

Federal Court



Cour fédérale

Date: 20120315

Docket: IMM-4916-11

Citation: 2012 FC 310

Ottawa, Ontario, March 15, 2012

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Applicant

and

SUBIR MUKERJEE

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Immigration Appeal Division of the Immigration and Refugee Board of Canada granting an appeal of a visa officer's decision to refuse to grant a travel document to return to Canada, because the respondent failed to comply with the residency obligations for permanent residents pursuant to section 28 of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

[2] The Board agreed with the officer that the respondent had failed to meet the residency requirements of the Act but found that there were sufficient humanitarian and compassionate (H&C) considerations to warrant special relief under the Act.

[3] The Board noted that in deciding the appeal it was guided by the H&C factors non-exhaustively set out in *Bufete Arce v Minister of Citizenship and Immigration*, [2003] IADD No 370 and *Kok v Minister of Citizenship and Immigration*, [2003] IADD No 514. The Board found that there was no child that would be affected by the decision, and that the situation of the respondent's family members did not give rise to H&C grounds. Further, it found that the respondent's explanation for his significant absences outside of Canada were the result of personal choices and did not give rise to H&C considerations. However, the Board found two factors weighed in the respondent's favour: hardship and establishment.

[4] The Minister submits that the Board's decision with respect to both of these two factors is unreasonable.

[5] In making a hardship finding the Board reasoned that some level of hardship was evidenced by the respondent's fulfilment of his conditions of landing, his substantial previous unsuccessful investment, and his testimony attesting to the significant time, energy and investment spent generating new business. The Court cannot interfere with the Board's weighing of this evidence even if it might have weighed and balanced these factors to a different

result. In my view, the Board's conclusion on hardship is an acceptable outcome based on the evidence and is not a basis to set aside the decision.

[6] The Board's analysis and conclusion with respect to establishment, however, is deficient.

Its finding on establishment is as follows:

As indicated above, the Appellant has been previously established in Canada through his investment here. It is unfortunate that the Appellant's previous business did not prosper as expected. Based on the Appellant's evidence, he has minimal funds in a savings account in Canada. The Appellant declares that he does not have any other assets in Canada. The panel accepts that the Appellant has demonstrated establishment in Canada through the funds in his savings account and his previous investment here. The panel weights the evidence in favour of the Appellant's case [emphasis added].

[7] I agree with the applicant that the Board failed to properly consider the lack evidence of establishment at the time of the hearing as required by this Court's jurisprudence: *Ambat v Minister of Citizenship and Immigration*, 2011 FC 292. The Board was obliged to consider the respondent's degree of establishment initially and at the time of the hearing; it failed to properly consider the establishment at the time of the hearing, noting only his previous investment.

[8] At the hearing, the respondent testified to having approximately \$3,000 in a Canadian bank account. He has no family members living in Canada, no permanent residence, and there was no evidence, besides a brochure and a deed of sale of one of the respondent's properties in India, to substantiate any current business plans in Canada. Moreover, the Board failed to weigh and balance the evidence of the respondent's considerable establishment in India against his scant establishment currently in Canada.

[9] For these reasons, I find that the Board's finding of establishment was made without an evidentiary foundation. The evidence in the record, if anything, weighs against a finding of a current establishment in Canada and therefore I find the Board's evaluation of the evidence and its decision on establishment to be unreasonable.

[10] Given the requirement to balance the factors established in the jurisprudence, and my rejection of the Board's finding of establishment, the majority of factors considered by the Board do not weigh in the respondent's favour. Accordingly, the conclusion the Board reached cannot stand.

[11] Neither party proposed a question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application is allowed;
2. The decision of the Immigration Appeal Division of the Immigration and Refugee Board of Canada dated July 14, 2011, allowing on humanitarian and compassionate considerations the respondent's appeal of a decision of a visa officer refusing him a travel document to return to Canada is set aside; and
3. The respondent's appeal is referred back to a differently constituted Board for determination; and no question is certified.

"Russel W. Zinn"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4916-11

STYLE OF CAUSE: THE MINISTER OF CITIZENSHIP AND
IMMIGRATION V. SUBIR MUKERJEE

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: February 29, 2012

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

DATED: March 15, 2012

APPEARANCES:

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