

Federal Court



Cour fédérale

**Date: 20170428**

**Docket: T-1969-15**

**Citation: 2017 FC 428**

**Ottawa, Ontario, April 28, 2017**

**PRESENT: The Honourable Mr. Justice Gleeson**

**BETWEEN:**

**MD SHABUDDIN**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

I. Overview

[1] Mr. Shabuddin, the applicant, is a citizen of Bangladesh who entered Canada on February 11, 2010 with his wife, daughter and three sons. He applied for citizenship on February 12, 2014.

[2] He was referred to a hearing with a Citizenship Judge [Judge] as his Integrated Customs Enforcement System [ICES] Traveller History showed travel that was not disclosed on his

application. He was not represented by counsel and appeared before the Judge with his son who acted as an interpreter.

[3] On October 13, 2015 the Judge rejected Mr. Shabuddin's application. The Judge found on a balance of probabilities that he had failed to establish his physical presence in Canada for the requisite number of days and thus had not established that he met the residence requirement under paragraph 5(1)(c) of the *Citizenship Act*, (*Pourghasemi (Re)*, [1993] FCJ No 232 at paras 4, 6, 19 Imm LR (2d) 259 (TD)).

[4] In seeking judicial review of the negative decision Mr. Shabuddin submits that: (1) the decision was unfair as the Judge delivered her decision prior to receiving the requested health claim documents; (2) he was denied procedural fairness as his counsel was incompetent; and (3) the decision was unreasonable. He asks that the decision be set aside and the application be referred to a different Citizenship Judge for redetermination.

[5] I can find no basis to interfere with the Judge's decision and therefore dismiss the application for judicial review.

## II. Issues

[6] The application raises the following three issues:

- A. Did the delivery of the Judge's decision prior to receipt of the requested health documents breach the duty of procedural fairness?

- B. Has a breach of natural justice resulting from the alleged incompetence of counsel been established?
- C. Was the decision reasonable?

### III. Standard of Review

[7] The reasonableness standard of review applies to the review of the Judge's determination of whether Mr. Shabuddin met the requirement of paragraph 5(1)(c) of the *Citizenship Act*, (*Zhou v Canada (Minister of Citizenship and Immigration)*, 2013 FC 19 at para 13; *Canada (Minister of Citizenship and Immigration) v Rahman*, 2013 FC 1274 at paras 12-13; *Saad v Canada (Minister of Citizenship and Immigration)*, 2013 FC 570 at para 18). The correctness standard of review applies to procedural fairness issues, including the counsel incompetence issue, (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Memari v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1196 at para 30).

### IV. Analysis

- A. *Did the delivery of the Judge's decision prior to receipt of the requested health documents breach the duty of procedural fairness?*

[8] The relevant period for calculating Mr. Shabuddin's residence in Canada for the purposes of paragraph 5(1)(c) of the *Citizenship Act*, RSC 1985, c C-29 [*Citizenship Act*] was from February 12, 2010 to February 12, 2014. Subsequent to the citizenship hearing, Mr. Shabuddin was contacted in writing and asked to provide specific documentary evidence to establish his presence in Canada [the Request]. The Request required that the identified documents be

provided within 30 calendar days from the date of the Request, August 13, 2015. Among the documents requested were copies of Provincial Personal Health Claims Summary for the period of February 12, 2010 to February 12, 2014.

[9] On August 17, 2015 Mr. Shabuddin contacted counsel seeking assistance in responding to the Request [Previous Counsel]. On this same date Previous Counsel requested his personal health records. On September 1, 2015, Previous Counsel wrote to Citizenship and Immigration Canada enclosing many of the requested documents and stated “The Applicant has applied for his Personal Health Claims History Information and CBSA Travel history on August 17, 2015. Upon receipt of the documents, our office will forward same to your office”. The letter did not explicitly request an extension of the time to submit the personal health records but rather concluded “Should you have any questions or concerns, please do not hesitate to contact the undersigned directly”.

[10] The personal health records were not submitted on September 12, 2013. On October 13, 2015 the Judge denied the citizenship application and notified the applicant of said decision on October 19, 2015, and also reminded him “that you may make a new application for citizenship”. Mr. Shabuddin argues that his Previous Counsel’s statement in the September 1, 2015 letter to the effect that the personal health documents had been requested and would be forwarded on receipt was in effect a request for an extension of time. He further argues, relying on *Eze v Canada (Minister of Citizenship and Immigration)*, 2012 FC 92 at paragraphs 16 to 18 [*Eze*] that this request needed to be addressed in the decision and the failure to do so was a breach of procedural fairness. I disagree.

[11] In *Eze*, Justice Near concluded that an applicant is entitled to have a request for an extension of time to provide further information explicitly considered and to not do so is a breach of procedural fairness (*Eze* at para 21). Applicant's counsel advanced the argument that the words used in Previous Counsel's September 1, 2015 letter were substantively the same as a request for an extension. They were not.

[12] In advising that the documents would be forwarded on receipt, Previous Counsel did not indicate that there was an expectation that the documents would not be received in advance of the 30 calendar day time period imposed by the Judge or request an extension to a specified future date. While there might well be circumstances where this type of language could reasonably lead one to conclude an extension of time has been requested they did not in the circumstances of this case. The language in Previous Counsel's letter did not impose an obligation on the Judge to delay the issuance of a final decision, inquire into when the documents might be received, or to articulate reasons for not granting an extension of time. Despite this the Judge did not render a final decision until October 13, 2015, one month after the deadline for the delivery of the requested documents. There was no breach of procedural fairness in these circumstances.

