Federal Court Cour fédérale

Date: 20170502

Docket: T-1513-16

Citation: 2017 FC 431

Ottawa, Ontario, May 2, 2017

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

GUY CHARLES FONTAINE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision which found that the Applicant is not eligible for support available pursuant to the Thalidomide Survivors Contribution Program ("Program"). The decision, dated August 23, 2016, was made by Crawford and Company (Canada) Inc ("Administrator"), the third-party administrator of the Program.

Background

[2] On February 13, 1990 the then Minister of National Health and Welfare announced that the federal government was providing $7.5 million in payments to an estimated 75 to 100 people who were born in Canada and whose mothers took Kevadon or Talimol, the trade names under which thalidomide was marketed, during their pregnancies. Thalidomide damaged limbs and other external and internal organs in children born to mothers who took the drug in the first trimester of their pregnancy. The press release stated that in Canada thalidomide was distributed under its trade names from July 17, 1959 until its recall by the government on March 2, 1962. Thalidomide victims had one year to establish their eligibility to receive this assistance, which was to supplement amounts received by them from the manufacturers of the drug, and that the making of the payments was not an admission of any legal liability or responsibility by the government of Canada.

[3] On May 10, 1990 the Governor-in-Council promulgated Order-in-Council PC 1990-4/872, an Order "respecting ex gratia payments to persons infected with the human immunodeficiency virus (HIV) through blood products in Canada and to Canadian thalidomide victims" ("First OIC"). The First OIC allowed for certain individuals affected by maternal ingestion of thalidomide to receive two monetary payments if they applied to the Minister of Health before February 14, 1991. On December 16, 1991, the Governor-in-Council promulgated Order-in-Council PC 1991-7/2543 ("Second OIC") which amended some definitions contained in the First OIC and retroactively extended the deadline to submit applications to September 1, 1991.

[4] Health Canada distributed the funding authorized by the First and Second OICs in accordance with the "Extraordinary Assistance Plan for Thalidomide Victims of 1991" ("1991 EAP"). The 1991 EAP required that applicants meet one or more of three eligibility criteria being: (1) verifiable information of the receipt of a settlement from the drug company ("criteria 1"); or (2) documentary proof (eg. medical or pharmacy records) of the maternal use of thalidomide (brand names Kevadon or Talimol) in Canada during the first trimester of pregnancy ("criteria 2"); or (3) listing on an existing government registry of thalidomide victims ("criteria 3").

[5] On March 6, 2015 the Minister of Health announced a new package of financial assistance to help support the immediate and ongoing needs of those affected by thalidomide, the details of the Program were announced on May 22, 2015. This was comprised of a one-time lump sum payment of $125,000 to each thalidomide victim, ongoing yearly support and the creation of an annual Extraordinary Medical Assistance Fund. The Program created two categories of eligible participants. The first being Canadian thalidomide survivors who were compensated as per the 1991 EAP. The second being "new" applicants who met one of the three eligibility requirements set out in the 1991 EAP.

[6] The Applicant was born on March 5, 1959. On October 15, 2015 he contacted Health Canada to request information about the Program, this was sent to him on November 27, 2015. On January 19, 2016, counsel for the Applicant contacted the Administrator by email advising that the Applicant had informed him that his mother was administered thalidomide while pregnant with the Applicant. Further, that the drug manufacturer had provided her physician

with free drug samples, prior to regulatory approval. The email described the Applicant's deformities and stated that counsel understood that the Applicant was in the process of referral to an orthopedic specialist to confirm that his deformities were linked to his mother's ingestion of thalidomide. On January 21, 2016 the Administrator wrote to the Applicant's counsel providing him with the three qualifying criteria.

[7] On February 25, 2016 the Applicant submitted a Qualification Application. On March 4, 2016, the Administrator contacted the Applicant's counsel by email advising that further documentary proof was required of the Applicant's mother's ingestion of thalidomide under the brand names Kevadon or Talimol during her first trimester of pregnancy. On the same date the Administrator wrote to the Applicant by email listing other documentary proof that may be considered acceptable if he was having difficulty proving his mother's ingestion of thalidomide. A follow-up was sent by letter dated April 12, 2016 indicating that the Applicant had until May 3, 2016 to submit additional information, including documentary proof of one of the three 1991 EAP criteria. Counsel for the Applicant responded to the Administrator by letter dated April 26, 2016 advising that the Applicant did not meet criteria 1 and 3 of the 1991 EAP eligibility requirements and that the documentary proof required by criteria 2 was difficult to obtain in his circumstances. Counsel sought an extension of time to provide an orthopedic specialist's assessment, failing which injunctive relief would be sought. On August 11, 2016, the Administrator emailed counsel acknowledging receipt of his April 26, 2016 reply and stating that if the request for an extension was in regard to obtaining a medical opinion as to the possible reasons for the Applicant's injuries, this would not satisfy the 1991 EAP criteria. The Administrator asked counsel to advise if any further information would be provided in support of

the Applicant's eligibility as the Administrator was at a point in its review where it could render its decision. The Administrator issued its negative decision on August 23, 2016, which decision is the subject of this application for judicial review. The Administrator subsequently declined the Applicant's request that it reconsider its decision.

