Federal Court  Cour fédérale

Date: 20150612

Docket: IMM-4845-14
IMM-4614-14

Citation: 2015 FC 740

Ottawa, Ontario, June 12, 2015

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

ROBERT MOSCICKI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

REASONS FOR JUDGMENT

[1] The Applicant brought an application for judicial review of the decision of the Immigration Division of the Immigration and Refugee Board ("the Board") dated May 8, 2014, where the Board found the Applicant inadmissible under subsection 36(1)(b) of the *Immigration*

and Refugee Protection Act, SC 2001, c 27 ("IRPA") for serious criminality (IMM-4845-14). That judicial review application was combined with IMM-4614-14, where the Applicant sought declaratory relief against Citizenship and Immigration Canada ("CIC") for a failure to conclude the Applicant's alleged 1989 application for permanent resident ("PR") status as an un-accompanied minor child of his father. The facts are generally common for both files.

[2] Both decisions were dismissed on December 11, 2014, without costs.

I. Background

[3] The Applicant is a citizen of Poland. He was 17 years old when he arrived in Canada on October 18, 1989. The Applicant was sponsored as a dependent son by his father who arrived approximately one year earlier. The Applicant says his father became a landed immigrant on March 24, 1989. The Applicant's two younger siblings have always remained in Europe.

[4] In March 1992, the Applicant was charged and on September 28, 1992, convicted of "attempted residential burglary" in Cook County, Illinois, United States. He was sentenced on January 22, 1993, to serve five years imprisonment and given time served credit of 317 days. When his sentence was completed in the United States, the Applicant was deported to Poland from the United States but he returned to Canada on August 9, 2008 at Toronto Pearson International Airport. When he arrived back in Canada, he was admitted on a Polish passport with a temporary resident visa ("TRV") for six months.

[5] In February 2010, the Applicant applied for Canadian citizenship but was rejected on June 3, 2013. CIC stated there was no indication that he was lawfully admitted to Canada for permanent residence. Because of his citizenship application, he came to the attention of the CBSA and the immigration task force. The Applicant was investigated and CBSA referred him under a section 44 report on February 12, 2014. As a result, CBSA issued an arrest warrant and when the Applicant was arrested in February 2014, CBSA determined he was a flight risk and detained him. At his admissibility hearing, the Board found the Illinois provision for "attempted residential burglary" to be equivalent to the Canadian criminal code provision for "attempt break and enter". The Applicant testified that his role in the crime was that he was sitting in a car outside a house that his companions were in the process of breaking into. The Board determined that he was a foreign national inadmissible for serious criminality and issued a deportation order for the Applicant.

[6] The FOSS notes indicate that the file relating to the Applicant's 1989 application was destroyed in 2008 in the normal course of business. CIC has no further records for the Applicant other than FOSS notes. The FOSS notes show that the Applicant was sponsored by his father and accepted in principle for processing of permanent resident status while in Canada with work authorization. In 1991, the FOSS notes indicate that "AIP in process still". No further remarks appear until February 2011 when he requested welfare and again in September 2012 when it is documented he requested welfare again.

[7] The FOSS notes show that the Applicant was eligible for a Pre-Removal Risk Assessment ("PRRA") on April 10, 2014, but did not file an application.

[8] To further his position he is a permanent resident he states:

- his dad picked up his PR card in 1991;
- he never received a refusal letter from CIC;
- he was issued a social insurance number (beginning with the number 5 indicating his landed immigrant status); and
- he has a Ontario Health Card where his status is listed as "landed immigrant".

II. The Board's Decision on Equivalence

[9] The Board rendered an oral decision following the admissibility hearing and found that the Applicant was inadmissible pursuant to section 36(1)(b) of the IRPA. The Board found that while the Applicant claimed to be a PR of Canada, he was unable to produce any objective evidence of his status. The Minister produced an email from CBSA to CIC that showed there was no record of PR status or any other lawful status in Canada for the Applicant. As well, the Respondent provided the June 2013 rejection letter from CIC which indicated the Applicant's lack of status.

[10] The Board noted that the Applicant pled guilty and was convicted of attempt residential burglary on September 28, 1992. The Board concluded that there are reasonable grounds to believe that he was convicted of the Illinois offence.

