Federal Court  Cour fédérale

Date: 20140909

Docket: T-1564-13

Citation: 2014 FC 855

Ottawa, Ontario, September 9, 2014

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

DEEPAN BUDLAKOTI

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for a declaration that Deepan Budlakoti [Applicant] is a Canadian citizen and not subject to the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The Applicant was born in Canada in 1989 to parents who had come to Canada as employees of the High Commission of India.

[2] There is a significant factual dispute between the parties as to whether the Applicant's parents left their Indian High Commission employment before or after his birth. If the parents left this employment before his birth, then the Applicant was entitled to Canadian citizenship by virtue of his birth in Canada. Nonetheless, he has an Ontario birth certificate and has been issued two Canadian passports, presumably on the strength of the Ontario birth certificate.

[3] The critical legislative provisions of the *Citizenship Act*, RSC 1985, c C-39, are:

3. (1) Subject to this Act, a person is a citizen if	3. (1) Sous réserve des autres dispositions de la présente loi, a qualité de citoyen toute personne :
(a) the person was born in Canada after February 14, 1977;	a) née au Canada après le 14 février 1977;
…	…
(2) Paragraph (1)*(a)* does not apply to a person if, at the time of his birth, neither of his parents was a citizen or lawfully admitted to Canada for permanent residence and either of his parents was	(2) L'alinéa (1)*a)* ne s'applique pas à la personne dont, au moment de la naissance, les parents n'avaient qualité ni de citoyens ni de résidents permanents et dont le père ou la mère était :
(a) a diplomatic or consular officer or other representative or employee in Canada of a foreign government;	*a)* agent diplomatique ou consulaire, représentant à un autre titre ou au service au Canada d'un gouvernement étranger;
(b) an employee in the service of a person referred to in paragraph *(a)*; or	*b)* au service d'une personne mentionnée à l'alinéa *a)*;
(c) an officer or employee in Canada of a specialized agency of the United Nations or an officer or employee in Canada	*c)* fonctionnaire ou au service, au Canada, d'une organisation internationale — notamment d'une institution spécialisée

of any other international organization to whom there are granted, by or under any Act of Parliament, diplomatic privileges and immunities certified by the Minister of Foreign Affairs to be equivalent to those granted to a person or persons referred to in paragraph *(a)*.

des Nations Unies — bénéficiant sous le régime d'une loi fédérale de privilèges et immunités diplomatiques que le ministre des Affaires étrangères certifie être équivalents à ceux dont jouissent les personnes visées à l'alinéa a).

…

…

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

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

(a) makes application for citizenship;

a) en fait la demande;

(b) is eighteen years of age or over;

b) est âgée d'au moins dix-huit ans;

(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:

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) 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

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

(ii) for every day during which the person was resident in Canada after his

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

lawful admission to Canada for permanent residence the person shall be deemed to have accumulated one day of residence;	résident permanent;
(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;
(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.
…	…
12. (1) Subject to any regulations made under paragraph 27(i), the Minister shall issue a certificate of citizenship to any citizen who has made application therefor.	12. (1) Sous réserve des règlements d'application de l'alinéa 27i), le ministre délivre un certificat de citoyenneté aux citoyens qui en font la demande.
(2) When an application under section 5 or 5.1 or subsection 11(1) is approved, the Minister shall issue a certificate of citizenship to the applicant.	(2) Le ministre délivre un certificat de citoyenneté aux personnes dont la demande présentée au titre des articles 5 ou 5.1 ou du paragraphe 11(1) a été approuvée.
(3) A certificate issued pursuant to this section does not take effect until the person to whom it is issued has complied with the requirements of this Act and the regulations respecting the oath of citizenship.	(3) Le certificat délivré en application du présent article ne prend effet qu'en tant que l'intéressé s'est conformé aux dispositions de la présente loi et aux règlements régissant la prestation du serment de citoyenneté.

(Court underlining)

II. Background

A. *Immigration Matters*

[4] In overview, the Applicant was sentenced to three (3) years in prison for weapons trafficking and cocaine importation in 2010. While in prison, Citizenship and Immigration Canada [CIC] determined that despite his Canadian passport, the Applicant has never been a Canadian citizen. An admissibility report was prepared and the Applicant was declared inadmissible on the basis of serious criminality pursuant to s 4 of the *IRPA*.

[5] India has denied that the Applicant is a citizen of India or entitled to citizenship but the record on this issue is sketchy at best.

[6] The Applicant was released from prison into immigration detention, which he was released from in April 2013 subject to conditions. The subsiding paragraphs detail the particulars of the Applicant's relevant immigration matters.