Decision Under Review

[8] The Administrator's decision letter stated that in order to qualify as a Canadian Thalidomide Survivor under the Program, individuals must satisfy one of the three criteria set out in the 1991 EAP, and reproduced those criteria. The letter stated that a thorough review of the Applicant's Qualification Application and supporting documentation had been completed. Further, that all applications had also been subject to a secondary review to ensure that all information provided had been fully considered. Following both of these reviews, the application did not satisfy any of the three criteria and, therefore, the Applicant was not eligible for support under the Program. The Administrator also noted that all decisions are deemed final.

Issues

[9] The Applicant identifies three issues, which he states as follows:

1. Did the Administrator deny the Applicant administrative fairness and natural justice in denying his application for participation in the compensation program?
2. Would such a denial in circumstances where the Applicant was requesting the opportunity to present medical opinion evidence be a denial of administrative fairness subject to remedy of this Court?
3. Would the restriction of consideration to the stated criteria be unreasonable and subject to judicial remedy?

[10] However, in my view, in light of the Applicant's arguments, the manner in which the Respondent has framed the issues is more appropriate, being:

1. Is the reasonableness of the Program's eligibility criteria within the proper scope of a judicial review of the Administrator's decision?
2. Was the Administrator's decision procedurally fair?

Standard of Review

[11] The parties have not made any submissions on the requisite standard of review.

[12] The first issue is concerned with the scope of this Court's powers on an application for judicial review, not with the decision of the Administrator. Accordingly, there is no application of a standard of review.

[13] As to the second issue, it is well-established that issues of procedural fairness are reviewable on the correctness standard *(Mission Institute v Khela*, 2014 SCC 24 at para 79; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43).

Issue 1: Is the reasonableness of the Program's eligibility criteria within the proper scope of a judicial review of the Administrator's decision?

Applicant's Position

[14] As a preliminary comment I note that the Applicant's written submissions were somewhat difficult to follow. And, although he identified three issues as set out above, his submissions did not follow or clearly correspond to those issues.

[15] In essence, he appears to suggest that the stated 1991 EAP eligibility criteria were unreasonable. Further, but less clearly, the suggestion appears to be that the fact that his date of birth, March 5, 1959, preceded the date on which the Respondent indicates thalidomide was first distributed in Canada, being July 17, 1959, should not be a determinative factor. In this regard, the Applicant submits that the Respondent did not have knowledge of the exact date that trade formulations of thalidomide were introduced into the Canadian market and any such knowledge appears to be industry generated. In the Applicant's view, such information is hearsay and does not fall within the business records exception to inadmissible hearsay or statutory business records exceptions. He submits that reliance on industry data gives rise to authentication issues, issues of hearsay and difficulties in testing the evidence. Further, the potential liability issues that the thalidomide manufacturers were facing at the time of the subject correspondence suggests that the motivation to misrepresent the date of entry into the Canadian market cannot be ruled out. As well, given the asserted gaps in primary materials as to introduction of the drug into Canada, including whether it was distributed under the guise of marketing or if physicians individually ordered it from sources outside of Canada, and the evidence on cross-examination of Ms. Cindy Moriarty, an Executive Director at Health Canada, on her affidavit affirmed on October 26, 2016 ("Moriarty Affidavit") "it stands to reason that Canada by its witness acknowledges that the birth date is not itself a criterion for compensation".

[16] When appearing before me the Applicant's submission was, essentially, that because for reasons beyond his control the documentary proof required to establish eligibility pursuant to criteria 2 of the 1991 EAP was impossible for him to obtain, the criteria were unreasonable as they were contrary to the objective of the Program. And because the Administrator would not

accept his anticipated medical opinion evidence, he was denied procedural fairness on the basis that he was not afforded a full and fair hearing. The Applicant relied heavily on *Gehl v Canada (Attorney General),* 2017 ONCA 319 ("*Gehl*") in support of his view that the Court can look at the social context behind the eligibility criteria to determine if they are reasonable and, if they are not, the Court can declare that the Administrator must accept and consider the proposed new evidence.

Respondent's Position

[17] The Respondent submits that the Program's eligibility criteria are not subject to judicial review. The Program is not founded upon a legal obligation - contractual, statutory or otherwise - to provide support to Canadians affected by thalidomide. Nor was the Crown's decision to provide support carried out through a statute, regulation or other enactment. Rather, it was an exercise of authority granted to the Minister by s 4 of the *Department of Health Act*, SC 1996, c 8 ("Act"). The *ex gratia* payments contemplated by the Program are funded by monies already allocated to Health Canada for the general purpose of fulfilling its statutory mandate. As such, the Program falls squarely within the Crown's prerogative power over the expenditure of public funds.