[11] With respect to equivalence, the Board recited the Illinois provision and section 24(1) (attempts) of the *Canada Criminal Code*, RSC 1985 c C-46 ("Code") and found the wording of the attempt statutes to be "virtually identical". The Board noted they both referred to intention, commission of an offence and for acts committed for the purpose of carrying out that intention.

The Board referred to section 463 of the Code, where there is a fourteen year sentence for an attempt of an indictable offence punishable with life.

[12] Finally, the Board compared the provisions for residential burglary in Illinois and "break and enter" section 348 of the Code in Canada. The Board determined that both offences refer to a dwelling place or house, both refer to breaking and/or entering, which is to enter without authority; both refer to intention to commit the offence and found that the elements of the provisions are equivalent. Section 348 is an indictable offence punishable by up to life sentence. In sum, the Board found there are reasonable grounds to believe that the Applicant is an inadmissible foreign national as contemplated by the IRPA and issued a deportation order.

III. Issues

A. Is the Board's equivalence analysis reasonable?

B. Should CIC be ordered to process the 1989 application and grant the Applicant PR status?

IV. Analysis

A. *Equivalence Analysis*

(1) Standard of Review

[13] The standard of review for equivalence for the purpose of inadmissibility pursuant to subsection 36(1)(b) of the IRPA is reasonableness (*Abid v Canada (Minister of Citizenship and*

Immigration), 2011 FC 164 ("*Abid*")). Findings of equivalence are decisions of mixed fact and law and so attract deference (*Abid* at para 11).

[14] The Applicant argues that inadmissibility findings based on facts of an offence committed abroad are assessed on a reasonableness standard, but that the equivalency analysis is a correctness standard because it is a pure question of law. I disagree. The underlying act that constitutes the foreign offence is an assessment of fact by the Board and the subsequent equivalence is an analysis of mixed fact and law (*Ulybin v Canada (Minister of Citizenship and Immigration*), 2013 FC 629 at 19 ("*Ulybin*")).

[15] As described by Madam Justice Snider in *Ulybin* at para 21:

> 21 How does the reasonableness standard apply to the analysis in issue? It is important that the Officer carrying out the equivalency analysis understand the elements of the comparable offence. A failure to address one of the elements would make the analysis unreasonable. However, the Officer's application of the facts to the Criminal Code elements is a matter for which the Officer is owed deference by the Court. This exercise may lead to more than one reasonable outcome, particularly when taking into account the highly factual determination of equivalency
>
> Emphasis added

[16] There is divergent case law where the equivalence analysis is characterized as a question of law attracting a correctness review (*Park v Canada (Citizenship and Immigration)*, 2010 FC 782 at 12). However, other jurisprudence as listed above finds that it is a reasonableness standard. I applied Madam Justice Snider's reasoning to use a reasonableness standard in this case because of the fact-specific nature of the equivalence analysis.

[17] The equivalency analysis may be conducted by one of three methods as described in *Hill v Minister of Employment and Immigration*, [1987] FCJ No 47 (QL):

> 1. By comparison of the precise wording of each statute through documents and if available, through experts in foreign law in order to find the essential ingredients of the offences;
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> 2. By examining the evidence before the adjudicator of the foreign conviction to determine if the essential elements of the Canadian offence were established in the foreign proceeding or
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> 3. A combination of method #1 and method #2

[18] As Mr. Justice Roy stated in *Victor v Canada (Public Safety and Emergency Preparedness)*, 2013 FC 979 at para 43, the three methods are alternatives and there is no hierarchy between them. The Board must have reasonable grounds to believe that certain facts have occurred (s. 33, IRPA); "reasonable grounds" refers to a standard that is something more than mere suspicion but less than the balance of probabilities standard (*Mugesera v Canada (Citizenship and Immigration)*, 2005 SCC 40). It is not necessary to compare all the general principles of criminal responsibility; it is sufficient to examine and compare the two offences, not the comparability of possible convictions consequently the equivalence analysis does not attempt to re-try the person (*Li v Canada (Citizenship and Immigration)*, [1997] 1 FC 235 at para 19 ("*Li*")). It is clearly the equivalence of the offence that is assessed, not the equivalence of the law (*Steward v Canada (Minister of Employment & Immigration*), [1988] 3 FC 452 (FCA); *Ngo v Canada (Minister of Citizenship & Immigration*), 2005 FC 609).