[7] In 2009, the Applicant was convicted of breaking and entering and sentenced to four (4) months in jail. In 2010, the Applicant was reported inadmissible for serious criminality based on this 2009 conviction. Proceedings seemed to grind to a halt when, despite CIC contending that the Applicant was not a citizen, he gave CBSA a copy of his passport.

[8] On December 12, 2010, the Applicant was convicted of weapons trafficking, possession of a firearm while prohibited and of trafficking in narcotics (cocaine). He was sentenced to three (3) years in jail.

[9] In May 2011, CIC provided the Applicant with an inadmissibility report, pursuant to the IRPA s 44, confirming inadmissibility due to criminality. A removal order was issued in respect of the 2009 conviction.

[10] Following an admissibility hearing in October 2011, the Immigration and Refugee Board [IRB] determined on December 8, 2011 that the Applicant was inadmissible due to criminality. The IRB decision focussed on the question of whether the Applicant was a Canadian citizen.

[11] In the IRB proceedings, the mother claimed that while pregnant with the Applicant, she had stopped working for the High Commission. The father testified that he had left his job in June 1989, applied for a Canadian work visa in Boston and moved into his new employer's home. Additionally, their new employer (Dr. Dehejia) testified that he travelled to Boston with the Applicant's father in the summer of 1989 to regularize the father's status.

[12] The IRB member was not satisfied that the Applicant was a Canadian citizen and issued a deportation order against him [December 8, 2011 IRB decision].

[13] Importantly, on May 24, 2012, Justice Barnes dismissed an application for judicial review of the December 8, 2011 IRB decision.

[14] In 2012, the Applicant received a negative PRRA decision.

[15] In December 2012, the Applicant completed his sentence and was released into CBSA custody. He has been released from custody on bonds and conditions which were amended on November 1, 2013 [November 1, 2013 IRB order].

The Applicant has brought a motion for interlocutory injunction prohibiting the legal enforcement of all immigration conditions imposed under the November 1, 2013 IRB order.

[16] On September 24, 2013, the Applicant filed this Notice of Application seeking a declaration of citizenship – the present matter before this Court.

B. *Citizenship Declaration Matters*

[17] The Applicant's problems begin with the status of his parents' employment at the time of his birth in October 1989. The parents came to Canada in 1985 to work as domestic helpers to the Indian High Commissioner to Canada. That employment terminated at some point in 1989 – the exact date is hotly contested and the facts in this record are difficult to make out.

[18] The parents entered Canada in 1985, as accredited domestic workers of India's High Commission; a diplomatic note to that effect was delivered to DFAIT on September 30, 1985.

[19] On August 26, 1988, another diplomatic note indicated that the parents had moved into the Indian High Commissioner's official residence to continue their domestic work.

[20] The Applicant contends that his parents quit the Indian High Commission in June 1989. In that regard, he relies on the same basic facts as were before the IRB.

[21] The Applicant relies on the affidavit of Dr. Dehejia. In his affidavit, Dr. Dehejia admitted that he did not recall specific dates as to when the parents began working for him.

[22] The Applicant also relies on the affidavit of S.J.S. Chhatwal, a former Indian High Commissioner, whose evidence was that the parents left his employment in June 1989 but cannot otherwise remember anything from that period. The integrity of this affidavit is undermined because the 3rd page of the four-page affidavit is missing.

[23] This *viva voce*/affidavit evidence is further undermined by several pieces of contemporary documentation:

- on December 6, 1989, the Applicant's father received an employment authorization allowing him to begin work for a new employer instead of the Indian High Commissioner;
- the corresponding FOSS Note states: "Head of family and wife were both employed by the Indian High Commission until Dec/89". The Note contains a reference to the son (this Applicant) not being a Canadian citizen;
- the Applicant's father travelled, on his Indian diplomatic passport, on December 13, 1989;
- a diplomatic note from the Indian High Commission dated December 21, 1989 reported that the father and mother left the service of the High Commissioner of

India on December 12 and 20, 1989 respectively (Mr. Chhatwal claimed that the note is in error but this has not been confirmed by an official of the Indian government); and

- on January 2, 1990, Canada revoked the parents' diplomatic status.

[24] To round out the facts, the parents filed for and ultimately obtained Canadian citizenship. In both their citizenship applications, the parents claimed their address as that of Dr. Dehejia, from October 1989 to August 1993, despite claiming elsewhere that they had started working for him in June 1989. Importantly, before filing for citizenship, the parents, in June 1992, applied for permanent resident status listing the Applicant as a dependent child. A visa and record of landing was issued for the Applicant.

