

Federal Court



Cour fédérale

Date: 20110426

Docket: T-1423-10

Citation: 2011 FC 490

Ottawa, Ontario, April 26, 2011

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

SINGH, LAKHVIR

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an appeal of the decision of the Citizenship Judge Aris Babikian (the “Decision”), pursuant to subsection 14(5) of the *Citizenship Act*, RSC 1985, c C-29 (the “Act”), by Lakhvir Singh (the “Applicant”), rejecting his application for citizenship because it could not be determined whether the applicant had resided in Canada for three of the four years preceding his application for Canadian citizenship.

I. FACTS

[2] The Applicant is a citizen of India. He arrived in Canada on December 1, 2000, claiming refugee status. He was granted refugee status and remained in Canada. On March 14, 2006, he became a permanent resident, and on June 19, 2008, the Applicant applied for Canadian citizenship.

[3] On September 14, 2009, a citizenship official reviewed the Applicant's application. This file review noted that the Applicant declared 1,143 days of physical residence in Canada, and zero absences from Canada during the applicable period for citizenship.

[4] On October 7, 2009, the Applicant was issued a Residence Questionnaire (RQ) and Residency Checklist (RC). The RQ and some of the requested supporting documents were returned on December 14, 2009.

[5] On February 2, 2010, a notice to appear for his hearing with the Citizenship Judge was issued to the Applicant. The date was set for February 26, 2010, and the Applicant was asked to bring several documents, including all passports and travel documents in his possession, and the December 2009 RQ.

[6] At the hearing, the Applicant did not provide all of the requested supporting documents. At the end of the hearing, he was issued another RC and was asked to provide the supporting documents by March 30, 2010. The RC was signed by both the Applicant and the Citizenship Judge. The Applicant did not meet this deadline, and requested an additional three months, which

was granted. The Applicant submitted another RQ on May 1, 2010. The last of the requested supporting documents was submitted on June 2, 2010.

[7] The Applicant submitted two travel documents: (1) the Applicant's Indian passport, which is missing pages 17, 18, 19 and 20. The Applicant claims that the agent who provided him with a false passport and travel visa in 2000 probably took the missing pages; (2) Canadian Travel Document No. RSO18606 valid from June 19, 2008 to June 19, 2010.

[8] The Applicant also submitted his Permanent Resident Card, Income Tax Returns for 2007 and 2008, Ontario Driver's Licence, Ontario Health Card, his children's Immunization records, Ontario Business registration Document for 6550851 Canada Inc. (Sanghera Renovation), Ontario Health Records and others.

[9] The Applicant did not submit his "Confirmation of Permanent Residence" form, as he claimed that it had been stolen from his van in Montreal in 2006.

[10] The Applicant's listed addresses showed contradictions. At Question 7(f) of his Application for Canadian Citizenship, he was asked to provide all of his addresses for the past four years. He provided only one address, in Hanover. However, his present address is in Mississauga. Furthermore, in the December 2009 RQ, he listed the Mississauga address as his residence from May 2005 until 2009. The Citizenship Judge noted that the contradiction in addresses concerned him. This issue was raised at the hearing, and the Applicant was unable to provide an explanation. In the Applicant's May 2010 RQ, he provided 8 addresses, none of them in Hanover. He claimed

that any mention of Hanover was an error on the part of an acquaintance that had filled the form for him.

[11] The Applicant also claims that he employed the services of an immigration consultant for the purposes of his citizenship application, which directly contradicts his answer to Question 12 of the citizenship application form. He also states, in his December 2009 RQ, that his daughter assisted him with its completion. Finally, in his affidavit, the Applicant also claims that he advised his consultant when he was requested to obtain his travel history. However, the letter purportedly sent to Canada Border Services Agency (CBSA) to obtain his travel history is on his personal letterhead. The May 2010 RQ lists the assistance of “Rajinder Singh”.

[12] The February 2010 RC signed by the Applicant required the Applicant to obtain a “Travel History into Canada”, which can be obtained free of charge by writing to CBSA. The Applicant failed to provide this document. Instead, the Applicant wrote to the Citizenship Judge, stating that the CBSA had responded to his request negatively, stating that the CBSA “does not keep any record for the travel history of individual residents”. The Applicant included a photocopy of the letter and the envelope sent by him to the Citizenship Judge, with the date stamp clearly visible on the envelope. The letter is on his personal letterhead. The Applicant also included a copy of the envelope purportedly sent to CBSA, on which no date stamp is visible. The Applicant did not provide a copy of CBSA’s answer.

