Federal Court  Cour fédérale

Date: 20130927

Docket: T-1419-12

Citation: 2013 FC 997

Ottawa, Ontario, September 27, 2013

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

DANKO PAVICEVIC

Applicant

And

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is the judicial review of a decision of the Acting Manger, Case Management Section, Security Bureau of Passport Canada (Passport Canada), dated April 25, 2012, revoking the Applicant's passport. The basis of the decision being that, because at the time of the Applicant's birth one of his parents was a foreign diplomat serving in Canada then, pursuant to the *Citizenship Act*, RSC, 1985, c C-29 (the Citizenship Act), the Applicant was not a Canadian citizen. Passport Canada was, therefore, required to revoke his passport in accordance with the *Canadian Passport Order*, SI/81-86 (the Passport Order).

Background

[2] The Applicant was born in Ottawa, Ontario on April 23, 1956.

[3] In 1990 or 1991, he presented his Ontario birth certificate at the Canadian Embassy in Belgrade and was subsequently issued a Canadian passport.

[4] He moved to Toronto in 1991 where he lived and worked until his retirement in 2011. During that time he sponsored his wife and together they had a daughter who was born in Canada in 2005. He renewed his passport in 1997, 2002 and 2007.

[5] In 2006, the Applicant applied for a Canadian passport for his son from an earlier marriage. By letter to the Applicant's son dated September 3, 2007, Citizenship and Immigration Canada (CIC) advised that it had been determined that the Applicant was exempt, pursuant to subsection 5(3) of the Citizenship Act, from obtaining citizenship by birth in Canada as his father was accredited as a representative of a foreign government and had diplomatic status at the time of the Applicant's birth. Accordingly, as the Applicant was not a Canadian citizen at the time of his son's birth, his son had no claim to citizenship through the Applicant.

[6] In April of 2012, the Applicant was in Serbia visiting his father and applied to the Canadian Embassy in Belgrade to renew his Canadian passport which was due to expire in May 2012. Instead of a renewal, he received a letter on April 25, 2012 from Passport Canada revoking his passport (the Decision). That Decision is the subject of the present application for judicial review.

Decision Under Review

[7] The Decision states that Passport Canada has been charged by the Minister of Foreign Affairs with administering all matters relating to the issuance, revocation, refusal and recovery of Canadian passports which mandate is expressed in the Passport Order. Pursuant to subsection 4(2) of the Passport Order, no passport shall be issued to a person who is not a Canadian citizen. Further, that pursuant to subsection 3(2) of the Citizenship Act, children born in Canada do not acquire citizenship if, at the time of their birth, neither parent was a Canadian citizen or permanent resident and one parent was a diplomat, or consular officer, or other representative or employee in Canada of a foreign government or an employee in the service of such a person.

[8] Passport Canada therefore made the decision to revoke the Applicant's passport because it had been confirmed that one of the Applicant's parents was a foreign diplomat serving in Canada at the time of the Applicant's birth.

Positions of the Parties

Applicant's Submissions

[9] The Applicant submits that Passport Canada is estopped from refusing to issue him a passport because it had previously decided that he was entitled to a Canadian passport and that he meets the requirements for issue estoppel followed by this court in *Yamani v Canada (Minister of Citizenship and Immigration)*, [2002] FCJ No 1550 (TD) (QL) [*Yamani*]. Further, that the doctrine of promissory estoppel applies in this case and that he has met the requirements of that doctrine as set out in *Maracle v Travellers Indemnity Co. of Canada*, [1991] 2 SCR 50 at para 13 [*Maracle*].

[10] The Applicant also submits that he had a legitimate expectation that he would be issued a Canadian passport. He cites *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) 193 [*Baker*] and argues that the passport authorities cannot backtrack on their previous representations and conduct without providing him with extensive procedural rights.

[11] The Applicant states that it is an abuse of process and/or authority for the passport authorities to now decide, after 20 years, that the Applicant should not be provided with a Canadian passport (*Minister of Citizenship and Immigration v Parekh*, [2010] FCJ No 856 (TD) (QL) at para 24 [*Parekh*]; *Blencoe v British Columbia (Human Rights Commission)*, [2000] 2 SCR 307 para 121, [*Blencoe*]). The passport authorities apparently became aware of his parent(s) diplomatic status in 2007, but did not do anything about it until he applied for a new passport in 2012. The Decision has had a devastating impact on the Applicant and is so oppressive that the public interest is served by allowing him to keep his passport rather than revoking it, regardless of whether Passport Canada had a valid statutory right to revoke.

[12] The Applicant submits that he was denied procedural fairness (*Baker*, above; *Muliadi v Canada (Minister of Employment and Immigration)*, [1986] FCJ No 1056 (CA) (QL); *Abdi v Canada (Attorney General)*, [2012] FCJ No 945 (TD) (QL) [*Abdi*]; *Hrushka v Canada (Minister of Foreign Affairs)*, [2009] FCJ No 94 (TD) (QL); *Kamel v Canada (Attorney General)*, 2008 FC 338 at paras 58-59, rev'd on other grounds 2009 FCA 21 [*Kamel*]). Passport Canada should have informed him of any concerns and provided him with an opportunity to respond before it made a decision. Passport Canada should also have provided him with the evidence it relied upon in making its Decision. In fact, Passport Canada relied on a series of emails in determining that his

parents held diplomatic status at the time of his birth. However, absent any supporting documentation or analysis of the factual basis upon which the Decision was made, Passport Canada could not have reasonably arrived at its Decision.

