotic Control Act* unless, after August 18, 1999, [the Applicant] is convicted of any subsequent offence under any Act of Parliament."

[61] The Applicant contends that this settlement, and the resulting Order, relate only to the previous attempt to revoke his citizenship, which was overturned by Order of this Court on December 20, 2013. The key operative provision of that Order simply states that "[t]he decision of the Governor-in-Council dated May 31, 2012, to revoke the Applicant's Canadian citizenship is quashed." According to the Applicant, this renders the previous settlement defunct.

[62] The core of the Applicant's argument is that it is unfair and unjust to revoke his citizenship because he has never had an oral hearing or an opportunity to explain that the misrepresentation was, in fact, an innocent translation error. The Respondent replies that the

Applicant had the opportunity for a full and complete oral hearing, but instead chose to resolve the matter on consent.

[63] I agree with the position of the Respondent. The Applicant entered into a settlement, and consented to an Order of this Court, which declared him to have obtained his citizenship by false representation or fraud or knowingly concealing material circumstances, contrary to paragraph 18(1)(b) of the *Act*. The Applicant was represented by legal counsel, and the detailed Minutes of Settlement are signed by his counsel. Pursuant to the *Act* at the relevant time, the Court Order could not have the effect of revoking the Applicant's citizenship; rather, it was making a factual determination in regard to the legislation. This determination – or admission – has never been disturbed or affected by any subsequent Order or decision of this Court, or any other legal process. And it runs contrary to the assertion by the Applicant now that the misrepresentation was actually mistaken and innocent (see, to a similar effect, *Montoya* at para 49).

[64] The 2013 Order quashing the subsequent Governor in Council decision to revoke the Applicant's citizenship does not have the effect of putting an end to the legal force of the 2003 Order. I will discuss below whether it gives rise to other legal consequences. At this stage, I simply find that the factual determinations made in the 2003 Order remain in effect and continue to have legal force.

[65] The consequence of this finding is that this case falls to be decided under the *Act* rather than the *SCCA*, because on May 28, 2015, when the relevant provisions of the *SCCA* came into force, the Minister was "entitled to make a report" under section 10 of the *Act* in order to recommend that the Applicant's citizenship be revoked. This is an inexorable consequence of the 2003 Order which makes specific reference to paragraph 18(1)(b) of the *Act*, which allows for a

report to be made to the Governor in Council to revoke citizenship, after the Court has found that a person obtained citizenship by false representation or fraud or by knowingly concealing material circumstances.

[66] It is not necessary to engage in a lengthy analysis of the proper interpretation of the transitional provisions in the *SCCA*. This has been done in other cases and I would simply adopt the guidance from these decisions regarding the proper approach: see *GPP v Canada (Citizenship and Immigration)*, 2018 FC 562; affirmed on appeal, reported at 2019 CAF 71; and see the discussion in *Almuhaidib*. The detailed transition rules appear to have contemplated exactly the situation that arises in the case at bar. The process to revoke the Applicant's citizenship had been under way for many years. At the time the amendments to the revocation process came into effect, the Minister was entitled to make a Report seeking Governor in Council approval of that revocation.

[67] Neither the Minister nor the Applicant were entitled, as a matter of right under the *SCCA*, to have the matter dealt with under the amended procedure. The transition rules make clear that cases like the Applicant's were to be resolved under the former procedure set out in the *Act*.

[68] I therefore find that the *Hassouna* decision has no effect on this proceeding. Its findings simply do not apply to the former procedure. It should be recalled that under that procedure, the Applicant had exercised his right to have the matter referred to this Court for determination, which would have entailed a full hearing into the facts during which the Applicant would have had the opportunity to test the case of the Minister and to present his own evidence. Instead, the Applicant chose to settle the matter, on the terms set out above. There is no unfairness to the

Applicant in the continued application of the provisions of the former *Act*, and in any event, the transitional provisions in the *SCCA* govern this matter.