[13] The Applicant has since obtained his travel history from CBSA, which is the subject of a motion under Rule 369 to serve an additional affidavit. The Motion was heard by Madam

Prothonotary Aronovitch, on March 30, 2011, who ordered that the motion be made returnable before this Court on April 12, 2011.

[14] At the hearing, the Court denied the motion on the basis that, barring exceptional circumstances, such as bias or jurisdictional questions, evidence that was not before the decision-maker is not admissible before the Court in a judicial review proceeding (*Bekker v Canada*, [2004] FCJ No 819, 2004 FCA 186 at para 11) and that it was filed late.

II. THE DECISION UNDER REVIEW

[15] In a decision dated June 28, 2010, the Citizenship Judge Aris Babikian found that he could not, on the balance of probabilities, determine how many days the Applicant was actually present in Canada, as there was insufficient evidence of his continued physical presence during the periods that he claims to have been in Canada.

[16] The Citizenship Judge also identified two main problems with the application: (1) the Applicant's declared absences from Canada could not be verified; and (2) the Applicant's addresses were contradictory.

[17] The Citizenship Judge found it problematic that the Applicant apparently was unable to obtain his travel history, as "all our applicants have provided this document when it was requested by the judges and the officers, without any problem. This request is standard procedure and CBSA complies with the request of the Applicants without any reservation, as required by the Privacy act".

The Citizenship Judge attempted to clarify this situation with the Applicant by telephoning him on April 27, 2010. He attempted to reach the Applicant at both telephone numbers provided by the Applicant and did not get an answer. He reached a message saying that “your call has been forwarded to a voice call service that has not been initialized by the customer you are calling”. He tried again the same day, but received the same message.

[18] Moreover, the Citizenship Judge found that the documentation submitted by the Applicant constituted “passive indicators of residence that can be established without actually living in Canada over an extended period”.

[19] The Citizenship Judge also found the Applicant’s address history problematic, as it contained numerous inconsistencies, errors and omissions. Furthermore, the Citizenship Judge noted that the Applicant did not provide any lease agreements or residence ownership documents to support his declarations. The Citizenship Judge sought clarity on the matter by telephoning the Applicant prior to the hearing, but received an ambiguous explanation. At the hearing, the Applicant was unable to provide further explanations. It was only in the May 2010 RQ that the Applicant argued that any confusion was due to an acquaintance having helped him with his application.

[20] The Citizenship Judge informed the Applicant that he is free to file a new application for citizenship at any time.

III. RELEVANT LEGISLATION

The relevant portions of the *Act* are as follows:

Grant of citizenship

5. (1) The Minister shall grant citizenship to any person who:

(a) makes application for citizenship;

(b) is eighteen years of age or over;

(c) is a permanent resident within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act, and has, within the four years immediately preceding the date of his or her application, accumulated at least three years of residence in Canada calculated in the following manner:

(i) for every day during which the person was resident in Canada before his lawful admission to Canada for permanent residence the person shall be deemed to have accumulated one-half of a day of residence, and

(ii) for every day during which the person was resident in Canada after his lawful admission to Canada for permanent residence the person shall

Attribution de la citoyenneté

5. (1) Le ministre attribue la citoyenneté à toute personne qui, à la fois :

a) en fait la demande;

b) est âgée d'au moins dix-huit ans;

c) est un résident permanent au sens du paragraphe 2(1) de la Loi sur l'immigration et la protection des réfugiés et a, dans les quatre ans qui ont précédé la date de sa demande, résidé au Canada pendant au moins trois ans en tout, la durée de sa résidence étant calculée de la manière suivante :

(i) un demi-jour pour chaque jour de résidence au Canada avant son admission à titre de résident permanent, et

(ii) un jour pour chaque jour de résidence au Canada après son admission à titre de résident permanent;

be deemed to have
accumulated one day of
residence;

(d) has an adequate knowledge of one of the official languages of Canada;

d) a une connaissance suffisante de l'une des langues officielles du Canada;

(e) has an adequate knowledge of Canada and of the responsibilities and privileges of citizenship; and

e) a une connaissance suffisante du Canada et des responsabilités et avantages conférés par la citoyenneté; et

(f) is not under a removal order and is not the subject of a declaration by the Governor in Council made pursuant to section 20.

f) n'est pas sous le coup d'une mesure de renvoi et n'est pas visée par une déclaration du gouverneur en conseil faite en application de l'article 20.