B. *Has a breach of natural justice resulting from the alleged incompetence of counsel been established?*

[13] Mr. Shabuddin argues that should the Court conclude there was no request for an extension of time then it should find a breach of natural justice on the basis of Previous Counsel's alleged incompetence.

[14] In advancing an allegation against counsel a party is required to comply with the March 7, 2014 Procedural Protocol of this Court: *Re Allegations Against Counsel or other Authorized Representative in Citizenship, Immigration and Protected Person Cases before the Federal Court* [the Protocol]. The Protocol requires that previous counsel be notified in writing of the allegation, be given an opportunity to respond and that previous counsel be served with the perfected application record which raises allegations against the former counsel. Previous counsel has the right to respond to the allegations set out in the record and may seek leave to intervene.

[15] In this case Mr. Shabuddin makes two different allegations of incompetence. With respect to the first allegation, Previous Counsel received notice in writing and provided a written response, prior to the perfection of the application record for this matter. With respect to the second allegation there has been no compliance with the Protocol. Furthermore, the applicant did not serve on Previous Counsel the perfected application record which makes allegations of incompetence against Previous Counsel.

[16] This matter had been scheduled to be heard on three separate occasions and was rescheduled on each of those occasions due to the health of Mr. Shabuddin's counsel. In oral submissions the Court was advised that these health issues have not resolved themselves and Mr. Shabuddin had retained new counsel just prior to the hearing of this matter.

[17] At the hearing, counsel for Mr. Shabuddin informed the Court that the Protocol had only been partly complied with in the case of the first allegation, there was no compliance in the case

of the second allegation and there was no service of the perfected application record upon Previous Counsel. He submitted, (1) relying on *McKenzie v Canada (Minister of Citizenship and Immigration)*, 2015 FC 719 that I should view the partial compliance with the Protocol in respect of the first allegation as substantial compliance and consider the issue, and (2) that should the Court take issue with the lack of service of the perfected application record upon Previous Counsel, that Mr. Shabuddin receive an opportunity to do so now.

[18] Competence arguments can be especially challenging for the Court. The stated purpose of the Protocol is to assist the Court “in the adjudication of applications where such allegations are made”. The Protocol has the additional effect of providing counsel against whom allegations are made the opportunity to respond to those allegations.

[19] In this case, prior to the perfection of the application record, Previous Counsel received notice of the allegation of negligence for failing to request an extension of time to deliver the requested documents. Previous Counsel responded to that notice correcting details relating to Previous Counsel’s involvement with the file, the steps taken to obtain the required documents and correcting errors relating to the timing of requests contained in the allegation letter. It is also evident from the letter that Previous Counsel sought a reconsideration of the Judge’s decision.

[20] While Mr. Shabuddin’s partial compliance has provided some information to the Court, it has also signalled that Previous Counsel disputes the allegation of incompetence and was prepared to advance arguments in response to the allegation. Having provided this initial response Previous Counsel has received no further notice that the allegations have been

maintained on judicial review and in fact broadened to include a separate allegation of incompetence. While partial compliance may amount to substantive compliance in some circumstances I am unable to reach that conclusion here. In this case the record leaves the Court with an incomplete understanding of the circumstances relating to the alleged incompetence and Previous Counsel has not been given the opportunity to advance submissions on the issue despite the impact the allegations may have both personally and professionally. I am not prepared to examine the merits of the allegation of incompetence.

[21] In reaching this conclusion, I am highly sympathetic to Mr. Shabuddin. If there was a failure in providing information to the Judge on a timely basis the fault for doing so does not rest with him. However, the fact remains that this matter has been scheduled on four separate occasions, Mr. Shabuddin must have reasonably been aware of the health issues facing his counsel yet new counsel was not retained until just prior to the hearing of this matter.

C. *Was the decision reasonable?*

[22] Mr. Shabuddin argues that it was unreasonable for the Judge to find that he failed to demonstrate that he resided in Canada for the minimum number of days. He argues that the Judge failed to consider the totality of the evidence and instead analyzed his evidence on a piece-by-piece basis. He submits that if the Judge had taken a “totality of the evidence approach” she may have found the evidence was sufficient to satisfy his evidentiary burden. Again, I am unable to agree.



[23] It was open for the Judge to find that Mr. Shabuddin's evidence failed to constitute proof on a balance of probabilities that he met the residency requirement under paragraph 5(1)(c) of the *Citizenship Act*. The Judge considered the evidence individually and as a whole and reasonably determined the evidence of the applicant's presence consisted of passive indicators rather than active indicators.

V. Conclusion

[24] The application is dismissed. The parties did not identify a question of general importance and none arises.

**JUDGMENT IN T-1969-15**

**THIS COURT'S JUDGMENT** is that the application is dismissed. No question is certified.

"Patrick Gleeson"

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Judge

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

**DOCKET:** T-1969-15

**STYLE OF CAUSE:** MD SHABUDDIN v THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** APRIL 26, 2017

**JUDGMENT AND REASONS:** GLEESON J.

**DATED:** APRIL 28, 2017

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