[13] The Applicant further submits that Passport Canada does not have the legal authority to revoke his passport because it erred in applying the current Citizenship Act retroactively to 1956, when the Applicant was born.

[14] Finally, the Applicant submits that Passport Canada exceeded its jurisdiction by revoking his passport. The Passport Order does not permit Passport Canada to analyze whether a passport applicant is a Canadian citizen based on considering whether his parents held diplomatic status at the time he was born. While the Passport Order contemplates various bases upon which Passport Canada can deny a passport to an applicant, parentage is not one of them. As it is CIC which has the authority to determine citizenship status, there was no legal foundation for the Decision.

Respondent's Submissions

[15] The Respondent submits that the Applicant did not have a legitimate expectation to be issued a passport. Passport Canada is statutorily obliged to administer the Passport Order and is required to revoke and to refuse to issue passports to individuals who are not Canadian citizens. Passport Canada does not have the authority to confer or revoke citizenship and, therefore, CIC is the appropriate ministry to address issues of citizenship. Any administrative errors that resulted in the Applicant being previously issued passports do not constitute issue or promissory estoppel or a legitimate expectation to receive a passport in the future. The fact that the Applicant was previously

issued a passport based on his birth certificate cannot have the effect of granting him citizenship. Further, administrative errors do not change requirements prescribed by law (*Minister of Natural Resources v Inland Industries Limited*, [1974] SCR 514 at p 523 [*Inland Industries*]).

[16] The Respondent further submits that it is well established that legitimate expectations can create only procedural and not substantive rights (*Khadr v Canada (Attorney General)*, 2006 FC 727 at para 30 [*Khadr*]). The present case is analogous to *Al-Ghami v Canada (Foreign Affairs and International Trade)*, 2007 FC 559 at paras 35- 36 [*Al-Ghami*]).

[17] The Respondent submits that Passport Canada had the legal authority to revoke and to refuse to issue the Applicant's passport as he was not a Canadian citizen. Subsection 4(2) of the Order stipulates that "No passport shall be issued to a person who is not a Canadian citizen under the Act." The reference to "Act" is defined in section 2 as the Citizenship Act and section 3 of that Act provides that children born of foreign diplomats or an equivalent in Canada are not entitled to Canadian citizenship simply by birth.

[18] The Respondent submits that this provision of the Citizenship Act was already in force at the time of the Applicant's birth. Subsection 5(2)(i) of the version of the Citizenship Act that was in place in 1952 contains the same exception for children born of a foreign diplomat, or consular officer, or a representative of a foreign government accredited to Her Majesty.

[19] The Respondent submits that Passport Canada would issue the Applicant a passport if he provides evidence that he is a Canadian citizen and meets the other requirements of the Passport

Order. Further, like any other foreign national, he can also apply for permanent residency pursuant to the *Immigration and Refugee Protection Act*, SC 2001, c 27 and later request to become a citizen.

Issues

[20] I would frame the issues as follows:

1. Is the Decision correct?

2. Is the Decision reasonable?

Legislative Background

[21] Section 3 of the Citizenship Act describes those persons who are Canadian citizens which, in most cases, would include persons born in Canada:

3. (1) Subject to this Act, a person is a citizen if	3. (1) Sous réserve des autres dispositions de la présente loi, a qualité de citoyen toute personne :
(*a*) the person was born in Canada after February 14, 1977;	*a*) née au Canada après le 14 février 1977;

[22] However, subsection 3(2) contains an exception which applies to the children of foreign diplomats and others connected with a foreign government:

(2) Paragraph (1)(a) does not apply to a person if, at the time of his birth, neither of his parents was a citizen or lawfully admitted to Canada for permanent residence and either of his parents was	(2) L'alinéa (1)a) ne s'applique pas à la personne dont, au moment de la naissance, les parents n'avaient qualité ni de citoyens ni de résidents permanents et dont le père ou la mère était :
(*a*) a diplomatic or consular	*a*) agent diplomatique ou

officer or other representative or employee in Canada of a foreign government;	consulaire, représentant à un autre titre ou au service au Canada d'un gouvernement étranger;
(*b*) an employee in the service of a person referred to in paragraph (a); or	*b*) au service d'une personne mentionnée à l'alinéa a);
(*c*) an officer or employee in Canada of a specialized agency of the United Nations or an officer or employee in Canada of any other international organization to whom there are granted, by or under any Act of Parliament, diplomatic privileges and immunities certified by the Minister of Foreign Affairs to be equivalent to those granted to a person or persons referred to in paragraph (a).	*c*) fonctionnaire ou au service, au Canada, d'une organisation internationale — notamment d'une institution spécialisée des Nations Unies — bénéficiant sous le régime d'une loi fédérale de privilèges et immunités diplomatiques que le ministre des Affaires étrangères certifie être équivalents à ceux dont jouissent les personnes visées à l'alinéa a).