(2) Applicant's Submissions – equivalence

[19] The Applicant argues that the words of the statute are not virtually identical as the Board described. At paragraph 11 of his submissions, the Applicant submits that the Canadian attempts provision is broader. The differences argued by the Applicant are outlined in the following chart:

Canada	**Illinois**
Encompasses intention and negligent acts by the words: "omits to do anything"	Intentional acts only
Requires accused to "do anything for the purpose of carrying out the intention"	Requires the accused to do an "act that constitutes a substantial step toward the commission of that offence"
Offence is made out "whether or not it was possible under the circumstances to commit the offence"	Offence only completed if accused commits "act that constitutes a substantial step toward commission of that offence"

[20] The Applicant also argues that the equivalence analysis between Illinois "residential burglary" provision and the Canadian "residential break and enter" provision are inaccurate and in error.

[21] The Applicant submitted that the Board was required to look into the facts underlying the Illinois conviction to determine what actually transpired in Illinois and if they constitute the essential elements of the Canadian offence. The Applicant's position was that the Board was in error because she conducted her equivalence assessment only the basis of the US conviction.

[22] The Applicant cites *Brannson v Canada (Minister of Employment and Immigration* [1981] 2 FC 141 ("*Brannson*"), to demonstrate that there must first be evidence that the essential

ingredients of the Canadian provision are included in the foreign offence and secondly there should be evidence that the circumstances resulting in the charge, count, indictment or other document to initiate the criminal proceeding would constitute an offence in Canada.

[23] The Applicant also relies on *Lei v Canada (Solicitor General),* [1994] FCJ No 222, where the court set that decision aside because without evidence as to the circumstances that resulted in the US conviction, no finding of equivalency could be made.

[24] The Applicant submits that the Board did not accept that during the commission of the crime in Illinois, he stayed in his car while others broke a garage window. The Applicant argues that the Board did not provide reasons why this version of events was not accepted and that the failure or omission to consider the Applicant's actions is fatal to the equivalency assessment. The Applicant submits that his actions are in fact equivalent to the mischief section 430 of the Code which is not an indictable offence.

(3) Applicant's Submissions – Rehabilitation

[25] The Applicant`s position is that he should not have been reported as inadmissible on grounds of serious criminality because his conviction was 21 years ago and he completed his sentence at least 16 years ago. Subsection 36(3)(c) of the IRPA provides that after a prescribed period, the foreign national or permanent resident may satisfy the Minister that they are rehabilitated. The Applicant does not argue that he qualifies for deemed rehabilitation.

[26] The Applicant submits that the Certified Tribunal Record contains no other evidence that he was convicted of an offence other than the United States offence. The Applicant submits that he told the Board about his rehabilitation by saying "…I've been keeping my nose clean for so many years. I just try to do good and comply with all laws". The Applicant submits that the Board should have been satisfied that the Applicant was rehabilitated.

(4) Analysis

[27] In my view, the Board conducted the equivalence analysis with a valid United States conviction, and evidence to support that the conviction occurred. The Applicant submits that only meagre facts were established by the record during the hearing and so with a very brief description of the events that led to the conviction, it is impossible for the Board to understand what the elements of the offence are. The standard, however, is that there must be "…reasonable grounds to believe" that a conviction would occur in Canada and it is not the Board's duty to re-try the crime with the precise facts of the events leading to the conviction. The Board used the third method described in *Hill*, above, where a combination of comparing the wording of the provisions and evidence of the facts of the conviction to determine that there was equivalence.

[28] The key point is that it is not necessary for the Board to determine whether there was sufficient evidence for an *actual conviction in Canada*. It is whether there are *reasonable grounds to believe* that the Applicant would be convicted if the same act were committed in Canada. Consequently, the equivalence is between the provisions and not the comparability of possible convictions. Furthermore, the equivalence analysis allows for different statutory wording (*Brannson*, above).

[29] From my reading of the Board's decision, method three from *Hill* was used to find equivalence.

[30] The Board starts with a determination that the Applicant was convicted in the United States of the Illinois offence. The Board uses the evidence of:

- his guilty plea,
- that a conviction is registered in the National Crime Information Centre,
- that he has fingerprints matching an FBI database for convictions; and
- that a certified statement of conviction from Illinois establishes that he was convicted.

[31] This is the Board first using method two to examine the evidence adduced before her to establish the Illinois conviction.

[32] Then, the Board switched to method one and extracted the necessary elements of both the Canadian and Illinois provisions, and found the necessary elements were equivalent. Consequently, the Board ultimately used method three to find equivalence because she used a combination of both methods.