[18] Prerogative power is the discretionary authority of the Crown which has not been overtaken by statute. It is not subject to judicial review, save for constitutional scrutiny, and it is for the executive and not the courts to decide whether and how to exercise prerogative powers (*Canada (Prime Minister) v Khadr*, 2010 SCC 3 at paras 34, 36-37 ("*Khadr*"); *Hospitality House Refugee Ministry Inc v Canada (Attorney General)*, 2013 FC 543 at para 12 ("*Hospitality*

House”)). The Respondent submits that the Applicant is not asking this Court to review the manner in which the Administrator applied the Program’s eligibility criteria to his application, which he acknowledges he cannot satisfy, but is contesting the criteria themselves and is taking issue with the Crown’s decision as to who receives the *ex gratia* payments. This is a challenge to the Crown’s prerogative power over the expenditure of funds which is not subject to judicial review (see *Pharmaceutical Manufacturers Assn v British Columbia (Attorney General)*, [1997] BCJ No 1902 (BCCA)).

[19] The Respondent submits that the Program’s eligibility criteria are also immune from judicial review as they constitute a policy decision by a Minister of the Crown (*Dixon v Canada (Somalia Inquiry Commission)*, [1997] FCJ No 985 (FCA) at para 17 (“*Dixon*”), leave to appeal to the Supreme Court of Canada dismissed in [1997] SCCA No 505 (QL)). The wisdom and reasonableness of a policy is outside the scope of judicial review (*Canadian Society of Immigration Consultants v Canada (Citizenship and Immigration)*, 2011 FC 1435 at para 103 (“*Canadian Society of Immigration Consultants*”); *Western Grain Elevator Assn v Canada (Attorney General)*, 2014 FC 337 at para 37, aff’d in 2012 FCA 194, leave to appeal to the Supreme Court of Canada dismissed in 2012 CarswellNat 5001 (WL); *Jafari v Canada (Minister of Employment and Immigration)*, [1995] 2 FC 595 (FCA) at para 14; *Canada (Attorney General) v Mercier*, 2010 FCA 167 at paras 75-76, leave to appeal to the Supreme Court of Canada dismissed in [2010] SCCA No 331 (WL)). For these reasons, *Gehl* has no application.

[20] As both an exercise of Crown prerogative over the expenditure of funds and as a Ministerial policy decision, the Program eligibility criteria are not justiciable. The

Administrator's role was to determine if the Applicant met the eligibility criteria and it did not have authority to expand or alter the criteria. Nor does this Court have jurisdiction to assess the criteria chosen by the Crown or, as the Applicant requests, establish new criteria.

Analysis

[21] Given the submissions of the Applicant, it is perhaps appropriate to remark that judicial review is directed at the legality, reasonableness and fairness of the procedures employed and the actions taken by government decision-makers, or in this case, their delegates (*Canada (Attorney General) v TeleZone Inc,* 2010 SCC 62 at para 24; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 28). Here the decision under review is that of the Administrator whose role was to determine if applicants met the eligibility requirements of the Program. The Administrator did not establish those criteria.

[22] In that regard, there were two groups of people who could be found to be eligible for support under the Program. The first was Canadian thalidomide survivors who were compensated as per the 1991 EAP. The second was new applicants who met one of the three eligibility requirements set out in the 1991 EAP.

[23] I acknowledge that in his affidavit made in support of this application, the Applicant stated that before his mother's death in 1984 she told him that her physician had provided her with morning sickness pills and that she later inferred that she had been provided with thalidomide. Further, that in 1991 the Applicant contacted a Mr. Cliff Chatterton of the War Amps organization who had lobbied for the thalidomide settlement and was representing

survivors. The Applicant deposes that Mr. Chatterton advised him that there was no point in applying as he was born before thalidomide was available in Canada. The Applicant states that he explained to Mr. Chatterton that it was his understanding that doctors were giving out morning sickness pills containing thalidomide without prescription at the time of his mother's pregnancy and that his mother had told him that she had taken a thalidomide containing drug and had so told family and members of the community. In response, Mr. Chatterton reiterated that the Applicant was too old and nothing could be done.

[24] However, regardless of the Applicant's reason for not applying in 1991 and whether the advice of Mr. Chatterton was well-founded or not, the salient fact is that the Applicant did not apply for and did not receive compensation in 1991. In the result, he could only fall within the second group of people who could be found to be eligible for support under the Program, being new applicants who were required to meet one of the three eligibility criteria set out in the 1991 EAP. When appearing before me, both parties were in agreement that being born after thalidomide was known to be available in Canada was not one of the three stated eligibility criteria. I would note only that while this may be implicit in criteria 2, the Applicant's date of birth was not the basis on which the Administrator made its decision.