[23] Section 2 of the version of the Canadian Passport Order in effect (from 2010-04-14 to 2012-05-16) at the time the Decision was made, defined Passport Canada as a section of the Department of Foreign Affairs and International Trade charged by the Minister of Foreign Affairs with issuing, refusing to issue, revoking, withholding, recovery and use of passports, including refusing and withholding any passport services.

[24] The Passport Order states that no person who is not a Canadian citizen under the Act, which is defined as the Citizenship Act (section 2), shall be issued a passport:

4. (1) Subject to this Order, any person who is a Canadian citizen under the Act may be issued a passport.	4. (1) Sous réserve du présent décret, un passeport peut être délivré à toute personne qui est citoyen

	canadien en vertu de la Loi.
(2) No passport shall be issued to a person who is not a Canadian citizen under the Act.	(2) Aucun passeport n'est délivré à une personne qui n'est pas citoyen canadien en vertu de la Loi.
(3) Nothing in this Order in any manner limits or affects Her Majesty in right of Canada's royal prerogative over passports.	(3) Le présent décret n'a pas pour effet de limiter, de quelque manière, la prérogative royale que possède Sa Majesté du chef du Canada en matière de passeport.
(4) The royal prerogative over passports can be exercised by the Governor in Council or the Minister on behalf of Her Majesty in right of Canada.	(4) La prérogative royale en matière de passeport peut être exercée par le gouverneur en conseil ou le ministre au nom de Sa Majesté du chef du Canada.

[25] Sections 9 and 10 of the Passport Order concern the refusal and revocation of passports, respectively.

Standard of Review

[26] Where previous jurisprudence has satisfactorily determined the appropriate standard of review applicable to a particular issue, that standard may be adopted by a subsequent reviewing court (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paras 57, 62 [*Dunsmuir*]).

[27] Whether or not Passport Canada has the jurisdiction to revoke the Applicant's passport because he was not a Canadian citizen is a question of law reviewed on a standard of correctness (*Dunsmuir*, at para 59). This Court has repeatedly held that decisions of Passport Canada to refuse,

revoke or withhold passport services are reviewed on the reasonableness standard (*Villamil v Canada (Attorney General)*, 2013 FC 686 at para 30; *Kamel*, above at paras 58 – 59; *Okhionkpanmwonyi v Canada (Attorney General)*, 2011 FC 1129 at para 8 [*Okhionkpanmwonyi*]; *Slaeman v Canada (Attorney General)*, 2012 FC 641 at para 44 [*Slaeman*]; *Sathasivam v Canada (Attorney General)*, 2013 FC 419 at para 13).

[28] A legitimate expectation is concerned with the procedural fairness of a decision. In *Moreau-Bérubé v New Brunswick (Judicial Council)*, [2002] 1 SCR 249, Justice Arbour (as she then was) held the following:

> [78] […] The doctrine of reasonable expectations does not create substantive rights, and does not fetter the discretion of a statutory decision-maker. Rather, it operates as a component of procedural fairness, and finds application when a party affected by an administrative decision can establish a legitimate expectation that a certain procedure would be followed: Reference re Canada Assistance Plan (B.C.), 1991 CanLII 74 (SCC), [1991] 2 S.C.R. 525, at p. 557; Baker, supra, at para. 26. The doctrine can give rise to a right to make representations, a right to be consulted or perhaps, if circumstances require, more extensive procedural rights. But it does not otherwise fetter the discretion of a statutory decision-maker in order to mandate any particular result: see D. Shapiro, Legitimate Expectation and its Application to Canadian Immigration Law (1992), 8 J. L. & Social Pol'y 282, at p. 297.

[29] The standard of review for questions involving the doctrine of legitimate expectations as well as promissory estoppel and rules of procedural fairness is correctness (*Productions Tooncan (XIII) inc c Canada (Ministre du Patrimoine)*, 2011 FC 1520 at para 41; *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at para 53). Whether the preconditions to the operation of issue estoppel are met is a question of law as it affects an individual applicant's procedural rights (*Rahman v Canada (Minister of Citizenship and Immigration)*, [2006] FCJ No 1661 at para 12 (TD)

(QL)). Issues of abuse of process concern procedural fairness which are reviewed on a correctness standard (*Herrera Acevedo v Canada (Minister of Citizenship and Immigration)*, 2010 FC 167 at para 10)

[30] Given the above, the first issue, which concerns both procedural fairness and Passport Canada's legal authority, is to be reviewed on the standard of correctness.

[31] The second issue is concerned with the reasonableness of the Decision. On a reasonableness standard, the Court's role is not to reweigh the evidence or to substitute its own opinion, but rather to ensure that the Board's decision fits with the principles of justification, transparency and intelligibility, and falls within the range of possible, acceptable outcomes" (*Dunsmuir*, above, at paras 47, 53; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 59 [*Khosa*]).