[Emphasis added]

IV. ISSUES AND STANDARD OF REVIEW

[21] The Applicant argues that the Citizenship Judge's decision should be rejected because it relies on extrinsic evidence (the Citizenship Judge's personal knowledge regarding the CBSA Travel History, and his inability to reach the Applicant on April 27th, 2010) and because it was unreasonable, in light of the evidence, to conclude that the Applicant had not satisfied his burden of proof that he was physically present in Canada for three of the four years.

[22] The issues at hand can be summarized as follows:

- (1) Was the Applicant's right to procedural fairness respected?
- (2) Was the Citizenship Judge's decision reasonable?

[23] Issues of procedural fairness are reviewable on a standard of correctness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43). The review of a citizenship judge's determination of whether an applicant meets the residence requirements stipulated in the *Act* is a question of mixed fact and law, and is thus reviewable on a standard of reasonableness (*Chowdhury v Canada (Minister of Citizenship and Immigration)*, 2009 FC 709 at para 24-28 and *Canada (Minister of Citizenship and Immigration) v Zhou*, 2008 FC 939 at para 7).

V. ANALYSIS

A. Procedural Fairness

[24] The Applicant argues that the Citizenship Judge's comment that "all our applicants have provided this document when requested by the judges and the officers, without any problem", is reliance on extrinsic evidence, that was determinative in this case and that consequently, the Applicant's right to procedural fairness was violated. Similarly, the Citizenship Judge's attempt to clarify the situation vis-à-vis the failure to obtain the CBSA Travel History was reliance on extrinsic evidence, and also violated the Applicant's right to procedural fairness.

[25] The Applicant cited the following jurisprudence in which the Citizenship Judge failed to discuss problematic evidence at the hearing (*Johar v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1015), obtained prejudicial evidence after the hearing and did not inform the applicant thereof (*Iqbal Singh Auja v Canada (Minister of Citizenship and Immigration)*, 46 Imm

LR (2d) 37 at p 38), and the interview was too brief and futile (*Stine v Canada (Minister of Citizenship and Immigration)*, August 16, 1999, Pelletier J.). A close review of these decisions leads this Court to conclude that they are not applicable to the factual situation in the present case.

[26] The Applicant also cited jurisprudence dealing with extrinsic evidence, which is not applicable either: the Citizenship Judge consulted an external website to verify data without informing the Applicant (*Viviers v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 765), contacted the Applicant's former employer and thus obtained highly prejudicial statements made by said employer (*Dasent v Canada (Minister of Citizenship and Immigration)*, [1995] 1 FC 720), and updated the research in the file on the Government's approach to domestic violence (*Ettienne v Canada*, 24 Imm LR (2d) 88, FCTD, December 15, 1993, Reed J.).

[27] Consequently, the Applicant's argument cannot be accepted. If the Applicant was instructed to obtain the CBSA Travel History, it is because this document is readily available. The Citizenship Judge was not required to explain this to the Applicant and relying on this knowledge is in no way akin to importing extrinsic evidence. Indeed, the Citizenship Judge went beyond his duty and attempted to speak to the Applicant about this issue. The Applicant claims that this attempt constitutes recourse to extrinsic evidence and that it was determinative in this instance. However, upon reviewing the Decision, it is clear that this information was not relied on to draw a negative inference nor was it determinative. Rather, the Decision simply states a fact, to highlight the Citizenship Judge's efforts to contact the Applicant and provide him with the opportunity to explain what had happened with the purported attempt to obtain his Travel History from the CBSA. The conclusion reached by the Citizenship judge does not rest on the absence of his Travel History but

on his overall failure to provide sufficient evidence to clearly establish his continued physical presence in Canada during the relevant period. It is but one of several elements that were considered by the Citizenship Judge.