[25] In his April 26, 2016 correspondence to the Administrator, counsel for the Applicant acknowledged that the Applicant did not meet the first of the three 1991 EAP criteria as he had not previously been in receipt of a settlement from a drug company. Nor did he meet the third criteria as he was not listed on an existing government registry of thalidomide survivors. As to the second criteria, documentary proof (for example, medical or pharmacy records) of maternal

use of thalidomide (brand names Kevadon or Talimol) in Canada during the first trimester of pregnancy, counsel stated that:

> a) his mother's physician, Claude Murphy, is likely deceased, and even if alive would be quite elderly and in any event he is not listed as a presently licensed physician in Manitoba. I note that in Mr. Fontaine's recollection his mother had not suspected drug involvement, took her son's condition as fated, that she told him that he was lucky that he was not like her doctor's son (the physician has administered the medication to his spouse and that doctor's son, Paul was born without arms and legs) and accordingly he has no reasonable expectation that the physician had documented Mr. Fontaine's condition as being ascribable to thalidomide administration.
>
> Additionally due to Mr. Fontaine's growing up in an isolated Metis Community, St. Laurent, Manitoba, there was no local pharmacy, and he is unable to access any pharmaceutical records pertaining to his mother. In any event we understand the physician administered the thalidomide prior to formal government regulatory approval, as drug company physician promotion (which promotion practice was known to government regulators or ought to have been known) and, not through a pharmacy. Accordingly we do not anticipate there were any formal pharmaceutical prescription records.

[26] By email of March 4, 2016, the Administrator advised that if the Applicant was having difficulty providing proof of his mother's ingestion of thalidomide then the following may also be considered acceptable documentary proof: (1) a copy of a doctor's prescription indicating thalidomide was prescribed for the individual's mother during the first trimester of pregnancy; or (2) hospital birth records of the individual making reference to his/her mother's ingestion of thalidomide during pregnancy; or (3) other medical/pharmacy records indicating that the individual's mother was prescribed/ingested thalidomide during pregnancy; or (4) if no records are available, proof in the form of a sworn affidavit from a medical professional with direct knowledge of the event may be acceptable, eg. physician stating that he/she prescribed

thalidomide to his/her mother during pregnancy. It is clear from the record that the Applicant did not provide the required documentary proof, nor does the Applicant contest this.

[27] In his application for judicial review the Applicant is not suggesting that the Administrator erred by unreasonably applying the eligibility criteria to the evidence which he presented in support of his application. Rather, that the criteria themselves were unreasonable and/or that the Administrator erred by limiting itself to the application of those criteria when it should have taken a more nuanced approach which considered the social context of the Program and that it was impossible for the Applicant to meet the specified criteria.

[28] In his Notice of Application the Applicant seeks, amongst other things, that the Administrator's decision be quashed and that his claim be sent back for reconsideration with a direction from this Court that valid proof for eligibility can be in the form of an expert medical opinion that, on a balance of probabilities, his injuries are consistent with first trimester maternal ingestion of thalidomide. Further, a declaration by this Court that upon reconsideration any criterion not allowing such proof is unreasonable and in error. The Applicant is asking the Court to find that the Administrator unreasonably limited its assessment to the 1991 EAP criteria and, in effect, that this Court create a new eligibility criteria.

[29] Thus, the question is whether the Administrator had the authority, and whether this Court has the jurisdiction, to do as the Applicant asks. For the reasons below, I do not believe that the Administrator could, or that this Court can, provide the remedy that the Applicant seeks.

[30] It is clear from the record that the Program is a compassionate one, providing *ex gratia* payments to thalidomide victims. By way of example, I note that on May 22, 2015, the Minister stated that the government, even in the absence of a legal obligation to provide support, had a clear moral obligation to help meet the changing needs of thalidomide survivors.

[31] Thus, the Program is a voluntary humanitarian effort. It is not founded on a legal obligation arising from statute, contract or otherwise to provide this support and this is not disputed by the Applicant. The Moriarty Affidavit states that the *ex gratia* payments are funded by Health Canada's existing budget, pursuant to the Minister's authority to promote and preserve the physical well-being of the people of Canada pursuant to s 4(2) of the Act. The Respondent submits that the Program was effected by prerogative power, therefore, it is not subject to judicial review by this Court.

[32] As to what comprises prerogative power, I note that in *Khadr* the Supreme Court of Canada considered whether the remedy sought in that case was precluded by the fact that it touched on Crown prerogative power over foreign affairs. It defined the prerogative power as:

> [34] The prerogative power is the "residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown": *Reference as to the Effect of the Exercise of the Royal Prerogative of Mercy Upon Deportation Proceedings*, [1933] S.C.R. 269, at p. 272, *per* Duff C.J., quoting A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (8th ed. 1915), at p. 420. It is a limited source of non-statutory administrative power accorded by the common law to the Crown: Hogg, at p. 1-17.