Procedural Fairness

[32] In *Apotex Inc v Merck & Co*, 2002 FCA 210, the Federal Court of Appeal defined issue estoppel as occurring when the same question has been decided in a "judicial decision" between the same parties. A tribunal decision can be considered a "judicial decision" that gives rise to issue estoppel (*Danyluk v Ainsworth Technologies Inc*, [2001] 2 SCR 460 [*Danyluk*] if three elements are satisfied. This requires looking at the nature of the administrative authority issuing the decision, i.e. whether it has adjudicative authority; whether the particular decision was one that was required to be made in a judicial manner; and as a question of law and fact, whether the decision was made in a judicial manner (*Danyluk*, above at para 35).

[33] The Applicant submits that he meets the requirements for issue estoppel followed by this court in *Yamani*, above namely:

1. that the same question has been decided;
2. that the judicial decision which is said to create the estoppel was final; and,
3. that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[34] He submits that because Passport Canada had previously issued passports to him, it had therefore decided that the Applicant was "entitled to" a Canadian passport. Thus, the same question as between the same parties had previously and finally been decided and that Passport Canada is therefore now estopped from refusing to issue the Applicant a passport.

[35] In my view, the Applicant's submissions on the application of issue estoppel are without merit. Passports are within the authority of the royal prerogative which is exercised by the Governor Council or the Minister in accordance with the Passport Order (s. 4(4); *Abdi v Canada (Attorney General)*, 2012 FC 642 at para 10). Therefore, I am not satisfied that the requirement that the prior decision be "judicial", as opposed to administrative or legislative, is met in the present case (*Danyluk*, at para 56).

[36] Moreover, Passport Canada's prior decisions to issue a passport to the Applicant were not "final". All passports expire and, therefore, any Canadian citizen desiring to continue to hold a valid passport must at some point in time apply to have a new passport issued. Every application

results in a new decision being made by Passport Canada based on that underlying application and, each time, the requirements of the Passport Order must be met. It may be that an applicant's circumstances will have changed thereby affecting the outcome of a subsequent application or the status of an existing passport. For example, if an applicant has been charged with an indictable offence, Passport Canada may refuse to issue or may revoke a passport pursuant to subsection 9(b) or subsection 10(1), respectively, of the Passport Order. Accordingly, the mere fact that Passport Canada issued a passport in the past does not give rise to a final decision in the context of the doctrine of issue estoppel.

[37] Similarly, there is no proper basis upon which promissory estoppel can be invoked in this case. Promissory estoppel exists only where there is an express or implied promise, the effects of which are clear and precise, and the promise has led the person to whom it was addressed to act in some other way than he or she would have acted in other circumstances (*The Queen v Canadian Air Traffic Control Association*, [1984] 1 FC 1081 at page 1085 (FC)).

[38] In this regard the Applicant submits that he has satisfied the principles of promissory estoppel, citing *Maracle*, above at p 57:

> The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on
>
> […]
>
> …the promise must be unambiguous but could be inferred from circumstances.

[39] Specifically, that by issuing him a passport in the past, Passport Canada led the Applicant to believe that he was a Canadian citizen entitled to a passport. In reliance on this representation, the Applicant made Canada his home for 20 years.

[40] I cannot accept that position. In my view, there could be no clear promise made by Passport Canada to issue or to continue to issue a passport to the Applicant. Passport Canada is obliged to administer the issuance or revocation of passports in accordance with the Passport Order. Promissory estoppel therefore does not arise.

[41] As regards to citizenship, the right to a hold a Canadian passport arises from citizenship which can only be granted in accordance with the Citizenship Act (*Solis v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 407 (QL); *Al-Ghamdi v Canada (Foreign Affairs and International Trade*), 2007 FC 539 at para 29 [*Al-Ghamdi*]). In this case, when Passport Canada issued the prior passports, it did so based on its mistaken belief that the Applicant was, based on his place of birth, a Canadian citizen. However, "the Minister cannot be bound by an approval given when conditions prescribed by the law were not met" (*Inland Industries*, above; *Al- Ghamdi*, above at para 31). Therefore, issuing a passport in the past does not create citizenship nor does it bind Passport Canada to issue future passports or preclude it from revoking a passport if the underlying legislative requirements are not met.

[42] In support of his claim of abuse of process, the Applicant relies on *Parekh*, above, however, in my view that case can be distinguished from the matter now before me.

[43] In *Parekh*, above, the respondents had been granted citizenship status in February of 2001. They were subsequently charged with making false representations on their citizenship applications and entered guilty pleas to those charges in November of 2002. CIC became aware of the convictions in May of 2003 and the next month made an internal recommendation that citizenship be revoked. However, no steps were taken to initiate that process until December 2006 and the statement of claim instituting the subject proceedings was not issued until May 2008.

[44] This Court found that the uncertainty over their status had a practical prejudicial impact on the respondents' lives including CIC's failure to process their daughter's application for residency which was based on humanitarian and compassionate grounds. Had CIC revoked their citizenships within a reasonable time, they could have re-applied after 5 years. The Court found that the delay was an abuse of process because it effectively deprived the respondents of key benefits of citizenship, such as the ability to travel and created an uncertainly as to their status.