[33] The Board found the equivalent essential elements between the attempt provisions to be (1) intent; (2) to commit offence; and (3) acts for the purpose of committing an offence. This is a reasonable extraction of elements from the provisions. The Board found the equivalent essential elements of the burglary/break and enter provision to be (1) dwelling house (same as dwelling place); (2) breaking and/or entering to be the same as enter without authority; (3) intention to commit offence; (4) theft or felony equivalent to indictable offence.

[34] I disagree with the Applicant's argument that "break and enter" is not the same as "enter without authority" because it is a distinction without a difference. The Board recognized that the wording was different but that the purpose and meaning of the words was the same. As described in *Li*, above at paragraph 18, the words must be *similar* or involve the same criteria – there is no requirement that the words be identical in order to find equivalence:

> I believe that it would be most consistent with the purposes of the statute, and not inconsistent with the jurisprudence of this Court, to conclude that what equivalency of offences requires is essentially the similarity of definitions of offences. A definition is similar if it involves similar criteria for establishing that an offence has occurred, whether those criteria are manifested in "elements" (in the narrow sense) or "defences" in the two sets of laws. In my view the definition of an offence involves the elements and defences particular to that offence, or perhaps to that class of offences.

[35] The Applicant's argument outlined in the chart above attempts to suggest that the Canadian provision is not equivalent to the Illinois one, but what he has really demonstrated is that the Canadian offence is broader, therefore, I see that it necessarily includes the acts that would constitute an offence in Illinois. Further, the Board found and extracted the essential ingredients of each offence and then considered whether they were equivalent. I find the Board's analysis is reasonable. Finally, for the Court to undertake a discrete analysis of the exact wording of the provisions and do its own equivalence analysis as the Applicant does in his memoranda would end up being a correctness review rather than a reasonableness review.

[36] The Applicant argues that in *Li*, the decision of equivalence was set aside because without evidence as to the circumstances of the United States conviction, there could be no finding of equivalency. *Lei* can very easily distinguished because in that case, the court found the Canadian offence was narrower and as such, the adjudicator would have to go beyond the words

of the statute and the acts would have to be analyzed. In the case at bar, the reasonableness of the equivalence is what is assessed at the Federal Court and I determined that the equivalence was reasonable. As such, the underlying facts do not need to be analyzed as suggested by the Applicant. The reliance on *Ngo*, above, does not stand because in that case, the board did not undertake any equivalency analysis between the specific wording of the statutes whereas here, the Board did exactly that.

[37] Similarly, the Applicant's reliance on *Brannson* is also faulty because the Canadian provision was narrower in that case and so the actions leading to the charge had to be analysed to determine if they would constitute a crime in Canada. Because of the difference in scope between the two provisions, the court found that the board in *Bransson* was obligated to investigate if the actions in the foreign jurisdiction would be captured by the Canadian provision.

[38] In his Further Memorandum of Argument, the Applicant strongly argues that the Board was required to look into the facts of the United States conviction in order to find equivalence. However, I just repeat that the Board is not required to re-try the Applicant to see if he would be convicted in Canada. The bar is simply not that high – the Board only needs to find reasonable grounds to believe that such an act would lead to a conviction in Canada. *Li* does not allow for the Board to conduct a "mini-trial" but that the Board must compare the provisions, not the chance of conviction in Canada. *Brannson* also states that the "essential ingredients, or elements constituting the Canadian offence" must be assessed for equivalence to the elements of the foreign provision, not necessarily the facts constituting the offence. *Brannson* at paragraph 38 states:

> [I]n determining whether the offence committed abroad would be an offence in Canada under a particular Canadian statutory provision, it would be appropriate to proceed with this in mind: Whatever the names given the offences or the words used in defining them, one must determine the essential elements of each and be satisfied that these essential elements correspond.

[39] The Applicant's argument that his actions are more in line with mischief and that the Crown would have proceeded in such a way is also an inappropriate consideration. The Board is not required to guess what the Crown would have done in Canada. The Board's role is to compare the provisions to determine if there are reasonable grounds to believe a conviction would have occurred.

[40] In light of the above, I find that the Board reasonably assessed the equivalence between the Canadian and US provision. The Board conducted a thorough analysis of the provisions and analysed their wording to find them equivalent.