[33] The Supreme Court of Canada concluded in *Khadr* that prerogative power over foreign affairs had not been displaced by legislation and continued to be exercised by the federal

government. It also stated that it is for the executive and not the courts to decide whether and how to exercise its powers, but the courts have the jurisdiction and the duty to determine whether a prerogative power asserted by the Crown does in fact exist and, if so, whether its exercise infringes the *Charter* (*Operation Dismantle Inc v R*, [1985] 1 SCR 441 (SCC)) or other constitutional norms *(Air Canada v British Columbia (Attorney General)*, [1986] 2 SCR 539 (SCC)).

[34] In *Hospitality House*, where an Order-in-Council which changed the rules relating to health coverage for privately sponsored refugees was challenged, this Court held that the Order was enacted under the Crown's prerogative power over the expenditure of funds and that such power is reviewable on constitutional grounds, but not otherwise (at para 12).

[35] Similarly, in *Canadian Doctors for Refugee Care v Canada (Attorney General)*, 2014 FC 651 ("*Canadian Doctors*"), Justice Mactavish acknowledged, in the absence of a legislative requirement, the Crown's prerogative power in the context of spending. She also noted that the Crown's prerogative power is not immune from judicial scrutiny as the exercise of the prerogative is subject to certain limits, it must be *intra vires* federal jurisdiction, it must be procedurally fair (if a duty of fairness is owed) and it must conform to the *Charter* (at para 402).

[36] Finally, I note that in *Mercier-Néron v Canada (Minister of National Health and Welfare)*, [1995] FCJ No 1024 (FC) ("*Mercier-Néron*"), this Court reviewed a decision denying an application for *ex gratia* payments for thalidomide victims under the First OIC. In rendering

that decision, the Court found that compensation for those victims through *ex gratia* payments is a matter that derives its enabling power from the royal prerogative (at para 14).

[37] Accordingly, in this matter, based on the forgoing, I am satisfied that the Crown's decision to make *ex gratia* payments, including its stipulation as to who will be eligible to receive those payments by the effecting of eligibility criteria, derives from and is an exercise of the Crown's prerogative power. The exercise of that power was not displaced by legislation and it is not challenged by the Applicant as reviewable on constitutional grounds and, as I have found below, it was not exercised in a manner that breached any duty of procedural fairness that was owed. Accordingly, it is not reviewable by this Court.

[38] Moreover as noted above, the Applicant attacks the eligibility criteria themselves. The Applicant does not assert that the Administrator unreasonably applied the criteria, rather that it erred by not expanding criteria 2 for new applicants to include opinion evidence, rather than documentary proof of maternal ingestion of thalidomide, or by not creating a new criteria in that regard. In my view, the Administrator had no authority to do so in this circumstance and it reasonably applied the proof submitted by the Applicant to the eligibility criterion.

[39] Nor does this Court have jurisdiction to assess the reasonableness of the existing criteria or to impose different or new criteria. This is because the Program, which includes the criteria, constitutes a policy decision by the Minister and is not subject to judicial review. As stated by the Federal Court of Appeal in *Dixon*, it is well-established that the courts have no power to review policy considerations which motivate Cabinet decisions. Absent a jurisdictional error or

constitutional challenge, where Cabinet acts pursuant to a valid delegation of authority from Parliament, it is accountable only to Parliament - and through Parliament to the Canadian public - for its decisions (*Dixon* at para 17).

[40] This is also demonstrated in *Canadian Society of Immigration Consultants*, where Justice Martineau stated that:

> [103] …regulations or policies of the Governor in Council or the Minister are not reviewable, except in cases of excess of jurisdiction, failure to comply with legislative or regulatory requirements. In other words, it is not open to a court to determine the wisdom of the regulation or policy and to assess their validity on the basis of the court's preferences. See *Canadian Council for Refugees v. R.*, 2008 FCA 229 (F.C.A.) at para 57 and *Mercier c. Canada (Service correctionnel)*, 2010 FCA 167 (F.C.A.) at paras 78 and 80. Such approach is entirely consistent with the treatment reserved in case of legislations passed by Parliament or a Legislature (*Imperial Tobacco*, above, at paras 58-60).

[41] More recently, in *Stemmler v Canada (Attorney General)*, 2016 FC 1299, Justice Gascon held that:

> [71] That said, I agree with the Attorney General that, irrespective of what the *ex gratia* payment ended up being in this case, the legal and policy instruments governing such payments are not the subject of this judicial review. As stated by this Court in *MacPhail*, the judicial review of the CDS Decision "does not and cannot encompass questions as to whether the TB's policy decision is fair or reasonable or whether the policy's impact upon the Applicant was just or unjust" (*MacPhail* at para 10). The subject of judicial review is the reasonableness of the CDS's disposition of Cpl. Stemmler's grievance. This Court does not have the power or authority to decide whether the *ex gratia* payment of $25,000 was just or unjust.

[42] In this matter the Applicant has challenged the eligibility criteria on the basis that they are premised on data that is unreliable (he asserts that thalidomide was sold "off label" prior to its initial distribution in Canada during clinical trials and views the evidence of the initial distribution dates as suspect, which would explain why he was impacted by the drug even though he was born before the first clinical trials were conducted); that a Hansard debate concerning a motion proposing that government effect a program to assist thalidomide victims establishes that the object of Parliament was to provide benefits to those victims, which object is improperly prescribed by eligibility criteria requiring documentary proof which it is impossible for him to meet; and, the 1991 criteria are dated and, given the passage of time, that expert medical opinion on causation should be another form of acceptable documentary proof.