[69] I therefore reject the Applicant's arguments that the provisions of the *SCCA* apply, and that *Hassouna* has any bearing on this proceeding.

B. *What effect do the 2003 and 2013 settlements have on this proceeding, and in particular does issue estoppel prevent the Minister from proceeding with the revocation?*

[70] The Applicant submits that issue estoppel should prevent the Minister from proceeding with the revocation, because the previous attempt to revoke his citizenship was quashed by the 2013 Order of this Court. The Applicant refers to *Angle v MNR*, [1975] 2 SCR 248 at 254, where the Supreme Court of Canada held that issue estoppel applies when: (i) the same question has been decided; (ii) the judicial decision was final; and (iii) the same parties are involved. The Applicant contends that the revocation of his citizenship was finally decided by the 2013 Order. The legal effect of the decision to quash the previous revocation decision is final. Since the issue and the parties are the same, and there is a final decision, the Minister should be barred by issue estoppel from proceeding again.

[71] The Applicant argues that this case should be halted in accordance with the guidance of the Supreme Court of Canada in *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44 at para 33, which stated that the rules governing issue estoppel "should not be mechanically applied." He contends that it is in the interests of justice that this litigation is put to an end, and that the attempt to revoke his citizenship over 20 years after he allegedly made an innocent misrepresentation is manifestly unfair and will bring the administration of justice into disrepute.

[72] The Respondent submits that the doctrine of issue estoppel does not apply to issues in the immigration context which have not been specifically considered and decided by a Court on judicial review; rather, such issues are properly left to the administrative decision-maker to be dealt with on the redetermination of the matter: *Burton v Canada (Citizenship and Immigration)*, 2014 FC 910 [*Burton*]. In this case, the 2013 Order did not make any findings on the merits of the matter – it simply quashed the decision. Furthermore, the Respondent contends that this Order was the result of negotiations and a settlement involving the Applicant and his counsel, and the terms of settlement specified that the Respondent would not be precluded from reinstituting citizenship revocation proceedings following the issuance of the Court Order.

[73] The Applicant disputes this characterization of the settlement, and adds that the Order of the Court does not contain any such provision.

[74] I am not persuaded that the doctrine of issue estoppel has any application in this case. It is not necessary to make a determination regarding the terms of the settlement that preceded the issuance of the 2013 Order, although I note in passing that the Respondent's position is reflected in the Report of the Minister to the Governor in Council, and no evidence has been filed by the Applicant to contradict this.

[75] This issue falls to be determined with reference to the legal effect of the 2013 Order. In simple terms, it quashed the previous decision to revoke the Applicant's citizenship. As Justice Mary Gleason confirmed in *Burton*, and as has been confirmed in subsequent decisions (see, for example, *Ouellet v Canada (Attorney General)*, 2017 FC 586 at para 27), the effect of a successful application for judicial review is generally to extinguish the decision of the decision-

maker and to set it aside for all purposes. This usually means that if the matter is reconsidered, the new decision-maker is not bound in any way by the prior determination.

[76] In this case, the 2012 revocation decision was quashed by the 2013 Order of this Court. That had the effect of maintaining the Applicant's citizenship. It did not, either expressly or by necessary implication, have any impact on the Minister's discretion under the *Act*. This means that the Minister could have decided to let the matter drop after the revocation was quashed. It also means that the Minister could exercise the statutory discretion to reinstitute revocation proceedings.

[77] The "finality" of the 2013 Order related only to the prior decision. The Applicant's argument that it also precluded the Minister from pursuing the revocation of his citizenship is not persuasive. Among other considerations, the obligations on the Minister in this regard must be understood to be ongoing rather than time-limited. In this circumstance, I find that the doctrine of issue estoppel is simply inapplicable to the case at bar.

