

**Date: 20090324**

**Docket: IMM-5373-06**

**Citation: 2009 FC 311**

**Ottawa, Ontario, March 24, 2009**

**PRESENT: The Honourable Mr. Justice O'Reilly**

**BETWEEN:**

**ROBERT GENE CLARK**

**Applicant**

**and**

**THE MINISTER OF PUBLIC SAFETY  
AND EMERGENCY PREPAREDNESS**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] At the time of his birth, Mr. Robert Clark's parents ran a farm in southern Manitoba, near the Canada-US border. Mr. Clark was born on June 5, 1947 in Westhope, North Dakota, the site of the nearest hospital. He has lived in Canada his whole life believing that he was a Canadian citizen. Persons in Mr. Clark's circumstances are sometimes referred to as "lost Canadians".

[2] In April 2006, Mr. Clark was convicted of various drug-related and smuggling offences. He was sentenced to 30 months in prison and to a firearms prohibition.

[3] After his conviction, Mr. Clark's file came to the attention of the Canada Border Services Agency (CBSA) which concluded that he was inadmissible to Canada on the basis of serious criminality under the *Immigration and Refugee Protection Act*, 2001, c. 27 (ss. 36(1), 44(1), (2); all statutory references are set out in Annex "A" attached). His file was subsequently reviewed by the Minister's delegate in September 2006. The delegate confirmed the CBSA's finding and issued a deportation order against Mr. Clark while he was in prison. The effect of the order was to render Mr. Clark ineligible for day parole, unescorted absences and transfer to a minimum-security institution.

[4] Mr. Clark requested that the deportation order be stayed. In December 2006, Justice Michael Kelen granted the stay pending the final disposition of the underlying application for judicial review (*Clark v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 1512). Mr. Clark was released on day parole soon thereafter.

[5] Mr. Clark argues that he was treated unfairly by the Minister's delegate. In addition, he submits that his rights under the *Canadian Charter of Rights and Freedoms*, as well as the *Canadian Bill of Rights*, have been infringed. I agree that Mr. Clark was treated unfairly. It is unnecessary, therefore, for me to deal with the other issues he has raised.

#### I. The Statutory Framework

[6] Under the *Citizenship Act*, R.S.C. 1985, c. C-29, s. 3(1)(e), a person is a Canadian citizen if he or she "was entitled" to become a citizen under s. 5(1)(b) of the former Act, enacted in 1946:

*Canadian Citizenship Act*, C.15. Paragraph 5(1)(b) of the former Act stated that a person born outside of Canada is a “natural-born Canadian citizen” if

- i. one of his parents was a Canadian citizen, and
- ii. the birth was registered within two years (or within an extended period authorized by the Minister).

[7] Mr. Clark argues that these two criteria establish, first, a condition for entitlement to Canadian citizenship (parent’s Canadian citizenship) and, second, a procedure for claiming it (registration). Accordingly, he submits that he “was entitled” to become a citizen under the former Act and, therefore, under the current legislation, should be recognized as a Canadian citizen, even though his birth was never registered. Mr. Clark’s interpretation of the legislation was adopted in *Bell v. Canada (Minister of Employment and Immigration)*, 76 F.T.R. 193. However, that decision was reversed on appeal, albeit on other grounds: 33 Imm. L.R. (2d) 305 (F.C.A.).

[8] The Minister argues that both criteria under the former Act must have been met before a person could be considered a Canadian citizen under the current Act. Accordingly, Mr. Clark’s citizenship claim is unfounded.

[9] For present purposes, I need not resolve the dispute between the parties on this issue. It is clear to me that Mr. Clark raised at least a serious question regarding his citizenship. Further, any ambiguity in the statute has now been resolved by an amendment to the *Citizenship Act*. Bill C-37,

due to come into force on or before April 19, 2009, provides that a person is a Canadian citizen if he or she was born outside Canada before February 15, 1977 to a parent who was a Canadian citizen (s. 3(1)(g)).

[10] The relevant provisions of the *Immigration and Refugee Protection Act* (ss. 36(1), 44(1), (2)) apply only to permanent residents or foreign nationals. A finding of inadmissibility to Canada can only be made in relation to a person who is not a Canadian citizen. The question that arises from these circumstances, then, is how a Minister's delegate should proceed in the face of a serious issue about the citizenship of the person whose admissibility to Canada is under review.

## II. Was Mr. Clark Treated Unfairly?

[11] Given that he found Mr. Clark inadmissible, it follows that the delegate must have been satisfied that Mr. Clark was not a Canadian citizen. However, he did not give Mr. Clark a chance to establish his citizenship before making his decision. Nor did he provide any reasons.

[12] Decision-makers have a clear duty to give adequate reasons for their decisions. As Justice L'Heureux-Dubé has stated, when a decision-maker is dealing with an issue that is critical to a person's future, it would be unfair to the person affected not to be told why the particular result was reached: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 43. In my view, the issue before the Minister's delegate in Mr. Clark's case clearly fell within that category of decision. It affected Mr. Clark's eligibility for parole, the circumstances of his

incarceration and his entitlement to remain in Canada. The officer had an obligation to give reasons for concluding that Mr. Clark was a foreign national inadmissible to Canada.

[13] Further, as Justice John Richard (now Chief Justice, Federal Court of Appeal) has concluded, where there is a serious dispute in an immigration proceeding about whether a person is a Canadian citizen, the decision-maker should adjourn the proceeding to allow the person to have the citizenship issue resolved: *McLean v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 1741, at para. 37. Here, given that the delegate could only issue a deportation order against a non-citizen, he should have waited until a determination of Mr. Clark's citizenship had been made before finding him to be inadmissible.

