

Federal Court



Cour fédérale

**Date: 20120127**

**Docket: IMM-3053-11**

**Citation: 2012 FC109**

**Ottawa, Ontario, January 27, 2012**

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

**BETWEEN:**

**DEVON CLIFTON SCOTT**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] The applicant is Devon Clifton Scott. The Style of Cause will be ordered amended to reflect his correct name. Mr. Scott is a citizen of Jamaica. He came to Canada on June 28, 2008, and made a refugee claim one year later which was rejected by the Refugee Protection Division of the Immigration and Refugee Board on March 22, 2011.

[2] It is quite possible that his claim for protection has no merit; however, the Board's decision must be remitted back to it for determination because the Board breached the principles of natural justice and fairness.

[3] On November 22, 2010 and December 9, 2010, the Board's scheduling department called and left messages on the voicemail of Desmond Cherrington, a registered member of The Canadian Society of Immigration Consultants, and the consultant retained by the applicant to represent his interests in his refugee claim. Neither message was returned by the applicant's consultant.

[4] The Board therefore sent a Notice to Appear to the applicant's consultant dated January 17, 2011 for a hearing on March 4, 2011. The next day, January 18, 2011 the Board sent the applicant a letter enclosing a Confirmation of Readiness form. The cover letter stated, in part, as follows:

If the RPD does not **receive** the completed reply form **within the 20 days**, the RPD will commence abandonment proceedings in connection with your claim under section 168 of the *Immigration and Refugee Protection Act*. In that case, **the hearing scheduled on the date indicated above [March 4, 2011] will become a show cause or abandonment hearing**. You will be given an opportunity to explain why your claim should not be declared abandoned at that hearing [emphasis in original].

[5] On February 7, 2011, the Board received a letter from the consultant seeking a postponement of the hearing as he would not be in the country on that date. The earliest alternative hearing date he would be available was May 27, 2011.

[6] The Board dismissed the application to change the hearing date and provided extensive reasons. It advised the consultant that “[i]f you are unable to attend on the scheduled date or find a counsel to replace you, please notify the claimant of that forthwith, in order to give [him] an opportunity to make other arrangements for counsel, if [he] so wishes.”

[7] At the March 4, 2011 hearing, the applicant was unrepresented. He submitted a letter from his consultant, dated February 27, 2011, repeating the previously denied request for a postponement. It reads as follows:

To whom it may concern:

I’m Desmond Cherrington and I’m [counsel] for Mr. Devon Scott, File number: TA9-15294. The intent of this letter is to inform you that Mr. Scott’s hearing is scheduled for March 4<sup>th</sup>, 2011. Mr. Devon Scott’s hearing was scheduled without my consultation. I must admit that I have been absent from Canada frequently within the last year as I was putting together an office outside of Canada. After my return to Canada on the 3<sup>rd</sup> of February, 2011 and speaking to the RPD regarding this hearing date, I was informed that the RPD [has] made a few attempts to secure a schedule date for Mr. Scott. Hence, the RPD has gone ahead and schedule this appointment without my consent.

Since learning of this date, I then began the process of preparing the client for his hearing in regards to requesting the police reports from Jamaica as well as his medical records. These documents [have] not been made available to me, to date. I am in constant contact with the Jamaican police office in Falmouth, where the incidents were recorded and [I have] been advised that the documents are pulled and [are] being processed. Please note also, that Mr. Devon Scott, the client, has been on the telephone almost daily with the police station there in Jamaica as he makes all efforts to have the police speed up their process of issuing his police reports for this hearing.

Additionally, I am unavailable to attend this hearing due the fact that I had prior standing appointments out of country, which I am unable to get out of. Since finding out the date of this hearing, I have made attempt[s] to have this hearing postpone[ed] without

any success from the IRB, who refused my request for postponement. Upon receipt of the IRB's decision, I have since attempted to make alternative arrangements without any success.