[41] In regards to rehabilitation, the Applicant is required to complete a rehabilitation application before the Board can properly consider if he is rehabilitated. The onus is again on the Applicant to submit such an application and then ensure that an approved application is before the Board. This is described by Mr. Justice Shore in *Akanmu Alabi v Canada (Public Safety and Emergency Preparedness)*, 2008 FC 370:

> [36] Mr. Akanmu Alabi's assertion must fail for a number of reasons. The onus is on Mr. Akanmu Alabi to establish that the Minister has deemed him to be rehabilitated. This would necessarily involve adducing evidence before the Immigration Division to establish that fact.
>
> [37] Secondly, the Immigration Division may only assess the evidence that is put before it. Unless evidence of the Minister's

> positive finding of rehabilitation is adduced, the Immigration Division cannot assess whether paragraph 36(3)(c) of the IRPA applies. If he was indeed determined to be rehabilitated by the Minister, it was incumbent on Mr. Akanmu Alabi to adduce that evidence before the Immigration Division Member.
>
> [38] Mr. Akanmu Alabi cannot be considered rehabilitated without adducing evidence that such a finding was made. The Immigration Division cannot be faulted for expecting the he adduce such evidence.

[42] At the hearing I asked the Respondent to provide the processing times for a rehabilitation application and it was provided as approximately 12 months.

[43] No rehabilitation application had been filed at the time of the hearing. I find it was reasonable for the Board not to consider whether the Applicant was rehabilitated.

B. *Should CIC be Ordered to Process the 1989 Application and Grant the Applicant PR Status?*

[44] The Applicant makes this application seeking declaratory relief against the alleged "unwillingness" of CIC to finalize the Applicant's 1989 application for PR status. In the alternative, the Applicant seeks a mandamus order compelling CIC to grant him PR status or alternatively, to compel CIC to complete the processing of the 1989 application within a specific time frame. The Applicant seeks costs on a partial-indemnity basis for the long delay in processing the application. There was no additional communication between the Applicant and CIC following the submission of the 1989 application and the 1991 FOSS notes that indicate that it is still in process.

[45] The Applicant does not dispute that he could not be landed at any point after the coming into force of the IRPA because CIC could not be satisfied that he is inadmissible since his medical, criminal and security clearance are mostly likely expired. The Applicant instead argues that he met all the statutory requirements of the former *Immigration Act* and its *Regulations* as of 1990 or 1991, and CIC refused or failed to land the Applicant between 1989 and 1993 (the year he was convicted in the US).

[46] The Applicant submits that the criteria for issuing a writ of mandamus has been met (*Apotex Inc v Canada (Attorney General)*, [1994] 1 FC 742 at 55; *Conille v Canada (Citizenship and Immigration)*, [1999] 2 FC 33 at 8). The Criterias are:

- There is a public legal duty to the applicant to act
- The duty must be owed to the applicant
- There is a clear right to the performance of that duty, in particular: (a) the applicant has satisfied all conditions precedent giving rise to the duty; (b) there was a prior demand for performance of the duty, a reasonable time to comply with the demand, and a subsequent refusal which can be either expressed or implied, eg unreasonable delay; and
- There is no other adequate remedy.

[47] Both counsel presented very compelling and excellent arguments. While it is somewhat of an enigma regarding what really happened to the 1989 application, the onus is on the Applicant to prove his status. The evidence before the Board does not support that he was ever given PR status even though his application was processed through stage one. Making the determination of what happened more difficult, the Applicant chose not to provide evidence for some of the gaps in time periods. Further complicating the situation is that there is a sparse CIC file since the file was destroyed as per the normal course of business in 2008 and remaining are only the FOSS notes.

[48] Upon judicial review of two of his detention hearings, Mr. Justice Hughes wrote in *Moscicki v Canada (Citizenship and Immigration*), 2014 FC 993 at para 6 "…while the Applicant has been in detention for some eight months the only reason why he has not yet been removed is his refusal to co-operate with the Polish authorities. He is the author of his own continued detention."

[49] I echo Mr. Justice Hughes and say that the Applicant is the author of his own misfortune regarding his status in Canada. I have some sympathy for the Applicant as the sponsorship happened when he was a young person and his young age may account for not following up with CIC. However, when the Applicant returned to Canada in 2008, he should have understood that he did not have PR status when he only received a 6 month TRV. All of the documents from the State of Illinois say he is a citizen of Poland and that is where he was deported to after serving his sentence. So again the fact he was not a PR in Canada should have been clear to him when he entered the American legal system in 1992.

[50] The Applicant argues that he has met these requirements for a mandamus order: (1) CIC has a public legal duty to process his permanent residence application and that duty is found in subsection 5(2) of the former *Immigration Act* and subsection 11(1) of the IRPA which imposes a obligation to grant landing to applications who meet the relevant statutory requirements; (2) once CIC determined the Applicant was a dependent son under subsection 2(1) of the former *Regulations*, CIC was obliged to assess whether landing could be granted; (3) the Applicant submitted a complete application, supporting documents and processing fee which required a CIC officer to perform his or her duty and (4) the application has been in process for almost 25

years which is an unreasonable delay. This is sufficient for mandamus order. But for the CIC's delay, the Applicant submits that he would have been landed as early as 1990 or 1991.

[51] The Applicant states that the evidence is conflicting about his status in that CIC has confirmed they have no record of his landing however Service Canada indicates he is a landed immigrant and there is no decision confirming refusal of his application. The Applicant points particularly to the Service Canada evidence which according to *Toussaint v Canada (Attorney General)*, 2011 FCA 213 at 40, Service Canada is prohibited from approving medical coverage to foreign nationals. The Applicant submits that in absence of contrary evidence, it should be deemed that Service Canada was diligent when verifying the Applicant's status prior to approving his renewal application in March 2013.

[52] The Federal Court has jurisdiction to grant a writ of mandamus pursuant to the *Federal Courts Act*, RSC 1985, c F-7, section 18.1(3). That order may be made if the test from *Apotex*, above is satisfied. Madam Justice Gagné in *Magalong v Canada (Citizenship and Immigration)*, 2014 FC 966, described *Apotex* as:

> [21] The writ of mandamus is a discretionary equitable remedy. It "lies to compel the performance of a public legal duty which a public authority refuses or neglects to perform although duly called upon to do so" (*Dragan v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 211, [2003] 4 FC 189 at para 38).
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> [22] The parties agree that the following criteria must be satisfied, as set forth in *Apotex Inc v Canada (Attorney General)*, 1993 CanLII 3004 (FCA), [1994] 1 FC 742, aff'd [1994] 3 SCR 1100 at para 45, before the Court can issue a writ of mandamus:
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> 1. there must be a public duty to act under the circumstances;
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> 2. the duty must be owed to the applicant;

> 3.there must be a clear right to performance of that duty, in particular:
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> > (a) the applicant has satisfied all conditions precedent giving rise to the duty;
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> > (b) there was (i) a prior demand for performance of the duty; (ii) a reasonable time to comply with the demand unless refused outright; and (iii) a subsequent refusal which can be either expressed or implied, e.g. unreasonable delay;
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> 4. no other adequate remedy is available to the applicant;
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> 5. the order sought must have some practical effect;
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> 6. in the exercise of its discretion, the Court must find no equitable bar to the relief sought; and,
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> 7. on a balance of convenience, an order of mandamus should issue.

[53] In *Singh v Canada (Citizenship and Immigration*), 2010 FC 757 ("*Singh*"), following the *Apotex* analysis, Mr. Justice de Montigny found that CIC had a public legal duty to process a permanent residence application in an analogous case:

> [50] …It is clear that CIC has a public legal duty to process the Applicant's permanent residence application. Section 5(2) of the former *Immigration Act* imposed on CIC a clear obligation to grant landing to an applicant for permanent residence who meets the relevant statutory requirements, and the same is true by virtue of section 11(1) of IRPA: see, for example, *Dragan*, above, at para. 40; *Vaziri v. Canada (Minister of Citizenship and Immigration*), 2006 FC 1159, [2006] FCJ No. 1458 at para. 41.

[54] In *Singh*, above, the facts are similar as are the statutory provisions: the applicant in that case advanced to stage two processing in order to determine whether he met the statutory requirements for landing but his application was not approved because CIC determined that a photocopy of his passport was not sufficient to meet the requirements. Criminal charges were

laid in the intervening years and the applicant never obtained PR status. Mr. Justice de Montigny found that once the applicant submitted a completed application with required supporting documents and paid the fee, he had a right to a performance of the duty described above. In the ten years prior to the charges being laid, the Court found that the applicant was entitled to PR status and consequently issued a mandamus order.

[55] While on its face, *Singh* is analogous, the crucial documentary evidence of the 1989 file is destroyed and the facts are far from identical as the Applicant argues. The Applicant here has complained of a 25 year delay and under the same provisions of the Act in force in 1993 as in *Singh*, also is owed a duty by the CIC to complete the application since the FOSS notes indicate that the application was being processed. Unfortunately, the Applicant cannot establish that he has satisfied all the conditions precedent that give rise to that duty as required from *Apotex*.

[56] The Respondent rightly argues that there is no evidence to prove that the Applicant met the requirements of permanent residence or that the delay is not his own fault.

[57] Unlike *Singh*, the evidence that may establish that the Applicant met the statutory requirements is ambiguous. Further, in *Singh*, the applicant and his counsel repeatedly contacted CIC for updates and there was an actual file date and file entry indicating that he satisfied all the statutory requirements.

[58] A further complication arises however because it is the Respondent who is responsible for the destruction of the file that would demonstrate whether they failed to act. Had the file been

intact and complete, considering an order of mandamus would be appropriate however without that evidence it is impossible to process the 1989 PR application.

[59] In *Canada (Minister of Citizenship and Immigration) v Obodzinsky*, [2000] FCJ No 1675, the issue of destruction of immigration files was raised. Mr. Justice Marc Nadon found that the routine destruction of immigration files is reasonable and does not constitute negligence on the part of the government. Further, the destruction of the file impacts both parties because the existence of the file is determinative for both parties.

[60] The Respondent has the ability to fill in some of the gaps in the time period that the file does not cover. The CIC file shows he met the stage one requirements and was given a work permit (October 18, 1989 to February 5, 1992) while being sponsored by his father when he arrived as a 17 year old on October 18, 1989. He provided a SIN and health card that indicates he was a PR, but I do not find that determinative as he was a child and being sponsored by his father and I have no evidence that these were not given on the basis of being a sponsored child. I have no evidence showing that he was a PR and had completed stage two, The FOSS notes shows that on February 5, 1991, the application was in process and then nothing else. So there is a three year period from October 1989 until the conviction on January 22, 1993 where there is no evidence.

[61] I do not have evidence of exactly when he served his sentence or when he was deported from the United States. I have evidence he was in Chicago on 08/12/93 when he was released. But, there is no evidence of his whereabouts until he arrived back in Canada on August 9, 2008

with a Polish passport and was issued a six month temporary resident visa in order to be allowed entry into Canada. This passport was not produced as evidence.

[62] I have no evidence whether he worked or where he worked during the missing time periods or for that matter where he resided in the world. The Applicant has chosen not to provide evidence to assist. While the Applicant stated in his affidavit and in written argument that he has "over twenty years of residence in Canada", there is no evidence to support that such as tax returns or his proof of where he resided. We do know he applied for welfare on two occasions from the FOSS notes.

[63] I understand the Applicant's arguments and do believe that when he was 17 years old that he knew the process was initiated and had the documentation to continue on with his life. He probably thought he had permanent resident status but I see no evidence that he progressed beyond stage one. In this case, there is no "clear right" to granting PR status and it is far from obvious that the Applicant satisfied all the conditions precedent giving rise to the duty to grant PR status.

[64] I am not prepared to grant any of the relief sought by the Applicant which was:

- Declaratory relief that in 1990 CIC failed to perform legal duties regarding the Applicant's PR application;
- Declare is the Applicant's status is in principle for a PR;
- Declare both the deportation and exclusion orders (removal orders) stayed pursuant to s. 233 of the *Immigration and Refugee Protection Regulations* because of public policy until CIC grants PR status;
- Issue a writ of mandamus to compel CIC to process the PR application within 90 days under stage two since stage one (approval in principle) is already complete.

[65] Based on what is before the Court, I do not see there is evidence to compel CIC to grant Permanent Residence.

[66] The Applications are dismissed and no special costs are ordered as requested. No question is certified.

THIS COURT'S JUDGMENT is that:

1. The applications are dismissed;
2. No costs are ordered;
3. No question is certified.

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4845-14 and IMM-4614-14
STYLE OF CAUSE:	ROBERT MOSCICKI V MCI ET AL
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	DECEMBER 3, 2014
REASONS FOR JUDGMENT:	MCVEIGH J.
DATED:	JUNE 12, 2015

APPEARANCES:

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Brad Gotkin	FOR THE RESPONDENTS

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