B. Reasonableness of Decision

[28] The Citizenship Judge states, in his reasons, that the Applicant failed to provide the requested supporting documents, on several occasions, finally doing so in June 2010. When the Citizenship Judge examined the file, he noticed several problematic areas, namely the CBSA Travel History, the domicile history, the use of a consultant, and the passive nature of the documentation submitted.

[29] The Applicant was asked for his places of residence over the four year period. He provided information that cannot all be true. When the Citizenship Judge sought to clarify the situation before the hearing, the Applicant first stated that he did not live in Hanover, then changed his mind and had his daughter explain. She was unable to say how long they were in Hanover. This should have been more than sufficient to alert the Applicant to the fact that the Citizenship Judge was troubled by the listed domicile history and the lack of evidence supporting the listed addresses. However, when the Citizenship Judge further questioned the Applicant on his domicile history at the hearing, the Applicant was unable to elaborate any further and provide additional information despite having been put on prior notice. The Applicant first attempted to attribute the fault to an acquaintance and now attempts to explain the contradictions by distinguishing between mailing addresses and residence, but there is no justification offered for his lack of explanation during the telephone

conversation with the Citizenship Judge or at the hearing. As such, the Applicant's retroactive explanations should be assigned little probative value.

[30] The evidence as to whether or not the Applicant used a consultant is also contradictory. There is no proof that the Applicant used a consultant prior to May 2010, when the Applicant stated on another RQ that he had received assistance from one "Rajinder Singh", and yet the Applicant blames his consultant for the failure to obtain the CBSA Travel History. The Citizenship Judge's concerns in light of such contradictions are reasonable.

[31] Finally, the supporting documents tendered by the Applicant were categorized as "passive" proof of the Applicant's presence in Canada, and reasonably so. These are all documents that can be readily obtained, and yet do little to actually establish one's physical presence in Canada.

[32] Similar documents were submitted in *Dachan v Canada (Minister of Citizenship and Immigration)*, 2010 FC 538, and the Court held that while such documents are proof of the Applicant's life in Canada, they do not establish physical presence:

[8] At the request of the citizenship officer, the applicant submitted the following supplemental documentation to establish her presence in Canada: a residence questionnaire; a letter from her employer confirming that she had been employed at a grocery store during the period between March 2003 and April 2006; deeds to the various properties she owns in the Montreal area; her Notice of Assessments for 2003 and 2005; her children's report cards from 2002 to 2006; bank account and credit card statements; home phone, cell phone, utility and internet bills; an employment contract from a live-in-caregiver the applicant had hired in 2005; a copy of her passport and those of her children, issued June 7, 2004; a police

report indicating that her previous passport was stolen; and finally, a partial photocopy of the stolen passport.

[...]

[24] While the documents submitted are proof of the applicant's life in Canada, they do not establish that she was physically present for the minimum mandated time. As noted by the citizenship judge, the documents are somewhat incomplete: her children's report cards demonstrate even more absences than what have been claimed by the applicant, she does not have a tax form from every year she has been in Canada and the evidence of her employment does not establish her physical presence in the country during the period in question.

[Emphasis added]

[33] The Applicant could have submitted any number of supporting documents, such as client lists and jobs completed by his construction company, a letter from the leadership of his place of worship confirming regular attendance during the four year period, income tax returns for each year he was in Canada. He did not do so, and the Citizenship Judge's decision that the documentation submitted was insufficient to prove physical presence on the balance of probabilities was reasonable. Furthermore, the Applicant was provided with several opportunities to supplement his case. The Applicant failed to file the agreed documentation within the agreed period, despite being granted extensions to do so. This Court cannot find any error in the determination that was made.

[34] In light of the evidence on file, the representations of the parties at the hearing and the above analysis, this Court dismisses the appeal. There are no clear errors or omissions in the Citizenship Judge's decision.

Under these circumstances, the appeal is rejected without costs.

JUDGMENT

THIS COURT'S JUDGMENT is that:

This Appeal is dismissed without costs against the Applicant.

"André F.J. Scott"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1423-10

STYLE OF CAUSE: SINGH, LAKHVIR
and
THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

Applicant

Respondent

PLACE OF HEARING: Montreal, Quebec

DATE OF HEARING: April 12, 2011

**REASONS FOR JUDGMENT
AND JUDGMENT:** SCOTT J.

DATED: April 26, 2011

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