Due to the fact that Mr. Scott's evidence in his hearing depends heavily on proof of what is outlined in his PIF and the fact that we were not given enough time to secure the documents, as well as the burden of proof and natural justice to a fair hearing [t]o Mr. Scott, that on these grounds I'm requesting a postponement.

Please adjourn this hearing until after my return to Toronto, and will be available during the month of May 7<sup>th</sup>, 2011 and onwards. As well I am confident that I will have all the client's police reports and medical proof. I sincerely apologize for any inconvenience this may cause. At this time, I also want to point out that this date was reached without my consultation of availability.

Sincerely yours,  
Desmond Cherrington.

[8] The applicant attests in an affidavit filed in this matter that he only learned at the hearing on March 4, 2001 that the first request for a postponement had been denied. The applicant's consultant, prior to his departure to Jamaica, gave the applicant the letter dated February 27, 2011 and instructed him to provide it to the Board.

[9] At the hearing, the applicant asked the Board for a postponement as he wanted representation. The Board refused and proceeded to hear the claim on the merits.

[10] On the basis of the record before the Court, the behaviour of the applicant's consultant was outrageous and unprofessional. I wish to make it clear that Mr. Scott was represented by different (and competent) counsel on this application. The Board, on at least two occasions, called the applicant's consultant and left messages in an attempt to schedule a hearing date.

After not receiving a response, the Board, by letter dated January 17, 2011, scheduled the hearing for March 4, 2011. On February 7, 2011, the Board received a letter from the applicant's counsel requesting an adjournment. The Board denied the request and provided several reasons. In that same decision, the Board informed the consultant that should he be unable to attend on the scheduled date or find counsel to replace him, to notify the applicant in order to give him an opportunity to make other arrangements for counsel.

[11] The applicant was not notified by his consultant. In fact, four days before the hearing the applicant was made aware that his consultant would be out of the country on the hearing date and would not be able to represent him. As previously stated, the applicant was given a letter to present to the Board at the hearing requesting a postponement. In light of the earlier rejection of that request, an experienced consultant would have understood that it was very unlikely that the Board would grant the requested adjournment.

[12] The fact that the applicant's consultant was absent from Canada, setting up an office in Jamaica, is no excuse for his conduct; business ventures do not come before professional obligations. If he is unable to properly represent his clients, he should not be representing them at all.

[13] The respondent submits that the applicant should bear the consequences of his counsel's misconduct for two main reasons: (1) the applicant is bound by the decisions of his legal representative absent proof of a formal complaint; and (2) the applicant is also to blame.

[14] The respondent's submission overlooks the Board's letter of January 18, 2011 and its statement to the applicant that if he failed to send in the Confirmation of Readiness form, the hearing on March 4, 2001 would become a show cause or abandonment hearing. Neither the applicant nor his consultant sent that form to the Board. According to the Board's own processes, the hearing on the merits ought not to have taken place; rather a show cause hearing ought to have been held. It was not. Although the applicant may not have been successful in a show cause hearing and it may be that the Board would have declared his claim for protection to have been abandoned, procedural fairness dictates that the Board follow its established process and provide the applicant with that opportunity.

[15] For that reason, this application must be allowed and the claim remitted back to be determined by a new Member.

[16] Neither party proposed a question for certification.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that:**

1. The Style of Cause is amended to change the applicant from SCOTT CLIFTON DEVON to DEVON CLIFTON SCOTT;
2. This application is allowed, the decision of the Board is set aside and the applicant's claim for refugee protection is returned for determination by a different Board member;  
and
3. No question is certified.

"Russel W. Zinn"

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Judge

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

**DOCKET:** IMM-3053-11

**STYLE OF CAUSE:** DEVON CLIFTON SCOTT v. THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** November 30, 2011

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

**DATED:** January 27, 2012

**APPEARANCES:**

Ali Amini FOR THE APPLICANT

Prathima Prashad FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

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