[45] The Court in *Parekh* referred to the Supreme Court decision in *Blenco*, above, which addressed the requirements to be met in order to establish that an abuse of process arises from delay at paras 120-122:

> 120 In order to find an abuse of process, the court must be satisfied that, "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" (Brown and Evans, supra, at p. 9-68). According to L'Heureux Dubé J. in Power, supra, at p. 616, "abuse of process" has been characterized in the jurisprudence as a process tainted to such a degree that it amounts to one of the clearest of cases. In my opinion, this would apply equally to abuse of process in administrative proceedings. For there to be abuse of process, the

> proceedings must, in the words of L'Heureux Dubé J., be "unfair to the point that they are contrary to the interests of justice" (p. 616). "Cases of this nature will be extremely rare" (Power, supra, at p. 616). In the administrative context, there may be abuse of process where conduct is equally oppressive.
>
> 121 To constitute a breach of the duty of fairness, the delay must have been unreasonable or inordinate (Brown and Evans, supra, at p. 9-68). There is no abuse of process by delay per se. The respondent must demonstrate that the delay was unacceptable to the point of being so oppressive as to taint the proceedings. While I am prepared to accept that the stress and stigma resulting from an inordinate delay may contribute to an abuse of process, I am not convinced that the delay in this case was "inordinate".
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> 122 The determination of whether a delay has become inordinate depends on the nature of the case and its complexity, the facts and issues, the purpose and nature of the proceedings, whether the respondent contributed to the delay or waived the delay, and other circumstances of the case. As previously mentioned, the determination of whether a delay is inordinate is not based on the length of the delay alone, but on contextual factors, including the nature of the various rights at stake in the proceedings, in the attempt to determine whether the community's sense of fairness would be offended by the delay.

[46] In contrast to the facts in *Parekh*, here the Applicant knew that CIC had determined that he was precluded from Canadian citizenship as a result of subsection 5(3) of the Citizenship Act since September 2007 when his son was denied citizenship. Although Passport Canada did not revoke the Applicant's passport until April 25, 2012, in the interim and unlike *Parekh*, above, the Applicant was not deprived of citizenship or the ability to travel to and from Canada or prejudiced in any substantial way.

[47] In my view, given the facts and context of this matter, the *Blenco* test is not met and the delay in revoking the Applicant's passport did not amount to an abuse of process.

[48] The Applicant cites *Abdi*, above in support of his position that the process followed by Passport Canada in revoking and refusing to issue a passport denied him of procedural fairness in. In my view, *Abdi* does not assist the Applicant.

[49] There, the applicants' passports were seized when they attempted to return Canada following a trip abroad. Passport Canada's investigators recommended that their passports be revoked, that their pending applications for passports be denied, and that future passport services be denied for a period of five years as a result of their finding that two of the applicants had been involved in a human smuggling incident and the third had improperly allowed her passport to be utilized by a third person. Passport Canada referred the matter to an adjudicator for determination, and the adjudicator agreed with its recommendation.

[50] On judicial review, Justice Gleason found that Passport Canada breached its duty of procedural fairness as it failed to disclose to the applicants information material to the investigation which was considered by the adjudicator. This deprived the applicants of the ability to properly respond to the adjudicator who made the decision.

[51] In that case, reference was made to the "Rules of Procedure in Passport Refusal and Revocation Cases" (Rules) which Passport Canada had unilaterally promulgated. The Rules provided a two-step procedure in cases involving the refusal and revoking of a passport. The purpose of the first step was to determine whether there was evidence to support a recommendation that a passport be refused or revoked on one of the grounds listed in section 9 or 10 of the Passport

Order. Under the Rules, the Entitlement Review Section of the Security, Policy and Entitlement Directive of the Passport Office (Section) was required to communicate to the interested party "all materials facts and information in possession of the Section and provide the party the opportunity to respond and provide further information."

[52] Although the applicants had made repeated requests, the Section did not disclose any of the documents it relied on, including detailed reports, but instead wrote a series of letters to the applicants in which several but not all of the material facts were disclosed. Justice Gleason found that procedural fairness did not require that the applicants be provided with a copy of the entire file that was put before the adjudicator. What was required was that all material facts discovered by the Section in its investigation and any form of submissions supporting the Section's position that were provided to the adjudicator must be disclosed to the affected parties. Further, the affected parties must be afforded a full opportunity to respond prior to the case being remitted to the adjudicator for determination.

[53] At the hearing in this matter, counsel for the Respondent could not advise the Court what, if any, procedural rules may have been in place when the Decision was made and was asked to provide the Court with a copy of any procedural rules or process in use by Passport Canada at the relevant time. By letter of July 23, 2013 counsel for the Respondent provided a web page print out of a document entitled "L'Ombudsman/The Ombudsman".

[54] In response, counsel for the Applicant wrote to the Court pointing out that the L'Ombudsman/The Ombudsman document set out procedures to be followed when complaints are

made about Passport Canada's services, whereas the rules referenced in *Abdi*, above regarding the refusal and revocation of passports appear to be a separate set of procedures. The Respondent then provided the Rules of Procedure in Passport Refusal and Revocation Cases, but submitted that they had no application because the Applicant's passport was revoked pursuant to section 4 of the Passport Order and not section 9 or 10. The Respondent suggested that there was a procedure in place for addressing section 4 revocations, but that the procedure was not published on Passport Canada's website. Nevertheless, the procedure that was applied "mirrored" the procedure outlined in the section sub-titled, "Procedure for non-adjudicated refusals and revocations" as set out in the printout of the document found in the L'Ombudsman/The Ombudsman document.