C. *Should a stay of proceeding be issued because of unreasonable delay amounting to an abuse of process?*

[78] The Applicant argues that the delay in this case amounts to an abuse of process. In accordance with *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at para 120 [*Blencoe*], the damage to the public interest due to the substantial delay in this case outweighs any public interest in enforcing a misrepresentation allegedly committed over 20 years ago. The Applicant submits that applying the factors set out in *Blencoe* to this case should result in a stay of the proceeding.

[79] The Applicant contends that the delay is far beyond the inherent time requirements; it is, after all, a relatively simple factual and legal matter. Further, the cause of the delay must rest largely on the Respondent. Any delay in contacting him during this process is not his responsibility since the Applicant, like other Canadian citizens, is not required to be at the beck and call of the Respondent. The Applicant submits that he had thought that the matter was at an end after it was quashed by the Federal Court and had no reason to be following up on the matter with the Respondent.

[80] The Applicant submits that he has been prejudiced by the delay in two ways: first, he has faced prolonged uncertainty and worry and incurred significant expenses to fight against the revocation of his citizenship. Second, he argues that the Minister's delay has prejudiced him because, when the original settlement was reached in 2003, the *Act* imposed only a five-year ban on reapplying for citizenship after revocation, but under current law, the ban is for ten years. If the Minister had acted with due dispatch, the Applicant may have already regained his citizenship. Instead, he is condemned to waiting for ten years to reapply, and during this additional period, he is stateless and cannot travel to be with his family. This is a meaningful prejudice to his interests that is entirely caused by the Minister's delay in advancing the matter (*Canada (Citizenship and Immigration) v Parekh*, 2010 FC 692 at para 55 [*Parekh*]).

[81] The Applicant argues that the decision in *R v Jordan*, 2016 SCC 27 [*Jordan*] is applicable, in that it makes it essential to evaluate the fairness of the proceedings based on delay.

[82] The Respondent argues that while the *Jordan* decision undoubtedly has resulted in a heightened sensitivity to the issue of delay in the legal system, it is limited in its application to the criminal law context (*Chen v Canada (Citizenship and Immigration)*, 2018 FC 767 at para

36). In this case, the Applicant has not demonstrated specific and significant prejudice or harm flowing from the delay such that the proceedings amount to an abuse of process. The Applicant has stated in a sworn affidavit that he "assumed that the matter was dropped," sometime after the 2003 Order. This is inconsistent with his assertion that he has suffered ongoing anxiety due to the prolonged nature of the proceedings.

[83] I am not persuaded that the proceedings should be stayed because the delay in this matter has caused such prejudice or harm to the Applicant that the proceedings amount to an abuse of process. The test for abuse of process in this context is whether "the damage to the public interest in the fairness of the administrative process should the proceeding go ahead would exceed the harm to the public interest in the enforcement of the legislation if the proceedings were halted": *Parekh,* at para 24, quoting *Blencoe* at para 120 (see also *Ogiamien v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 30 at para 43; *Oberlander 2018*, at paras 101-05; *Montoya* at paras 29-31).

[84] The delay in this matter must be examined in its overall context. This includes a consideration of the specific periods of alleged delay and its causes, as well as the impact on the Applicant.

[85] The chronology begins in October 1995, when the Applicant applied for citizenship. He was charged with trafficking in narcotics in March 1996. The Applicant was interviewed by a Citizenship Judge in June 1996, and obtained his Canadian citizenship on June 17, 1996. In April 1997, the Applicant was convicted of trafficking in cocaine. He was notified by the Minister of her intention to recommend that his citizenship be revoked in December 2000, and this was successfully served in May 2001. This was resolved in July 2003, with the issuance of the Court

Order that put an end to the proceeding that the Applicant had requested. That is the first period of delay.

[86] The next period involved a series of efforts to contact him to serve him with the preliminary report of the Minister to the Governor in Council. As noted previously, these efforts continued from June 2009 until March 2012, when the Minister signed the Report to the Governor in Council. It is relevant that during this period, the Applicant applied for and obtained a Citizenship Certificate (Proof of Citizenship). The revocation decision was quashed, on consent, in December 2013. The evidence reveals that the Applicant had been able to travel outside of Canada for some unknown time during this period, because his passport was seized when he returned to Canada in January 2013. This is the second period of delay.