### III. Conclusion and Disposition

[14] The Minister's delegate treated Mr. Clark unfairly by failing to provide reasons for finding him inadmissible to Canada and by doing so in advance of a decision on Mr. Clark's citizenship. Accordingly, I must overturn that decision. Given that there has still been no decision on the issue of Mr. Clark's citizenship and the matter has now been addressed legislatively, there is no point ordering another officer to reconsider the question of inadmissibility to Canada.

[15] Mr. Clark has asked for costs. In immigration matters, costs are unusual. Special circumstances must exist. Mr. Clark argues that special circumstances exist in his case, namely:

- The Minister's delegate took into account Mr. Clark's eligibility for day parole, a factor that was extraneous to the issue the delegate had to decide;
- The effect of the delegate's decision was a longer period of incarceration for Mr. Clark;
- The Minister's materials filed on the motion for a stay falsely referred to a conviction for membership in a criminal organization; and
- No decision was ever rendered on his application for citizenship, filed in September 2006.

[16] In response, the Minister notes that the delegate was aware of the effect of his decision on Mr. Clark's eligibility for parole but did not take it into account in his decision. The error in the Minister's materials was quickly corrected, before the motion for a stay was heard. Finally, the Minister notes that various means of rendering this proceeding unnecessary were proposed to Mr. Clark, but none was taken up.

[17] On balance, I am not persuaded that special circumstances exist that would warrant an award of costs. Neither party proposed a question of general importance for me to certify, and none is stated.

**JUDGMENT**

**THIS COURT’S JUDGMENT is that**

1. The application for judicial review is allowed.
2. No question of general importance is stated.

“James W. O’Reilly”

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Judge

<i>Citizenship Act</i> , R.S.C. 1985, c. C-29	Annex "A" <i>Loi sur la citoyenneté</i> , L.R.C. 1985, c. Ch. 29
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Persons who are citizens

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

...

(e) the person was entitled, immediately before February 15, 1977, to become a citizen under paragraph 5(1)(b) of the former Act.

Citoyens

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

[...]

e) habile, au 14 février 1977, à devenir citoyen aux termes de l'alinéa 5(1)b) de l'ancienne loi.

*Citizenship Act*, S.C. 1946, C. c-15 (repealed)

**5.** (1) A person, born after the commencement of this Act, is a natural-born Canadian citizen:

...

(b) if he is born outside of Canada elsewhere than on a Canadian ship and

(i) his father, or in the case of a child born out of wedlock, his mother, at the time of that person's birth, is a Canadian citizen by reason of having been born in Canada or on a Canadian ship, or having been granted a certificate of citizenship or having been a Canadian citizen at the commencement of this Act, and

(ii) the fact of his birth is registered at a consulate or with the Minister, within two years after its occurrence or within such extended period as may be authorized in special cases by the Minister, in accordance with the

*Loi sur la citoyenneté*, L.C. 1946, Ch. 15

**5.** (1) Une personne, née après l'entrée en vigueur de la présente loi, est citoyen canadien de naissance

[...]

b) si elle naît hors du Canada ailleurs que sur un navire canadien, et si

i) son père ou, dans le cas d'un enfant né hors du mariage, sa mère, à la naissance de ladite personne, est citoyen canadien en raison de sa naissance au Canada ou sur un navire canadien, ou parce qu'il lui a été accordé un certificat de citoyenneté ou du fait d'avoir été citoyen canadien lors de la mise en vigueur de la présente loi, et si

ii) le fait de sa naissance est inscrit à un consulat ou au bureau du Ministre, dans les deux années qui suivent cet événement ou au cours de la prorogation que le Ministre peut autoriser, dans des cas spéciaux, en conformité des



regulations.

Bill C-37

**3. (1)**

(g) the person was born outside Canada before February 15, 1977 to a parent who was a citizen at the time of the birth and the person did not, before the coming into force of this paragraph, become a citizen

*Immigration and Refugee Protection Act, 2001*  
c. 27

Serious criminality

**36. (1)** A permanent resident or a foreign national is inadmissible on grounds of serious criminality for

(a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;

(b) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or

(c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.

règlements.

Projet de Loi C-37

**3. (1)**

g) qui, née à l'étranger avant le 15 février 1977 d'un père ou d'une mère ayant qualité de citoyen au moment de la naissance, n'est pas devenue citoyen avant l'entrée en vigueur du présent alinéa

*Loi sur l'immigration et la protection des réfugiés, L.C. 2001, ch. 27*

Grande criminalité

**36. (1)** Emportent interdiction de territoire pour grande criminalité les faits suivants :

a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;

b) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;

c) commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans.

#### Preparation of report

**44.** (1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.

#### Referral or removal order

(2) If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration Division for an admissibility hearing, except in the case of a permanent resident who is inadmissible solely on the grounds that they have failed to comply with the residency obligation under section 28 and except, in the circumstances prescribed by the regulations, in the case of a foreign national. In those cases, the Minister may make a removal order.

#### Rapport d'interdiction de territoire

**44.** (1) S'il estime que le résident permanent ou l'étranger qui se trouve au Canada est interdit de territoire, l'agent peut établir un rapport circonstancié, qu'il transmet au ministre.

#### Suivi

(2) S'il estime le rapport bien fondé, le ministre peut déférer l'affaire à la Section de l'immigration pour enquête, sauf s'il s'agit d'un résident permanent interdit de territoire pour le seul motif qu'il n'a pas respecté l'obligation de résidence ou, dans les circonstances visées par les règlements, d'un étranger; il peut alors prendre une mesure de renvoi.

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-5373-06

**STYLE OF CAUSE:** CLARK v. MPSEP

**PLACE OF HEARING:** Saskatoon, Saskatchewan

**DATE OF HEARING:** October 9, 2008

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**DATED:** March 24, 2009

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