[55] Regardless of this lack of clarity as to the applicable Passport Canada process, what is clear is that the jurisprudence indicates that refusing and revoking a passport requires "real participation by the applicant in the investigation process" (*Kamel*, above at para 67). However, even if a Court finds a breach of procedural fairness, the Court may keep the decision intact if it is satisfied that it could have no impact on the outcome of the matter (*Ahani v Canada (Minister of Citizenship and Immigration)*, [2002] 1 SCR 72 at para 26). The Court may refuse to grant relief where a breach of procedural fairness is "purely technical and occasions no substantial wrong or miscarriage of justice" (*Khosa*, above at para 43).

[56] Or, as it was put by Justice Snider in *Nagulathas v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1159:

> [24] Even if I accept that there has been a breach of procedural fairness, the remedy sought by the Applicant is not warranted on the facts of this case. Where there may be a breach of the rules of fairness, the court should assess whether the error "occasions no

> substantial wrong or miscarriage of justice" (*Khosa*, above at para 43) and whether it would be "hopeless" to remit the case back for re-determination (*Mobil Oil Canada Ltd v Canada-Newfoundland Offshore Petroleum Board*, 1994 CanLII 114 (SCC), [1994] 1 SCR 202 at 228, 111 DLR (4th) 1). The breach of procedural fairness must affect the outcome for the court to find a reviewable error (*Lou v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 862 at paras 13-14).

[57] The Decision clearly stated why the Applicant's passport was being revoked and communicated the only material fact, being that the Applicant's father held diplomatic status at the time of the Applicant's birth. It also advised that should the Applicant wish to communicate further with Passport Canada in relation to the matter that he should do so, in writing.

[58] On April 27, 2012, the Applicant did respond by writing to Passport Canada expressing his shock at the revocation of his passport and stating that at the time of his birth his father was a non-diplomat on service staff. Any confirmation to the contrary by the Office of Protocol was in error as could be corroborated by the Ministry of Foreign Affairs in Belgrade, Serbia. However, the Applicant himself provided no documentation to support that position. The Applicant asked that the revocation decision be revisited in light of this information so that he and his family could return to Canada to resume their lives there.

[59] Passport Canada and the Applicant exchanged various emails between May 3 and 15, 2012 in which the Applicant was asked if he held citizenship and a passport of another country and if he sought to have an emergency Canadian travel document issued. He confirmed that he held Serbian citizenship and passport. On May 14, 2012, Passport Canada acknowledged the Applicant's reply to its April 25, 2012 letter and stated that it had conducted further verifications with the Office of

Protocol which had confirmed that both the Applicant's parents were in Canada under a diplomatic status between 1953 and 1957.

[60] In my view, the Applicant was clearly advised of the reason for the revocation of his passport and was provided with and utilized an opportunity to respond to the Decision. Further, the Applicant had known of the existence of this issue since September 2007. He took no steps to address the question of his father's status prior to the revocation of his passport, perhaps believing that this would have no impact on his status. However, even in his response to the Decision, he did not provide any documentation to support his assertion that his father did not hold diplomatic status.

[61] More significantly, in his affidavit filed in support of this judicial review, the Applicant states that his father was employed as a non-diplomat with the Yugoslav Embassy, as a Finance Officer in the Ministry of Foreign Affairs, at the time of his birth. His father was a part of the technical or administrative staff at the Embassy who did not enjoy diplomatic immunity or privileges. He also states that his mother was a home-maker.

[62] In essence, the Applicant acknowledged that at the time of his birth the Applicant's was an employee in Canada of a foreign government. The result is that the subsection 3(2)(a) Citizenship Act exception applies to him. Accordingly, even if he had been denied procedural fairness, which in my view is not the case, I am satisfied that this would have had no impact on the ultimate outcome of this matter.

[63] In my view, there is also no basis for the Applicant's claim that he has and may rely on a legitimate expectation that he will receive a Canadian passport. As stated in *Baker*, above, at para 26, the doctrine of legitimate expectations cannot lead to substantive rights outside the procedural domain. Rather, it is "based on the principle that the circumstances affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights" (Also see *Khadr*, above at para 119; *Agraira v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras 93-94 and 98).

[64] In this regard, I would also note *Al-Ghamdi*, above, which is factually very similar to this case and in which the same provisions of the Citizenship Act and the Passport Order were considered. There the applicant was born in Montreal had erroneously been issued a Canadian passport based on his provincial birth certificate. Passport Canada later refused to issue a new passport when it learned that the applicant was not a Canadian citizen because, at the time of his birth, his father was a foreign diplomat or equivalent.

[65] The applicant in *Al-Ghamdi* also raised an argument regarding legitimate expectations which was rejected by this Court. Justice Shore stated that it is well established in Canadian law that the doctrine gives rise only to procedural rights and, in that regard:

> [37] The Applicant has always known the case to be met and has been given the opportunity to satisfy the requirements of the Canadian Passport Order.