[87] The final period of delay runs from January 2014, when the redetermination process began, until April 2015, when the preliminary Report of the Minister was successfully served on the Applicant.

[88] Unlike the case of *Parekh*, these facts do not indicate a lengthy period of unexplained inaction on the part of the Minister. I find that these facts are more similar to those in *Hassouna*, in that there is an explanation for the actions which have occurred during the relevant periods, including that at several points during this time-frame, the Minister was making efforts to comply with the requirements of procedural fairness by serving the Applicant with the relevant documents, and the Applicant was taking steps to protect his legal interests.

[89] In this case, the analysis of the delay and its causes does not support a conclusion that there has been unexplained administrative inaction such that further proceedings would amount to an abuse of process.

[90] The second factor is the impact of the delay. The Applicant argues that a delay of over 20 years is unreasonable and unjust, and that he has been prejudiced because during this period he has lost the opportunity to reapply for his citizenship within five years.

[91] There is some force to the Applicant's argument that the delay combined with the change in the time period to reapply for citizenship is the type of prejudice that can be viewed as damaging the public interest, as described in *Blencoe* and *Parekh*. However, the facts of this case do not support a conclusion that the process has harmed the Applicant in such a manner as to give rise to an abuse of process.

[92] Several factors support this conclusion. First, while the overall delay may amount to over 20 years, there have been a series of proceedings, and the Applicant has participated in several of these – it is not a situation where the legal process has only recently been initiated, or where there was a lengthy period of unexplained inaction. Second, the Applicant has indicated that he thought the matter was resolved in 2003, and there is no evidence that he has experienced any significant psychological distress or other harm, nor any indication that relevant evidence is no longer available. Third, for significant periods the Applicant was either apparently outside of Canada, or not living at the address he had provided to authorities, or the address he had given was not his actual residence. He must bear some responsibility for a portion of the overall delay.

[93] Finally, and perhaps most importantly, during this period the Applicant has maintained his Canadian citizenship, despite having acknowledged in 2003 that he had obtained it by misrepresentation or failing to disclose a material circumstance. In addition, since 2003 the Applicant has known that if his citizenship were revoked by the Governor in Council he would revert to the status of permanent resident. However, he has also known that the Minister would be bound not to issue a report under subsection 44(1) of *IRPA* as long as he was not convicted of another subsequent offence. The Applicant has had this status, and this reassurance, throughout this time period, and has not demonstrated the type of significant prejudice or harm that is required in order to sustain a claim of abuse of process.

[94] For all of these reasons, I do not find that this is the type of exceptional case which warrants the grant of a stay of proceedings due to delay amounting to abuse of process.

D. *Does the Applicant's potential statelessness have any bearing on this proceeding?*

[95] The Applicant argues that he is owed a higher duty of procedural fairness because he will be rendered stateless if his citizenship is revoked. He points to the evolution in the jurisprudence on the question of the impact of statelessness since the outset of this process. The Respondent contends that the Applicant should have raised this in his previous submissions to the Minister, and that there is no unfairness to the Applicant that arises here.

[96] I am not persuaded that the Applicant's potential statelessness gives rise to a higher duty of procedural fairness in this case. The revocation of a person's citizenship is a very serious matter that requires a high standard of procedural fairness. Like Justice Iacobucci in *Benner v Canada (Secretary of State)*, [1997] 1 SCR 358 at para 68, "I cannot imagine an interest more

fundamental to full membership in Canadian society than Canadian citizenship" (cited with approval in *Parekh*, at para 52). The fact that a person may be rendered stateless because of revocation of citizenship is undoubtedly a relevant consideration, but it does not increase the already high procedural fairness bar that applies to these proceedings (see *Oberlander 2018* at para 76).