[43] However, the eligibility criteria comprise part of a policy decision to effect the Program to provide support for thalidomide victims. Whether the criteria are well-founded or not, whether they are fair or reasonable or whether the policy's impact upon the Applicant was just or unjust is not the subject of this judicial review which is only concerned with the decision of the Administrator. The Court does not have jurisdiction to review the Program nor to reformulate or add criteria. In this regard, I need only add that the Applicant's reliance on the exceptions to the rule against hearsay as well as his reliance on the Hansard debate is misplaced in this context.

[44] When appearing before me the Applicant relied heavily on *Gehl*. There the applicant submitted that evidence she presented should have been accepted to establish that she was entitled to be registered as an Indian under s 6(1)(f) of the *Indian Act*, RSC 1985, c I-5 ("*Indian Act*"). The *Indian Act* stipulated that the Registrar was to determine eligibility and the Registry

developed a policy which set out the five types of evidence of paternity that would be accepted. Justice Sharpe of the Ontario Court of Appeal undertook a *Charter* values analysis and concluded that when applying the policy to the applicant's circumstances the Registrar failed to take into account the equality-enhancing values and remedial objectives underlying amendments to the *Indian Act* and, therefore, its decision was unreasonable.

[45] Justices Lauwers and Miller concurred but decided the matter based on administrative law principles. They noted that the applicant had provided circumstantial evidence capable of supporting the inference that her paternal grandfather was, more likely than not, entitled to registration (which, in turn, entitled her to registration). Those Justices held that the Registrar erred by applying a categorical evidentiary rule that worked in an exclusionary manner to deny registration and status to an entitled individual. The demand for evidence of specific identity, when in the circumstances only circumstantial evidence of Indian status of an ancestor whose actual identity was not known or knowable, was unreasonable as it was at odds with the purpose of s 6 of the *Indian Act* which is to provide for the registration of persons who are entitled to registration. The denial was based solely on the basis of the inability to satisfy an evidentiary demand not mandated by the *Indian Act*, which was unobtainable due to the passage of time and was, therefore, unreasonable.

[46] It is easy to see the Applicant's attraction to this decision. There, as here, the applicant alleged that she could not, due to the passage of time, provide the stipulated eligibility criteria. What distinguishes it from this matter, however, is that here the Program, which includes the 1991 EAP eligibility criteria, arose from a government policy decision. It is not an

administrative policy effected to achieve a legislative purpose. Accordingly, the Court has no jurisdiction to intervene, even if, due to the passage of time since 1991, the existing criteria in some circumstances may exclude applicants with potentially valid claims.

[47] The reasonableness of the eligibility criteria is not a justifiable issue in these circumstances.

Issue 2: Was the Administrator's decision procedurally fair?

Applicant's Position

[48] The Applicant submits that he was denied procedural fairness because he was deprived of the opportunity to be heard fully. While unclear, the Applicant's argument appears to be that the breach arises from the Respondent's failure to accept, in the circumstances of his case, documentary proof that does not comply with the Program criteria and that he had a reasonable expectation that it would do so.

[49] The Applicant submits that an understanding of the institutional and social context of the Program is germane to an analysis of whether he was afforded fair treatment *(Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 22 ("*Baker*")). He submits that the Hansard debates are admissible to demonstrate the institutional context at play. As evidenced by these debates, Parliament approved the motion for compensation having awareness of humanitarian and regulatory failures and, while the Program was couched as *ex gratia*, the debates also suggest that claimants would have a reasonable expectation that they will be able to

present their case fully and be heard fully. The Applicant submits that notwithstanding that the payment program is *ex gratia*, court supervision is available by way of *mandamus* or *certiorari* (*Martineau v Matsqui Institution*, [1980] 1 SCR 602, p 624). Further, that the Administrator had the duty to act honestly and fairly lest their decision be questioned by *certiorari* (*Martineau* at p 621). The Applicant submits that in *Baker*, the duty of procedural fairness applies to humanitarian and compassionate decisions and requires a meaningful opportunity to present the various types of evidence relevant to the case and have it fully and fairly considered (at para 32).

[50] The Applicant submits that while it might be said by the Respondent that the Court should not second guess the criteria, the institutional and social context of this matter suggests that to take an overly legalistic view of participatory rights deprives the Applicant of the ability to be fully heard.

Respondent's Position

[51] The Respondent interprets the Applicant's procedural fairness arguments as follows: (1) that in general, the procedure was "unfair" because his application was refused and, (2) that the failure to grant an indefinite extension of time breached the duty of fairness.