[25] The Applicant, having been born in Ottawa on October 17, 1989, holds an Ontario birth certificate, and had been issued a first and then a second Canadian passport.

[26] The case turns on whether the Applicant's parents were on October 17, 1989, employees in the service of a diplomatic officer in accordance with s 3(2)*(b)* of the *Citizenship Act*, RSC 1985, c C-29.

[27] The issues in this matter are:

- Is the Applicant a Canadian citizen?
- Has the Applicant been made stateless by some action of the Respondent?
- Are the Applicant's rights being violated under the current arrangement?

- Should a declaration of citizenship be issued at this time?

The first and last issues are interrelated.

III. Analysis

[28] There are three principal reasons for not granting the core relief sought – a declaration of Canadian citizenship.

[29] Firstly, I have grave doubts that this Court can and should issue a bare declaration of citizenship unrelated to some other relief or proceedings. The legislative scheme leaves to the Minister or potentially a citizenship judge the task of providing the documentation of citizenship. A refusal to provide such documentation, such as a certificate of citizenship, would then be reviewable by this Court.

[30] Under the current procedure, this Court is asked to declare a person a citizen; however, there is no legislation suggesting that it is the function of this Court to make such a bald declaration. One may ask rhetorically, whether such relief is open to any person desiring citizenship.

[31] Secondly, this matter was already subject to a Court decision, raising the matter of issue estoppel. The December 8, 2011 IRB decision held that the IRB was not satisfied that the Applicant was a Canadian citizen. That decision was upheld by Justice Barnes on May 24, 2012.

[32] This declaration proceeding is a collateral attack on the December 8, 2011 IRB decision and an "end run" on Justice Barnes' decision on judicial review. The issue of citizenship was central to those decisions; the facts pleaded were the same and the evidence tendered was much the same as in this declaration proceeding.

[33] In my view, the issue of citizenship has been dealt with and this Court ought not to revisit the matter under a subsequent but parallel proceeding.

[34] Thirdly, the evidence in this case does not justify the relief sought. It might have been preferable if this case had been converted to an action (where credibility can be better tested) but the Court must deal with the evidence as presented. The record does not establish the Applicant's claim to citizenship by reason of birth in Canada.

[35] The Applicant's case is significantly undermined by the documentary evidence and the internal inconsistency in its own records including:

- the Applicant's father did not receive an employment authorization permitting work outside the High Commission until December 13, 1989;
- The FOSS Notes confirming that the father worked at the Indian High Commission until December 1989 and the Applicant's status as a non-Canadian citizen;
- the Indian High Commission diplomatic note confirming that the parents ceased to work there after December 12 and 20, 1989 respectively;
- the father's travels under a diplomatic passport up to December 13, 1989;

- the parents' permanent resident application of 1992, which included the Applicant as part of the request – a matter inconsistent with a claim of Canadian citizenship; and
- the inconsistency between the parents' claim that they had left the High Commission employment in June 1989 and began work for a new employer, and the citizenship application that they lived at the new employer's house in October 1989. At the very least, the inconsistency undermines the main story-line.

[36] The affidavit evidence suffers from being based on the recollection of events 25 years ago; specifically, by the refusals to answer specifics from that period.

[37] The Court prefers the documentary evidence to that of the recollections of Mr. Chhatwal and Dr. Dehejia because the documentary evidence was made at the relevant time and is more consistent with other related evidence.

[38] The Court has credibility concerns about the evidence relied on by the Applicant, both because of the inconsistencies and contradictions caused by the 25 year time lapse therein and the witnesses' responses when challenged.

[39] The fact that passports were issued to the Applicant is not, in this case, determinative of citizenship. I adopt the reasoning of Justice Strickland in *Pavicevic v Canada (Attorney General)*, 2013 FC 997, 20 Imm LR (4th) 37, holding that issue estoppel does not arise in the case of a passport issued in error.

[40] On the issue of whether the Respondent has taken any action to render the Applicant stateless, the Respondent has done nothing to deprive the Applicant of his Canadian citizenship. The Applicant's position is based on the erroneous assumption that the Applicant initially had Canadian citizenship.

[41] Whether the Applicant has Indian citizenship or is entitled to Indian citizenship is not a matter which this Court can decide. At the very minimum there is no expert evidence on Indian law and the Applicant's entitlements to Indian citizenship.

The law relied on by the Applicant relates to revocation of citizenship and is not applicable or persuasive in these circumstances.

[42] On the issue of violation of the Applicant's rights, the Applicant claims violations of sections 6 and 7 of the *Charter*.