> [38] In advising the Applicant of its decision, Passport Canada provided sufficient information for the Applicant to know its reasons: namely, that the Applicant is not a Canadian citizen.
>
> [39] The explanation as to why the Applicant is not a Canadian citizen is immaterial to the decision to deny him a passport. As this information is not relevant to the decision, it was not required to be contained in the office's decision.
>
> [40] Indeed, even today, if the Applicant provides evidence that he is a Canadian citizen, and assuming that he meets all the other requirements prescribed under the Canadian Passport Order, Passport Canada would issue him a passport.

[66] I would also note the case of *Lee v Canada (Minister of Citizenship and Immigration)*, 2008 FC 614. There, a citizenship officer rejected the applicant's request for a certificate of citizenship. The officer received information from border officials relating to the applicant's criminal record and citizenship status prior to providing decision. The officer found that the applicant's father was a diplomat at the time of the applicant's birth which triggered exclusion for citizenship. One of the applicant's arguments was that he was denied procedural fairness because the officer obtained information from the CBSA officer without giving notice to the applicant. Justice Mandamin stated the following:

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

[67] Justice Mandamin further stated:

> [34] In my opinion, given that the Applicant was aware of the CBSA documents in question, the Applicant was not denied an opportunity to make a full presentation. The Applicant's submissions to the Citizenship Officer clearly indicate he focused on the issue raised by section 3(2) of the Citizenship Act and the status of his father. The CBSA letter refers to information in the possession of the Applicant. It addresses questions the Applicant himself has addressed in his submissions to the Citizenship Officer although not his submission that the MIDA was a non-governmental organization.
>
> [35] I find that the Applicant was not deprived of a meaningful opportunity to make submissions concerning his father's status at the time of the Applicant's birth. I conclude that the Citizenship Officer did not breach the Applicant's right to procedural fairness.

[68] As in *Al-Ghami* and *Lee*, the Applicant in this case was aware that his father's status would be determinative and he was provided with an opportunity to respond to that concern.

[69] For these reasons, even if Passport Canada should have, but did not conduct an investigation in accordance with any rules pertaining to the revocation and refusal to issue passports that may have been in effect at the time of the Decision, the Applicant was not denied procedural fairness. Further, even if this had amounted to a breach of procedural fairness, the breach did not affect the outcome and therefore a reviewable error does not arise.

[70] I also agree with the Respondent that pursuant to the Passport Order, Passport Canada had the legal authority to revoke and to refuse to issue the Applicant's passport because he was not a Canadian citizen.

[71] The Applicant submits that by failing to apply the version of the Citizenship Act that was in force at the time of the Applicant's birth, being the *Citizenship Act*, RSC 1952 c 33, the decision is rendered invalid.

[72] As the Respondent points out, the same exception was in force in subsection 5(2) of the 1952 version of the Citizenship Act:

> 5(1) A person born after the 31st day of December 1946, is a natural-born Canadian citizen,
>
> (a) if he is born in Canada or on a Canadian ship; or…
>
> (2) Subsection (1) does not apply to a person if, at the time of that person's birth, his responsible parent
>
> (a)…
>
> (b) is
>
> (i) a foreign diplomat or consular officer or a representative, of a foreign government accredited to Her majesty;
>
> (ii) an employee of a foreign government attached to or in the service of a foreign diplomatic mission or consulate in Canada, or
>
> (iii) an employee in the service of a person referred to in subparagraph (i).

[73] Therefore, if the Applicant's father held any of the types of positions as described in subsection 5(1), the Applicant would not acquire citizenship simply by birth on Canadian soil.

[74] In this case, the Applicant has acknowledged that his father was employed as a non-diplomat with the Yugoslav embassy as a finance officer with the Ministry of Foreign Affairs at the time of his birth. Thus, even if his father was not a diplomat, in my view he was still an employee

of a foreign government attached to or in the service of a foreign diplomatic mission or consulate in Canada and therefore fell within the exception under either versions of the Citizenship Act.

[75] For all of the forgoing reasons I find that the Decision was correct.

Is the Decision Reasonable?

[76] The Applicant submits that the Decision is unreasonable as Passport Canada relied on a deficient evidentiary record. Specifically, that there was no factual evidence adduced to support Passport Canada's position that his parents held diplomatic status at the time of his birth. Passport Canada relied solely on internal emails and obtained no documentation nor conducted any analysis to verify the material fact, the status of the Applicant's father, prior to making the Decision.

[77] The record before Passport Canada contains the following regarding the status of the Applicant's parents:

> - A Passport Canada document entitled "Security Case History Sheet", File No. C66090093, in an entry dated 2007-11-19 which states "It has been confirmed by the Office of Protocol that father, Nicola Pavicevic born 1930-09-16, was accredited as a Foreign representative in Canada from his arrival on 1953-10-07 until 1957-11-21. As such, accredited with diplomatic status during the time of birth of Danko Pavicevik (1956-04-23);
>
> - A further Passport Canada document entitled Visualiser la note pour Fichier FL2009-054769 dated November 19, 2007, repeats this statement;
>
> - An email of April 19, 2012, of Passport Canada seeking confirmation from the Protocol Office, Foreign Affairs and International Trade (Protocol Office) as to the status of the Applicants parents: "I just want to double check with you the status of the following person. According to the remarks we have on file, it has been confirmed by your office back in 2007 that the subject's

> father Nicola Pavicevic born 1930-09-16 was accredited as a Foreign Representative in Canada from his arrival on Oct. 7, 1953 to Nov. 21, 1957. As such, he was accredited with diplomatic status during the time of the subjects birth…
>
> - The email response from the Protocol Office was that it was not sure that its records went back that far and that they might have to request the information from the archives if it was not on microfiche;
>
> - By internal emails dated April 20, 2012, Passport Canada stated that it would like to see what was held in the archives and it could also contact CIC. It also asked whether the microfiche dates back as far as 1953;
>
> - By internal email dated April 20, 2012 the Deputy Director, Privileges, Immunities and Accreditation, Diplomatic Corps Services of the Protocol Office, responded "Yes" to the question of whether the microfishe dated back as far as 1953 and, if not, that a request to archives would be needed and also stated "I also confirm that both the father and mother were under dip status between 1953 and 1957;"
>
> - A Foreign Affairs Case Note dated April 25, 2012 states "additional verifications have been performed with Protocol Office/DFAIT and CIC to confirm subject's status. According to the information provided, it has been confirmed by the Protocol Office that both subject's father and mother were under diplomatic status between 1953 and 1957. As a result, subject is not entitled to a Canadian passport;"
>
> - The email chain resumes in May of 2012, suggesting that an archives request was to be made, in the context of the status of the Applicant's sister, given that the records checked did not indicate that the Applicant's parents reported the birth of any children as is required of diplomats, the results of any archive check are not found in the record.

[78] While the verifications contained in the supporting record are comprised of intergovernmental communications rather than actual documentation as to his parent(s) status, the role of this Court is not to determine whether the evidence was sufficient proof that the Applicant's

father was a foreign diplomat. Rather, the issue before this Court is whether the impugned decision of Passport Canada is supported by the evidence on record and falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir*, above at para 47; *Khosa*, above, at para 59).

[79] In my view, the Decision was reasonable because it is defensible on the basis of the record before Passport Canada and because it is not contradicted by any documentary evidence submitted by the Applicant. Even if this were not the case, the Applicant himself confirmed that his father was an employee of the Yugoslav Embassy at the time of the Applicant's birth. Accordingly, the outcome would be unchanged even if the matter were remitted back to Passport Canada for reconsideration.

Costs

[80] The Applicant submits that costs on a lump sum basis in the amount of $10,000 are justified and reasonable in this case. The Applicant was denied a passport despite the fact that he has lived in Canada for 20 years and the case raises important and complex issues. Passport Canada has placed the Applicant in an intractable situation, made no meaningful offer to settle the matter and has resorted to threatening the Applicant with costs in an effort to cause him to cease his litigation.

[81] The Respondent submits that a lump sum amount of costs for $10,000 is inappropriate and that the Applicant should provide its draft bill of costs in accordance with Rule 400 and Tariff B of the *Federal Court Rules*, SOR/98-106 (the Rules) at the hearing. Further, that it is inappropriate for the Applicant to reference the settlement discussions between the parties. The Respondent did not

threaten the Applicant with costs, but made an offer to settle and, in the interests of transparency, advised the Applicant that if the Respondent was successful in the current proceeding, it would apprise the Court of its offer to settle in order to request elevated costs in accordance with the Rules.

[82] At the hearing before me, the Respondent submitted its correspondence purporting to be an offer to settle as well as a Tariff B, Column III Bill of Costs I, in the amount of $2,485.26.

[83] As I indicted at the hearing, while the Respondent states in its correspondence that "this is an offer to settle…" the notion that Passport Canada was in a position to make any form of offer to settle is directly in conflict with its argument that, in the circumstances of this matter, the Passport Order and the Citizenship Act precluded Passport Canada from taking any action other than revoking the Applicant's passport. Indeed, in the "settlement offer," counsel for the Respondent states, "This is not a matter that Passport Canada can rectify for Mr. Pavicevic. Rather it is a matter to be addressed with Citizenship and Immigration Canada ("CIC")." The letter goes on to state that if the Applicant discontinued his application, the Respondent was prepared to waive its costs. However, if the Applicant proceeded and was not successful, then the Respondent would seek elevated costs on the highest scale permitted by Tariff B and would rely on the "Offer to Settle."

[84] In response, counsel for the Applicant advised that he would not be withdrawing his application and would seek costs on a solicitor-client basis.

[85] In my view, there was no settlement offer, as such, and elevated costs to the Respondent are not warranted. While the Applicant has not been successful, the revocation of his Canadian

passport was a very serious matter with serious consequences, particularly as he had made his home in Canada for over 20 years, worked here, paid taxes and was a contributing member of Canadian society.

[86] A trial judge's discretion in the allocation of costs must be exercised judicially with regard to the principles and factors enumerated at rule 400(3) of the Rules (*Illinois Tool Works Inc v Cobra Anchors Co,* 2003 FCA 358). Having regard to this and the facts and circumstances described above, I am exercising my discretion and awarding a lump sum of $500.00 in favour of the Respondent.

[87] This application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

Costs are awarded to the Respondent in the amount of $500.00.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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