[52] The Respondent submits that the Applicant misunderstands *Baker*. While the Applicant asserts that the Administrator's decision concerned a "humanitarian and compassionate" program and argues that *Baker* stands for the proposition that "humanitarian and compassionate" administrative decisions attract a high duty of procedural fairness, the reference to "humanitarian and compassionate" grounds in *Baker* is to a legislative term applicable only in immigration

cases. While *Baker* is useful in determining the content of the duty of fairness in any administrative decision, here a detailed *Baker* analysis is unnecessary as none of the Administrator's actions could be considered procedurally unfair by any standard.

[53] The Respondent submits that the Applicant had a meaningful opportunity to present the various types of evidence relevant to this case and have it fully and fairly considered (*Baker* at para 28). The Minister determined the eligibility criteria, these were both available publicly and drawn specifically to the attention of the Applicant in a letter sent to him on November 27, 2015, an email sent to his counsel on January 21, 2016 and the Qualification Application Instructions. The Administrator subsequently wrote to the Applicant and invited him to submit missing documentary evidence on April 12, 2016. The Applicant's counsel replied to the request on April 26, 2016 conceding that the Applicant does not meet the eligibility criteria and explaining why this was the case. Notwithstanding this admission, the Administrator made another request for further information on August 11, 2016. However, documentary evidence of maternal ingestion of thalidomide was not provided by the Applicant and, accordingly, he was advised that he was ineligible. The Respondent submits that, save for the refusal of an extension of time for an indefinite period, it is difficult to see how it could be found that the decision was procedurally unfair. The Applicant's written argument suggests that the procedural fairness complaint may relate to his claim that the eligibility criteria are unreasonable, however, this cannot constitute procedural unfairness and the reasonableness of the eligibility criteria is not justiciable.

[54] As to the refused indefinite extension of time in order to obtain a medical opinion, this does not give rise to unfairness. The Applicant explained that he was on a waiting list to see an orthopedic surgeon and hoped the doctor could provide an opinion that his condition is attributable to thalidomide. The Applicant did not know when he would see a doctor, when he might be able to receive the opinion or if the doctor could conclude that his condition was attributable to thalidomide. The Administrator declined to grant an extension, correctly advising that possessing a medical opinion identifying thalidomide as the likely origin of deformities does not make one eligible for the Program. The sought after medical opinion would therefore not be of assistance and granting an indefinite extension of time would have been pointless. It cannot be said that failing to grant an extension of time to potentially obtain irrelevant evidence is a denial of procedural fairness.

Analysis

[55] In *Mercier-Néron*, this Court held that "the duty to act fairly must be complied with even when the government, responsible as here for implementing a program of ex gratia payments established by order in council, derives its enabling power from the royal prerogative. The performance of this function may also be reviewed by the courts" (at para 14; also see *Canadian Doctors* at para 402). The Respondent agrees that, in this case, there was such a duty but submits that it was not breached.

[56] The thrust of the Applicant's argument is that he had a right to be more fully heard given the social and institutional context at play. That is, given the purpose of the Program and because through no fault of his own it was impossible for him to provide the required

documentary proof. In my view, to the extent that the Applicant is asserting that a denial of procedural fairness arises from the reasonableness or fairness of the criteria themselves, this is not an issue of procedural fairness and, for the reasons discussed above, the argument cannot succeed.

[57] The Applicant relies on the Hansard debates in the context of the duty of fairness, on the basis of his assertion that it establishes Parliament's broader intent to remedy a humanitarian failure. Thus, it serves to demonstrate that claimants would have a reasonable expectation of being able to fully present their case and to be heard. Again, this premise cannot succeed.

[58] I would first note that the Applicant has not cited any case law in support of his view that Hansard debates inform the content, or perhaps demonstrate the intended duty of fairness owed. It is true that a Court can review Parliamentary debates as an aid to statutory interpretation. In this regard the Applicant cites *Parliamentary Debates in Statutory Interpretation: A Question of Admissibility or Weight?*, Beaulac, McGill Law Journal, Vol 43, p 288, referencing *R v Morgentaler*, [1993] 3 SCR 463 at para 31, which states that Hansard evidence should be admitted as relevant both to the background and the purpose of the legislation at issue, provided that the Court remains mindful of the limited reliability and weight of that evidence. However, no issue of statutory interpretation arises in this matter. The Program criteria are not contained in a statutory instrument that could be clarified by looking at the debates. Rather, as I have found above, it was the Minister under the Crown's prerogative powers who authorized the Program and the criteria were part of a policy decision.

[59] While I acknowledge the Applicant's view that, when implementing the Program, Parliament must not have meant the 1991 EAP criteria to have an exclusionary effect as this, in his view, defeats the purpose of the Program, this issue is really one of the reasonableness of the criteria. Moreover, the Hansard debate, even if it were admissible, does not establish a breach of procedural fairness based on a legitimate expectation that the Applicant would be permitted to present evidence that does not meet the criteria.