[43] With respect to s 6 rights, the Applicant's position is dependent on his being a Canadian citizen. In *Solis v Canada (Minister of Citizenship and Immigration)* (2000), 186 DLR (4^{th}) 512 (FCA), 96 ACWS (3d) 455, Justice Rothstein, then on the Court of Appeal, confirmed that for s 6 *Charter* rights to be engaged, the person must be a citizen.

[44] Having concluded that the Applicant has not established his Canadian citizenship, there can be no violation of s 6 *Charter* rights.

[45] With respect to s 7 *Charter* rights, the Applicant is entitled to rely on the protection of this provision. The Applicant argues that absent citizenship, he faces the threat of removal from the country of his birth and has been rendered stateless, in violation of his right to liberty and to security of the person including access to basic Canadian social services such as health care.

[46] The Applicant, while entitled to s 7 *Charter* protection, has failed to establish a violation of the rights accorded by the provision.

As Justice Mandamin held in *Lee v Canada (Minister of Citizenship and Immigration)*, 2008 FC 614, 167 A.C.W.S. (3d) 859, the denial of citizenship is not synonymous with deportation (where s 7 *Charter* rights would crystallize).

[47] Further, the denial of state funded health care does not violate s 7 of the *Charter*, as held in *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35, at paragraph 104:

> 104 The *Charter* does not confer a freestanding constitutional right to health care. However, where the government puts in place a scheme to provide health care, that scheme must comply with the *Charter*. We are of the view that the prohibition on medical insurance in s. 15 of the *Health Insurance Act*, R.S.Q., c. A-29, and s. 11 of the *Hospital Insurance Act*, R.S.Q., c. A-28 (see Appendix), violates s. 7 of the *Charter* because it impinges on the right to life, liberty and security of the person in an arbitrary fashion that fails to conform to the principles of fundamental justice.

[48] While an *Oakes* test analysis is not required here, in considering the objectives of the *Citizenship Act*, I can do no better than to quote Justice Shore in *Al-Ghamdi v Canada (Foreign Affairs and International Trade)*, 2007 FC 559, 314 FTR 1:

> [74] The objective of paragraphs 3(2)*(a)* and *(c)* of the *Citizenship Act* is to ensure that citizenship is not accorded to

someone who is immune from almost every obligation of citizenship (e.g. paying taxes and respecting criminal law). This is manifestly an important objective.

Rational connection between the measure and the objective

[75] In an effort to ensure that no citizen is immune from the obligations of citizenship, denying citizenship is tightly connected to the objective.

[76] The only other alternative would be not to grant immunity to the children of individuals with diplomatic status. This would violate long standing tradition in international law and interfere with the exercise of the Crown's prerogative over international affairs.

[77] It is not necessary that the government demonstrate that the means chosen is the least impairing imaginable. It is only necessary that "the law falls within a range of reasonable alternatives". Where this is the case "the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement." (*Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827.)

Proportionality in respect of the restriction and the objective

[78] In measuring the proportionality of the restriction and the objective, it is important to recognize paragraphs 3(2)*(a)* and *(c)* only have the effect of denying Canadian citizenship. Although Canada cannot control sovereign foreign states and be certain that children born of every foreign diplomat will be entitled to citizenship in their home country, it is nonetheless, reasonable to assume that most would be and therefore paragraphs 3(2)*(a)* and *(c)* treat these children no differently than every other citizen born in their parents' home country.

[79] As any other foreign national, the Applicant can apply for permanent residence pursuant to the IRPA, and once the residency obligations as set out in section 5 of the *Citizenship Act* are met, request to become a citizen.

[80] In addition, because the conditions as set out in paragraphs 3(2)*(a)* and *(c)* reflect the standards of international law, it meets the requirements of being demonstrably justified in a free and democratic society.

[49] Therefore, even if there was a violation of s 7 of the *Charter*, the challenge would not survive an *Oakes* test analysis.

IV. Conclusion

[50] For all these reasons, I would dismiss this application for a declaration with costs.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for a declaration is dismissed with costs.

"Michael L. Phelan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1564-13
STYLE OF CAUSE:	DEEPAN BUDLAKOTI v MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	JUNE 16, 2014
JUDGMENT AND REASONS:	PHELAN J.
DATED:	SEPTEMBER 9, 2014

APPEARANCES:

Yavar Hameed Ahmad Ramadan Paul Champ Peter Stieda	FOR THE APPLICANT
Korinda McLaine	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Hameed & Farrokhzad Barristers and Solicitors Ottawa, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT