IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2009-485-1884

UNDER	the Judicature Amendment Act 1972, the Citizenship Act 1977 and the New Zealand Bill of Rights Act 1990
IN THE MATTER OF	applications for judicial review and interim relief
BETWEEN	SLAWOMIR RYSZARD BUJAK Applicant
AND	THE MINISTER OF INTERNAL AFFAIRS First Respondent
AND	THE CHIEF EXECUTIVE OF THE DEPARTMENT OF INTERNAL AFFAIRS Second Respondent
AND	THE ATTORNEY-GENERAL Third Respondent
AND	THE MINISTER OF JUSTICE Fourth Respondent

Hearing: 2 November 2009

Counsel: F C Deliu for applicant
V E Casey and A K Mobberley for fourth respondent

Judgment: 3 November 2009

RESERVED JUDGMENT OF DOBSON J

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[1] This constitutes an application for interim orders under s 8 of the Judicature Amendment Act 1972 seeking orders that the fourth respondent (the Minister) not make a determination under the Extradition Act 1999 on whether the applicant

(Mr Bujak) should be surrendered for extradition to the Republic of Poland. Any effective determination by the Minister needs to be made sufficiently before 16 November 2009 for removal of Mr Bujak from New Zealand to Poland to be arranged by that date. Accordingly, the Ministry has indicated that the Minster would, barring the applicant obtaining the interim relief now sought, be making a decision in the week of 2-6 November 2009.

[2] These proceedings were commenced on 17 September 2009. The Statement of Claim pleads eight discrete grounds for challenging steps previously taken in the name of the second respondent that resulted in Mr Bujak not being granted New Zealand citizenship. Four of the claims raise various forms of illegality alleged in relation to the incomplete processing of Mr Bujak's application for citizenship, two allege procedural impropriety and unfairness constituting either a breach of the New Zealand Bill of Rights Act 1990 or of a legitimate expectation as to process, one alleges unreasonableness in the nature of irrationality or disproportionality of conduct, and the last alleges a mistake of fact or law.

Preliminary issues

[3] Two preliminary issues arose. First as to Mr Deliu's standing to appear as counsel for Mr Bujak. A Memorandum of Counsel dated 30 October 2009 was brought to my attention 10 minutes before the hearing began. This Memorandum, unlike other recent documents filed which were conveyed initially by electronic means to the Registry, appears only to have been despatched by post. In it, Mr Deliu advised that the solicitor on the record had withdrawn Mr Deliu's instructions to appear as counsel. Mr Deliu explained that his arrangement with Mr McClymont was in the nature of a "reverse brief" and that Mr McClymont had not had any substantive involvement, but rather provided only pro forma services as solicitor on the record. Mr Deliu has dealt throughout directly with Mr Bujak, and he advised that Mr Bujak wants Mr Deliu to continue acting for him as his barrister. Mr Deliu reported that Mr Bujak is making attempts to find a new instructing solicitor, but suggested that that may involve a delay longer than could be afforded in the circumstances of urgency of the present application.

[4] The situation is obviously most unsatisfactory. I was not prepared to accede to Mr Deliu's suggestion that he be appointed an amicus. However, to deny Mr Bujak a hearing because of a formal lack of standing for Mr Deliu would lead to a potential miscarriage of justice. Accordingly, I indicated I would hear the argument from Mr Deliu on the basis that he retained responsibility as an officer of the Court, and in anticipation that Mr Bujak will appoint a new solicitor who is prepared to brief Mr Deliu, and that a Notice of Change of Solicitor will be filed in due course.

[5] The second preliminary issue was a challenge raised on behalf of Mr Bujak to the evidence adduced on behalf of the Minister by Mr May, the manager of the Citizenship Office within the Department of Internal Affairs (the Department). It was sworn on 28 October 2009 and annexed a number of documents from the Department's file maintained in respect of Mr Bujak's application for citizenship. A request had been made on behalf of Mr Bujak in February 2009 for a copy of the file, but he was advised at that time that the Department had mislaid the file and accordingly could not provide exhaustive copies. Certain parts of what would have been on the file that were able to be reconstructed from electronic records were provided. Mr Bujak commenced his proceedings on the understanding that the file was unavailable, and it was only three working days before the interim hearing that the Crown Law Office filed and served Mr May's affidavit, which demonstrated that he had access to the file.