[97] As noted previously, in the latest Report of the Minister to the Governor in Council, the Minister makes clear that if the Applicant's citizenship is revoked, and he therefore becomes a permanent resident of Canada, the Minister will abide by the 2003 agreement, and the Applicant "could not be reported under section 44 of the [IRPA] unless he is convicted of an offence under an Act of Parliament after August 18, 1999." The Applicant has not demonstrated that this somehow gives rise to a situation of procedural unfairness.

[98] I therefore reject the Applicant's argument on this issue.

## V. Conclusion

[99] For the reasons set out above, the application for judicial review is dismissed. The Applicant has not demonstrated that the decision to revoke his citizenship is unreasonable, in light of all of the circumstances of this case.

[100] At the hearing, the Applicant proposed certified questions relating to the disclosure of Cabinet confidences. Further submissions were filed by both parties following the hearing.

[101] The Applicant proposed three questions:

1. Do Federal Courts Immigration and Refugee Protection (sic) Rule 17 and Federal Courts rule 151 conflict with section 39 of the Canada Evidence Act?
2. Does substantially extending the time someone is unable to reacquire citizenship amount to prejudice?
3. When consenting to misrepresentation under section 10 of the *Citizenship Act* does the Minister or GIC have a *bona fide* obligation to move to revoke someone's citizenship in a reasonable amount of time?

[102] The Applicant submitted that these questions meet the test for certification of a "serious question of general importance" pursuant to subsection 74(d) of *IRPA*.

[103] The Respondent objects to the proposed questions, arguing that the first question does not meet the test for certification, and it is inappropriate to consider the final two because at the hearing the Applicant only raised the issue of certification regarding disclosure of Cabinet confidences and these two questions go to the merits of the judicial review.

[104] Having considered the submissions of the parties, I will not be certifying any of the proposed questions. The test for certification has recently been confirmed by the Federal Court of Appeal in *Lunyamila v Canada (Public Safety and Emergency Preparedness*), 2018 FCA 22 at para 46 [*Lunyamila*]:

> The question must be a serious question that is dispositive of the appeal, transcends the interests of the parties and raises an issue of broad significance or general importance. This means that the question must have been dealt with by the Federal Court and must arise from the case itself rather than merely from the way in which the Federal Court disposed of the application. An issue that need not be decided cannot ground a properly certified question. Nor

> will a question that is in the nature of a reference or whose answer turns on the unique facts of the case be properly certified.
>
> [Citations omitted.]

[105] In regard to the first question, I find that it is not a question of general importance. At the hearing, counsel indicated that this is the second case in which the intersection of Rule 17 of the *Citizenship Rules* and the question of Cabinet confidences has arisen. This is not an issue which is likely to arise in many other matters, because the Cabinet and Governor in Council are no longer involved in citizenship revocation under the *SCCA*. In addition, this is not a question which arises directly from this case.

[106] In regard to the final two questions, they are inherently factual, and so they are not the type of questions which are appropriate for certification (*Lunyamila* at para 46, citing *Mudrak v Canada (Citizenship and Immigration)*, 2016 FCA 178 at paras 15, 35).

[107] I am therefore not certifying any of the proposed questions.

[108] In exercise of my discretion under Rule 400 of the *Rules* and considering the circumstances of this case, I decline to award costs against the Applicant. Each party will bear their own costs in this proceeding.

**JUDGMENT in T-863-18**

**THIS COURT'S JUDGMENT is that**:

1. The application for judicial review is dismissed.

2. No question for certification arises.

3. No costs are awarded. Both parties shall bear their own costs in this proceeding.

"William F. Pentney"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-863-18 |
| **STYLE OF CAUSE:** | THAI TRAN v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | WINNIPEG, MANITOBA |
| **DATE OF HEARING:** | MARCH 11, 2019 |
| **JUDGMENT AND REASONS:** | PENTNEY J. |
| **DATED:** | FEBRUARY 6, 2020 |

**APPEARANCES:**

| | |
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