

Federal Court



Cour fédérale

Date: 20120124

Docket: T-122-11

Citation: 2012 FC 92

Ottawa, Ontario, January 24, 2012

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

OKEY FABIAN EZE

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an appeal of a Citizenship Judge's decision, dated December 13, 2010, denying the citizenship application of Okey Fabian Eze based on the prohibition related to criminal charges in subsection 22(1)(b) of the *Citizenship Act*, RSC, 1985, c C-29 (the *Act*).

[2] For the following reasons, the appeal is allowed.

I. Background

[3] On November 1, 2004, Okey Fabian Eze (the applicant) filed an application for Canadian citizenship.

[4] On May 31, 2006, however, he was charged with the following offences under the *Criminal Code of Canada*, RSC, 1985, c C-46: (a) conspiracy to commit an indictable offence; (b) fraud over \$5000; (c) possession of property obtained by crime; and (d) commission of an offence for criminal organization.

[5] On August 10, 2010, Citizenship and Immigration Canada (CIC) Windsor mailed a Request for a Court Information Sheet or Certificate of Conviction to assess whether the applicant was now prohibited from becoming a Canadian citizen. On September 14, 2010, the Citizenship Judge hand-delivered a second request. The applicant had sixty days from the date of the initial request to comply, but failed to do so.

[6] On October 7, 2010, however, the applicant and his counsel prepared a request for a 90 day extension of time to file materials and fulfill the criminality requirements of the *Act*. In this request he noted that some of the charges had been withdrawn and his criminal counsel was seeking to stay the proceedings for delay based on section 11(b) of the *Canadian Charter of Rights and Freedoms* (*Charter*). According to the courier company, Fedex, the request and supporting documents were received on October 13, 2010.

[7] Regardless, in a short letter dated the same day, the Citizenship Judge denied his citizenship application, citing the criminal charges and failure to comply with requests for additional information. The Citizenship Judge wrote that “[b]ecause you have not complied with the requests within the period given, I have no choice but to non-approve your file.” Based on the prohibition under subsection 22(1)(b) of the *Act*, a person cannot be granted citizenship under subsection 5(1) or take the oath of citizenship while charged with an indictable offence under any Act of Parliament.

[8] The Citizenship Judge also considered whether he should make a favourable recommendation to the Minister to exercise discretion under subsections 5(3) and 5(4), but after reviewing the applicant’s submissions found that this was not warranted in the circumstances. Notably, the request for an extension of time was not referred to in the Citizenship Judge’s letter.

[9] On December 21, 2010, the Ontario Superior Court of Justice heard the applicant’s motion for a stay of proceedings related to his criminal charges. On January 12, 2011, the applicant attended at the office of the Citizenship Judge to make her aware of this development and claims he was informed she was unavailable.

[10] On January 17, 2011, the applicant’s motion for a stay of proceedings was granted by Justice Wilson of the Ontario Superior Court of Justice based on sections 24 and 11(b) of the *Charter* and the delay in getting to trial. On January 19, 2011, the applicant attended at the office of the Citizenship Judge to provide her with a copy of the decision. At this time, he was informed that the Citizenship Judge had already denied his application.

[11] The applicant asks this court to review the Citizenship Judge's decision to refuse citizenship based on criminality for a failure to consider his request for an extension of time and relying on charges subsequently withdrawn or stayed.

II. Issues

[12] The specific issues before the Court are as follows:

- a) Did the Citizenship Judge commit a breach of procedural fairness by not addressing the request for an extension of time?
- b) Did the Citizenship Judge err in denying the application based on subsection 22(1)(b)?

III. Standard of Review

[13] Issues of procedural fairness demand the correctness standard (see *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, 2009 CarswellNat 434 at para 43).

[14] However, the standard of review for a Citizenship Judge's decision under subsection 22(1)(b) of the *Act* is reasonableness (see for example *Zhan v Canada (Minister of Citizenship and Immigration)*, 2010 FC 822, [2010] FCJ no 1021 at para 18). The Court's intervention is not warranted unless the decision fails to accord with the principles of justification,

transparency and intelligibility or falls outside the range of possible, acceptable outcomes (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47).

IV. Analysis

A. *Did the Citizenship Judge Commit a Breach of Procedural Fairness by Not Addressing the Request for an Extension of Time?*

[15] The applicant claims his right to a fair hearing was denied by the Citizenship Judge in ignoring the request for an extension of time and subsequently concluding that he had failed to provide necessary information regarding the criminal charges. He relies on the decision of *Niedzialkowski v Canada (Minister of Employment and Immigration)*, [1992] FCJ no 459 where the Federal Court of Appeal intimated in relation to a delayed request for an extension of time, since the “Board never dealt with that request at all or made any move to fix a date for claimant’s submissions; instead, within a few days of counsel’s telephone call, it prepared and filed a written decision dismissing the claim. Thus, the claimant never really had a chance to put his case at all.”

[16] The respondent suggests that the fact the applicant’s request for an extension of time was not granted does not mean that it was not considered. Given that the applicant failed to comply with two previous requests for a Court Information Sheet or Certificate of Conviction, it would not have been unreasonable for the Citizenship Judge to refuse his request for an additional 90 day extension.

[17] Admittedly, the applicant’s previous failure to comply may justify a decision by the Citizenship Judge not to grant the extension of time. The applicant was also slow to bring the

matter to the attention of the Citizenship Judge. Assuming the applicant's information regarding the receipt of the request is accurate, the Citizenship Judge prepared her decision on that same day.

This may in part explain why the request was not mentioned as it may not have made its way to the Citizenship Judge in the period prior to releasing the decision.

[18] Regardless, the issue is that a belated request was made by the applicant around the time of the release of the decision. He was entitled to have this request considered as supported by a similar holding in *Niedzialkowski*, above. Whatever the Citizenship Judge's decision on this matter, it was a breach of procedural fairness not to consider the request.

B. *Did the Citizenship Judge Err in Denying the Application Based on Subsection 22(1)(b)?*

[19] I acknowledge the respondent's submission that notwithstanding the request for an extension of time the Citizenship Judge's decision was reasonable based on the information available to her. As the respondent further contends, there was no stay of proceedings in place when the Citizenship Judge issued her decision and the applicant can always reapply for citizenship.

[20] However, there was a request filed with additional information as to a potential change in the status of criminal proceedings which should have been addressed in the course of her decision.

V. Conclusion

[21] It amounted to a breach of procedural fairness for the Citizenship Judge not to explicitly consider the request for an extension of time to provide further information in denying the citizenship application on the basis of criminal charges under subsection 22(1)(b) of the *Act*.

[22] Accordingly, the appeal is allowed. The matter is referred to a different Citizenship Judge to reconsider his application along with the request for an extension of time to file material relevant to the criminal proceedings.

JUDGMENT

THIS COURT'S JUDGMENT is that this appeal is allowed. The matter is referred to a different Citizenship Judge to reconsider his application along with the request for an extension of time to file material relevant to the criminal proceedings

“ D. G. Near ”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-122-11

STYLE OF CAUSE: OKEY FABIAN EZE v. MCI

PLACE OF HEARING: TORONTO

DATE OF HEARING: JANUARY 9, 2012

**REASONS FOR JUDGMENT
AND JUDGMENT BY:** NEAR J.

DATED: JANUARY 24, 2012

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