[6] In these circumstances, Mr Deliu argued that the affidavit and documents attached to it ought not to be read because Mr Deliu was prejudiced by the absence of the file, taken by surprise by the documents now exhibited, and had no opportunity to complete an affidavit in reply. Mr Deliu had been provided with a complete copy of the file on Friday, 30 October 2009.

[7] This procedural complaint did not bear close scrutiny. A copy of the file that then existed had been provided in September 2003. Certain documents in the file were withheld in reliance on s 27(1)(c) and (d) of the Privacy Act 1993 because of the prospect that disclosure would prejudice the maintenance of the law, including the prevention, investigation and detection of offences, and the right to a fair trial.

The majority of the criticisms pleaded against the Department relate to matters that occurred before September 2003.

[8] In any event, when I reviewed the exhibits to Mr May's affidavit on an individual basis with Mr Deliu, he acknowledged that all but one of the exhibits were either documents prepared by Mr Bujak or correspondence or emails sent to him. Accordingly, the material placed before the Court as exhibits to the May affidavit should not have taken Mr Bujak by surprise.

[9] Ms Casey explained that the file had been retrieved within the Department only after the present proceedings were commenced. She denied that there was any tactical motivation in not revealing to Mr Deliu the availability of the file, and that the delay until 30 October 2009 in providing a complete copy to Mr Deliu was a matter of regrettable oversight. She volunteered that if Mr Deliu considered there were other items from the file that were material to the present argument, then he should feel at liberty to tender them to the Court, without objection on behalf of the Minister.

[10] Mr Deliu could not make out any proper basis for excluding Mr May's affidavit or any of the exhibits to it. In the course of his argument, he traversed the content of some further documents from the file, and I invited him to provide copies of two particular items which I have had regard to in reaching a view on the matter.

Background

[11] Mr Bujak has previously mounted a vigorous defence to Poland's attempts to extradite him from New Zealand. Ultimately, the District Court at Christchurch concluded in April 2008 that Mr Bujak was eligible for surrender, an application for judicial review of that decision was decided by the High Court against Mr Bujak in October 2008, and a further appeal to the Court of Appeal was dismissed in June 2009. That was the second occasion on which the matter had been to the Court of Appeal and subsequently the Supreme Court has dismissed Mr Bujak's application for leave to appeal the second Court of Appeal decision on 15 September 2009.

[12] Mr Bujak first came to New Zealand in 1999 and was later granted permanent residency. He subsequently applied for New Zealand citizenship and was advised by letter dated 8 May 2001 that his citizenship application had been approved. The letter, which appears to be in a standard form, congratulated Mr Bujak on his application having been approved. It advised that citizenship would be granted at a ceremony in his area where he would take the oath or affirmation of allegiance and be presented with his citizenship certificate. The letter advised it was important that he attend a ceremony within the next 12 months or the approval for grant of citizenship would lapse, and that a "Ceremonies Team" would write to advise him of the date of the ceremony as soon as it had been arranged.

[13] In July 2001, the Police advised the Department of Internal Affairs that Mr Bujak was wanted in Poland in relation to theft or fraud or misappropriation of funds. Within the Department it was recognised that his citizenship should not be granted until the matter was resolved. On 29 August 2001, an officer within the Department wrote to Mr Bujak, apparently in confirmation of matters traversed in a conversation that morning. The letter advised:

> I have been advised that you are currently wanted in Poland in relation to a theft/fraud matter in regards to appropriation of funds. Unfortunately, I have no other details regarding these charges.
>
> This new information is relevent (sic) when assessing your ability to meet the requirements of the Citizenship Act, especially the good character requirement. As a result, I intend to ask the Minister of Internal Affairs to review his decision to approve your grant of New Zealand citizenship. This submission will recommend that the Minister agree to put your application on hold until you have been able to sort out these charges with the Polish authorities.
>
> Before I prepare this submission, I would like to offer you an opportunity to comment regarding these allegations. These comments will be given to the Minister for him to consider as part of my submission. If you would like to comment, please send them to me by **14 September 2001**.
>
> […]

[14] In response to an email from Mr Bujak, the same officer who had despatched the 29 August 2001 letter emailed Mr Bujak on 19 September 2001 as follows:

> Thank you for your email. I will arrange for your citizenship approval to be revoked by the Minister until such time as you have been able to clarify your problems with the relevant Polish authorities.

> Please keep me informed of any developments or if you change your address.

[15] Then on 11 January 2002, the same officer advised Mr Bujak by email that he had not, in fact, yet asked the Minister of Internal Affairs to revoke Mr Bujak's citizenship approval as the officer was hoping that further information would be received from Poland. The email continued that with Mr Bujak's consent, the officer would hold Mr Bujak's application while he continued to investigate the allegations which had been made against Mr Bujak, without seeking the revocation of Mr Bujak's citizenship approval. The email gave Mr Bujak the option of requesting the officer to prepare a submission for the Minister, if Mr Bujak would prefer that course. Mr Bujak responded that he had no desire to withdraw his application.

[16] In March 2002, the Department, mindful that the citizenship application would lapse in May 2002, requested the Minister to approve a 12 month extension of the grant of citizenship and that was approved on 19 March 2002. The consequences of that were conveyed to Mr Bujak by email in the course of an update provided to him on 16 July 2002.

[17] The exchanges as to evidence of good character tended to be at cross purposes. The Department maintained its concerns about Mr Bujak being wanted by Polish authorities in connection with a theft or fraud matter, whereas Mr Bujak insisted that he had no previous convictions or problems with the law previously. One certificate he produced in late 2001 stated that he was not "wanted" in Poland.

[18] It appears that a first request by the Polish authorities for extradition of Mr Bujak was made in 2001, but that failed to meet the requirements of the Extradition Act. The operative request commenced in March 2004 and Mr Bujak's challenge to various aspects of that were finally resolved with the Supreme Court dismissal of his application for leave to further appeal. The outcome of all those proceedings is confirmation of the District Court's decision that Mr Bujak is eligible for surrender. Thereafter, the process requires the Minister of Justice to make a determination on surrendering Mr Bujak for removal to Poland.

[19] The Minister is now required to make such a decision in accordance with s 30 of the Extradition Act. The factors affecting the discretion in that decision are not immediately relevant because it is the prior conduct by the Department that is alleged to amount to reviewable error.

[20] The time frame signalled for the Minister's decision is because of concerns that if Mr Bujak is not surrendered to Poland within two months from the conclusion of all judicial proceedings (being the Supreme Court's dismissal of his application for leave on 15 September 2009), then Mr Bujak would be entitled to apply for a discharge under s 36 of the Extradition Act 1999. Although there is no concession on behalf of the respondents that there would be good grounds for such a discharge, counsel signal a substantial concern that very substantial steps undertaken to comply with what are seen as New Zealand's obligations under its extradition treaty with Poland ought not to be jeopardised by the prospect of a discharge. If that were to occur and the process to pursue extradition required to begin again, then it may well be that it could not be concluded within a time frame in which the charges sought to be pursued against Mr Bujak in Poland could lawfully be pursued in that country.

[21] Interim relief is opposed first and foremost on the ground that the claim is a hopeless one, with no realistic prospects of success.

Essence of the claims

[22] The essence of Mr Bujak's claim is reflected in two broad propositions. I do not intend any disrespect to various nuances in Mr Deliu's argument that might justify a different characterisation of some refinements on the points he made. For an urgent evaluation of overall tenability, I am satisfied that these broader headings capture the thrust of Mr Bujak's complaints.

[23] The first proposition is that the letter to Mr Bujak dated 8 May 2001 reflected a decision to grant him citizenship. He had satisfied all the criteria required to be considered and the only outstanding step, namely the ceremonial swearing of an oath, was something he was prepared to do at any time, but was out of his hands because it required others to make the arrangements for that to occur. In essence,

Mr Bujak argues that the Department, having found him to be of good character as at 8 May 2001, committed to having him as a New Zealand citizen and could not thereafter revisit its decision.

[24] His second group of criticisms were that, even if the Department was entitled to reconsider the view it had formed about his good character after 8 May 2001, then it acted unreasonably, or made reviewable errors in relying on informal communications from certain elements of the Police or prosecuting authorities within Poland which suggested that they wished to pursue serious criminal charges against him. It was unreasonable, irrational or unlawful not to prefer the formal certificates that Mr Bujak obtained, verifying the absence of any previous criminal record and the absence of outstanding warrants for his arrest. It was argued that the Department erred in attributing any weight to indications that criminal charges were likely to be pursued against Mr Bujak in Poland when the basis for that belief was purely informal and inherently less reliable than the formal documentation procured by Mr Bujak.

[25] A discrete set of factual allegations in the Statement of Claim raise the prospect that the Department failed to inform, or misled, or even lied to Mr Bujak about the status of his citizenship application in the period after advising him that the application had been approved in May 2001. Mr Bujak's affidavit in support of the present application tended to support these complaints. However, the correspondence attached to Mr May's affidavit is a sufficient refutation of these allegations. That may explain Mr Deliu's concern to have the affidavit excluded. In terms of the process of dealings between Mr Bujak and the Departmental officer liaising with him, on the information currently available I can see no basis for any criticism that would advance a tenable ground for judicial review.

[26] As to the first group of arguments that depended on the decision conveyed to Mr Bujak in May 2001 not being able to be revisited thereafter, Mr Deliu's arguments did not deal adequately with the terms of ss 11 and 12 of the Citizenship Act 1977, as in force at the time. They provided:

> **11. Minister may require oath of allegiance to be taken** – The Minister may, in such case or class of cases as he thinks fit, make the grant

> of New Zealand citizenship conditional upon the applicant taking an oath of allegiance in the form specified in the First Schedule to this Act.
>
> **12**. **Certificate of New Zealand citizenship** – (1) Where the Minister authorises the grant of New Zealand citizenship to any person, the Secretary shall issue to that person a certificate of New Zealand citizenship in the prescribed form.
>
> (2) A person to whom a certificate of New Zealand citizenship is issued under subsection (1) of this section shall be a New Zealand citizen as from the specified date.
>
> (3) Where a certificate of New Zealand citizenship is issued to a person who is a New Zealand citizen by descent, he shall cease to have that status as from the specified date.
>
> (4) For the purposes of subsections (2) and (3) of this section the specified date shall be –
>
> (a) In the case of a person required under section 11 of this Act to take an oath of allegiance, the date on which he takes that oath or makes an affirmation to the same effect.
>
> (b) In every other case, the date specified in the certificate.

[27] The best that could be said to minimise the impact of s 11 is that the grant of citizenship was complete, except for compliance with the last condition. That might either lead to the sufficiency of all other criteria accepted at that date being closed, or alternatively that until the whole process was complete and a certificate of citizenship issued, a conditional grant had no formal status. This would mean that if new information arose that justified a reconsideration of any of the criteria previously determined, then the candidate for citizenship still only had the status of an applicant, so that a reconsideration of the relevant criteria was open to the Department.

[28] Ms Casey explained that at the time of these events, the Department treated the effect of ss 11 and 12 as making a conditional approval, such as in the terms conveyed to Mr Bujak in May 2001, one that was capable of being reconsidered (with a view to revocation, if warranted) until a certificate of citizenship issued. This contemplates that until the process was complete when a certificate of citizenship issued, the applicant was simply not yet a New Zealand citizen. It would follow that an artificiality would arise in treating the applicant as a New Zealand citizen, if material information became available to the Department that would warrant a

revisiting of the grounds on which the Department had previously been satisfied of the applicant's qualifications for citizenship.

[29] The point is no longer relevant as a new s 9B was inserted by the Citizenship Amendment Act 2005. That section now makes explicit that the Minister may rescind an authorisation at any time before the date that the person becomes a citizen under s 12, if no longer satisfied that the person meets the requirements for a grant of citizenship.

[30] Ms Casey submitted in support of the approach adopted to the pre-s 9B situation, that all aspects of a citizenship application required good faith and full disclosure by an applicant, and that the process was to be considered on the basis that citizenship is a privilege not a right. Protecting the integrity of the system for granting citizenship therefore warrants an interpretation of the provision permitting the most thorough vetting at any point until citizenship is actually granted.

[31] The alternative would be to treat an applicant who had been given conditional approval as if already a citizen, so that the onus would shift to the Minister to justify deprivation of citizenship such as on the basis of fraud, false representation, or wilful concealment of relevant information, or by mistake as provided for in s 17 of the Citizenship Act. Ms Casey argued that the pre-2005 statutory scheme was implicitly the same as has now been made explicit in s 9B, because the context of dealings with an applicant rendered it unnecessary for the onus to shift, before citizenship had actually been granted. She referred to a recent decision of Hugh Williams J in *Hao v Minister of Internal Affairs* HC AK CIV-2009-404-005610 7 September 2009 that involved a challenge to the exercise of powers under s 17. That decision includes recognition of the importance of full disclosure, and that the grant of new citizenship is a privilege ([78]).

[32] I do not need to finally determine the issue, in resolving the status of an applicant who had received a conditional approval in the pre-2005 period. However, I consider that the balance between the practicalities for the Department in administering the system, as against the interests and any legitimate expectations of an applicant for citizenship, weigh strongly in favour of the former. That would

mean that the Department was entitled to reconsider Mr Bujak's eligibility in light of new information, up to the point where the oath was taken and a certificate of citizenship issued to him. If the parts of this application for judicial review depending on the contrary proposition that he was entitled to hold the Department to the indication that his application had been approved are at all tenable, then they are at best a very weak basis for the application.

[33] Turning to the second group of criticisms revolving around the unreasonableness of the Department relying upon informal indications of the prospect of criminal charges against Mr Bujak, I am similarly sceptical about the prospects of any grounds for judicial review relying on these propositions being made out.

[34] As noted, Ms Casey sought to invoke the proposition that a grant of citizenship is a privilege and not a right, to resist arguments that applicants for citizenship in Mr Bujak's position can have legitimate expectations of reasoned and reasonable evaluation of all aspects of their applications. I do not find that sweeping proposition attractive. All those materially contributing to the exercise of the statutory powers in the Citizenship Act are amenable to review on usual administrative law principles.

[35] However, that proposition is likely to avail on any reconsideration of the extent of justification for a decision against an applicant in circumstances such as those involving Mr Bujak, once the Department was on notice that he was facing the prospect of serious criminal charges in Poland.

[36] Mr Deliu characterises the rejection of the certificates purporting to confirm the absence of prior criminal convictions, or current criminal charges, as unreasoned. In addition, Mr Deliu relied on email communications that he had located on the Department's citizenship application file for Mr Bujak, first from January 2002 questioning whether various parts of the Police and prosecuting authorities in Poland might not know what each other was doing, given the then inconsistent signals between the certificate Mr Bujak had provided and the understanding that extradition was still sought. He also instanced a Ministry of Foreign Affairs and Trade

communication from July 2002 that continued to reflect the inconsistency between the certificate Mr Bujak had provided indicating that he was not wanted in Poland, and other indications that an amended extradition request might still be forthcoming.

[37] No decision to revoke Mr Bujak's conditional approval was made at this time. To the contrary, the Department proposed to the Minister, and the Minister agreed, to extend his conditional approval for 12 months from May 2002 to May 2003. The Department's stance in 2002 was to await developments in the anticipated extradition initiatives that the Polish authorities were to take. I infer that those initiatives took longer than the Department anticipated. However, assuming the conditional status of the approval conveyed to Mr Bujak in May 2001 permitted the Department to undertake a reconsideration thereafter, then it is difficult to criticise the decision to await the outcome of the extradition initiative as unreasonable or unlawful.

[38] Ultimately, that initiative afforded sufficient grounds for doubting Mr Bujak's good character. Ms Casey referred to the review undertaken by Judge Erber in his August 2006 District Court decision in the proceedings under the Extradition Act. For instance, paragraph [32] of that decision found:

> [32] The evidence relating to the charges brought against Mr Bujak must be viewed against a background of an initially successful business becoming less and less able to satisfy its creditors. Finally in 1998, creditors became pressing, commercial obligations were enforced and the business disintegrated. Business and personal assets of Mr Bujak were sold. The chronology (page 23 Part 2) provides a bird's eye view of this disintegration and the activities of Mr Bujak during it. Mr Bujak left Poland and came to New Zealand between March and June 1999 bringing with him substantial funds having failed to respond to demands by Polish law enforcement authorities to interview him.

[39] Once a case is made for extradition on criminal charges involving theft, fraud or misappropriation, then the Department would be derelict in not reaching a view that Mr Bujak needed to positively resolve such matters before he could seriously lay claim to the requisite good character.

[40] Accordingly, I treat the second group of criticisms advanced on behalf of Mr Bujak as losing any impact they might have had, once analysed in a time frame

recognising the entitlement of the Department to await the outcome of the extradition proceedings, and then to have regard to that outcome.

[41] Accordingly, overall I am dubious that there is any tenable claim for Mr Bujak to advance. Without ruling it out entirely, his case for any interim relief must be assessed in the context that it is at best a very weak case.

Considerations on remedy

[42] As to the justification for an interim order, Ms Casey argued that delay in commencement of the proceedings was, in any event, fatal.

[43] Ms Casey makes the point that all the conduct material to the application for judicial review occurred in the period up to the conditional grant lapsing in 2003. The essence of the complaints now advanced could have been pleaded at any time since then. Instead, the proceedings had been delayed until an application for interim relief could be contrived in circumstances creating the most pressure, to whatever extent that might improve the chances of a positive outcome. Ms Casey submitted that such delay was sufficient of itself to disentitle Mr Bujak to any relief, or certainly to weigh heavily against interim relief in these circumstances.

[44] Ms Casey also pointed out that interim relief would be likely to afford collateral benefits to Mr Bujak in the event that he was subsequently unsuccessful in the substantive proceedings. If the Minister is prevented from making a decision that is able to be enforced by 16 November 2009, then the window of two months from completion of proceedings challenging the extradition decision would pass, enabling Mr Bujak to apply for a discharge under s 36 of the Extradition Act.

[45] I consider the prospect of a discharge being granted to be more theoretical than real. However, this contingent effect is disproportionately adverse to the extradition process that has been pursued for the last five years. On the view I have of the case overall, to run the risk of conferring an incidental benefit on Mr Bujak from any interim orders would be disproportionate to the modest prospects he has of any substantive success. It is also relevant that the challenge to the process of his

citizenship application is being used in the tangential context of resisting extradition. Whilst status as a New Zealand citizen would involve the Minister having regard to that fact, there is no guarantee that it would alter the outcome.

[46] In addition, as Mr Deliu's analysis of the steps likely to follow demonstrated, these proceedings are not the last opportunity Mr Bujak will have to avoid his forced removal from New Zealand, should the Minister decide to order his surrender. That decision involves the exercise of a statutory power, and Mr Deliu confidently predicted that he would be instructed to seek judicial review of the Minister's decision, should it be against Mr Bujak, and in that context would be making an application under s 8 for interim relief. Although the prospect of any viable grounds in the context of that decision cannot be foreshadowed, it would certainly come before the Court without the adverse consequences of interim relief which arise here. That is because the two month limit that presently imposes a timing imperative for the Minister would not apply once his decision had been made, and it was that step being challenged rather than this collateral attack on the circumstances in which Mr Bujak failed to secure the New Zealand citizenship he sought.

[47] Cumulatively, these points are sufficient to persuade me that, had a prima facie case or even a seriously arguable case been made out in relation to the substantive grounds for review, I would have been most reluctant to grant relief.

[48] Mr Deliu's final plea was, in the event I declined the present application, that I direct that Mr Bujak have an entitlement to a declaration being the equivalent of a stay (assuming respect by the Minister for the terms of such limited relief in the absence of the power to positively order a stay), to enable whatever steps he might be instructed to take, to pursue an appeal from this decision in the course of this week.

[49] I raised with Ms Casey whether any insurmountable difficulties would arise for the Minister's office if I indicated an entitlement for a temporary stay so that the decision could not be announced until 3pm on Friday, 6 November 2009, on the basis that all steps leading up to that point can continue in the meantime. She indicated that was a situation which the Minister's office could live with and I

accordingly declare that the preservation of Mr Bujak's interests to pursue an appeal would justify a stay on such terms, were the respondent not the Crown.

[50] If the respondents seek costs and that matter cannot be agreed, I invite Memoranda, first on behalf of the Minister within 14 days, and thereafter a Memorandum in response on behalf of Mr Bujak within a further 14 days.

Dobson J

Solicitors:
Alastair McClymont, Auckland for applicant
Crown Law, Wellington for fourth respondent
Copy to: F C Deliu, Auckland (fdeliu@amicuslawyers.co.nz)