[60] As to *Baker*, the Applicant does not engage in a cogent analysis of the content of the duty of procedural fairness owed to him based on the Supreme Court of Canada's decision in that matter. And, with respect to his reference to the *Baker* headnote stating that a duty of procedural fairness applies to humanitarian and compassionate decisions, I agree with the Respondent that the Applicant appears to fail to appreciate that in *Baker* the applicant had applied for an exemption from the requirement to apply for permanent residence from outside Canada which was based upon "humanitarian and compassionate considerations" as explicitly permitted by s 114(2) of the *Immigration Act*, RSC 1985, c I-2 (now s 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27).

[61] In any event, in light of the circumstances and given the factual backdrop in this matter and the record, there is only one possible basis upon which the Applicant can assert that he was denied procedural fairness because of an alleged failure to permit him to fully present and have his case heard. This concerns the Administrator's refusal to provide an extension of time until an anticipated medical opinion from an orthopedic specialist was submitted. This became the procedure described in the Program was followed by the Administrator and, as described by the

Respondent, the Applicant and his counsel were clearly notified of the criteria to be met and given opportunities to respond. This is not disputed by the Applicant.

[62] The background to the request to submit the anticipated medical opinion begins with the January 19, 2016, correspondence from counsel for the Applicant to the Administrator which attached correspondence from a nurse practitioner, dated December 18, 2015, stating that she had forwarded a referral to the WRHA [Winnipeg Regional Health Authority] Surgery Program Orthopedic Hip & Knee Central Intake Office for an assessment and that it was unknown how long that process would take. Also attached was a January 7, 2016 letter from the WRHA, Orthopedic Waitlist Coordinator, WRHA Surgery Program indicating that the WRHA Surgery Program Hip and Knee Replacement Central Intake Office had received the Applicant's Pre-Consultation Questionnaire and had assigned the Applicant to Dr. Bohm for consultation and assessment, that the average wait time was 4 months with an additional further wait time of 7 months for surgery from the day it was determined surgery was appropriate and agreed. Regarding those attachments, counsel stated that he understood that the Applicant was in the process of referral to an orthopedic specialist to confirm that his described condition/deformities "are linked to administration of thalidomide to his mother and accordingly to Mr. Fortaine *in vitro*". Noting his understanding that finalization of settlements by the Administrator was intended by May 31, 2016, counsel pointed out that the timing of the receipt of the assessment was up to the medical professionals.

[63] Various correspondence was exchanged and, by letter dated April 26, 2016, counsel for the Applicant asked that the Administrator confirm, on or before May 1, 2016, an extension of

time to provide an assessment report from a medical professional attesting to the Applicant's condition being ascribed to thalidomide, failing which the Applicant would apply for injunctive relief.

[64] On August 11, 2016, the Administrator emailed counsel for the Applicant acknowledging receipt of his April 26, 2016 reply and requesting a timeline for the extension of time to obtain additional documentary evidence and stated that:

> [I]n regard to the request for an extension, if the extension is in regard to obtaining a medical opinion as to the possible reason for your client's injuries, unfortunately an opinion does not satisfy any of the 1991 criteria. Please advise if you will be presenting any further information in support of your client's eligibility as we are at a point in the review of your client's file to render our decision.

[65] The negative decision was rendered on August 23, 2016.

[66] In response to a request by the Applicant's counsel that the decision be reconsidered, by email of September 12, 2016, the Administrator asked when counsel anticipated receiving further information, the type of this information, reiterated that a medical opinion as to the possible origin of the Applicant's injuries would not satisfy the criteria, and stated that upon receipt of his reply a review would be conducted and he would be advised whether an extension of time would be possible. Counsel for the Applicant replied on September 12, 2016, referencing a number of avenues of investigation apparently being pursued. The Applicant filed his application for judicial review on September 14, 2016.

[67] The relief sought in the Notice of Application pertains solely to an expert medical opinion. Specifically, that the Administrator be directed that an expert medical opinion that, on balance, the Applicant's injuries are consistent with first trimester maternal ingestion of thalidomide, be accepted as valid proof for eligibility for the Program, and, that the Administrator be enjoined to extend the date for a final decision on his claim, pending the receipt of an "expert assessment". Although not relevant, I observe that the Applicant's affidavit filed in support of his application for judicial review, dated September 2, 2016, does not indicate that the orthopedic assessment had been conducted or if a report had been prepared.

[68] In my view, the Applicant in this matter was provided with a full and fair opportunity to be heard. And, in any event, the Administrator clearly indicated that an expert opinion on whether the Applicant's condition could be attributed to thalidomide would not constitute the required documentary proof as prescribed by the second of the 1991 EAP eligibility criteria. Accordingly, the refusal to grant an indefinite extension of time for the submission of the anticipated evidence does not amount to a breach of procedural fairness.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The Application for judicial review is dismissed.

2. There shall be no order as to costs.

"Cecily Y. Strickland"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1513-16
STYLE OF CAUSE:	GUY CHARLES FONTAINE v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	APRIL 24, 2017
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