Volume 11, Issue 6
June 2015

ImmQuest

"Qui bene interrogat bene docet" "He who questions well teaches well"

Editors-in-chief: Cecil L. Rotenberg Q.C. and Mario D. Bellissimo LL.B., C.S.

Current Methodologies for Identifying Labour Shortage[1]

Cobus Kriek

22 April 2015

6. September 2013: Methodology of ESDC Technical Working Group (TWG)

A briefing note[2] was prepared for the Minister of ESDC in September 2013 for a meeting with the Canadian Labour Congress on 1 October 2013. The briefing note was named 'Labour shortages in Canada Internal File number 2013 HR NHQ 027563 folder 610535'.[3] In this briefing note, reference was made to the following:

a. a plan to provide better and more consistent advice and projected labour/skills shortages;

b. a methodology for providing labour market conditions to a large number of occupational groupings at a national level; and

c. an assessment methodology that uses several labour market indicators, such as wage growth and unemployment statistics.

1 This is part 2 of a 2-part paper. Part 1 appeared in the May 2015 edition of *ImmQuest*.
2 Access to Information Act Request at Employment and Social Development, File number AI-2014-00018/EM a.
3 *Ibid.*

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Current Methodologies for Identifying Labour Shortage

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In June 2014, the TWG then identified a list of occupations for which there are shortages for each province. These assessments were based on an examination of data from 2010 to 2012.[4]

The following is quoted from the TWG publication named, 'Recent Labour Market Conditions at Provincial and National Levels', and dated 7 July 2014:[5]

> "This list was created as part of a broader departmental plan requested by the ESDC Deputy Minister to provide better and more consistent advice concerning current and projected occupational shortages at the national, provincial, and local levels. This plan is being implemented by an intradepartmental technical working group (TWG) with representation from all branches involved in assessing high demand occupations, including Strategic Policy and Research (SPR), Skills and Employment Branch (SEB), Service Canada (SC), and Learning Branch (LB).
>
> "One component of this plan is the annual preparation of lists of occupational labour market conditions at the national and provincial levels. This work has been done by Policy Research Directorate (PRO), and reviewed by the TWG. The following list pertains to this component of the broader plan.
>
> "Assessments of recent occupational labour market conditions were based on the analysis of relevant, available labour market indicators, including: rate of unemployment; wage growth; employment growth; hours worked/overtime; job vacancies or job postings; and El claims. The results of this analysis, for both the national and provincial-level assessments, were then reviewed by the TGW and provincial officials (via the Forum of Labour Market Ministers Labour Market Information Working Group). Several provincial level assessments were revised as a result of the comments provided by provincial officials.
>
> "The methodology used in these assessments was peer reviewed by three experienced economists: Professor Tony Fang of York University who has done research on labour shortages, and Professor Jennifer Stewart of Carleton University and Mr. Ernie Stokes of Stokes Economic Consulting, who are familiar with or have experience assessing occupational labour market conditions. The reviewers found the methodology to be sound.
>
> "A Director General-level Learning and Labour Market Information (LLMI) steering committee with representation from the same branches has been briefed on the methodology and has approved the release of this information.
>
> "It is important to understand that these results are best estimates of recent labour market conditions at the geographic level in which they are analyzed. So for example, while there may not be evidence of a shortage of stationary engineers and power station and system operators in Alberta, this does not mean that there are not shortages of workers for these occupations in Wood Buffalo, Alberta.
>
> **"Also, the assessment results obtained for the occupational groupings that could be analyzed may not hold for finer groupings. For example, while the analysis shows no signs evidence of labour shortages among teachers in Ontario, that does not mean there are not shortages of French or Math teachers.**
>
> **"Furthermore, these methods do not measure whether there are skills deficits among available workers. So for example, the analysis may find no signs of shortages of auto mechanics, but this does not mean that there is not a shortage of auto mechanics with knowledge of the latest diagnostic tools or with good interpersonal skills.**
>
> **"Finally, when employers and others speak of occupations in shortage they are sometimes referring to occupations that they forecast will be in shortage in the future due to various factors such as anticipated economic growth or retirements. The attached list is about recent labour market conditions, not about future conditions."** [emphasis added]

Comments:

The last three paragraphs above are crucial as they again indicate that the Occupation List is based on shortages on a provincial

4 The list can be found here: http://www.matrixvisa.com; navigate to "Our Efforts" and scroll to point number 22 named "Hidden List of Shortages".
5 Access to Information Act Request: JL A-2014-00466/JL

level and does not recognize regional shortages within a province. It thus suffers from the same shortcomings as the labour shortage methodology developed by Service Canada in Western Canada (as mentioned in part 1 of this article).

The TWG has 34 members; 5 are from Service Canada in Eastern Canada, 14 are from ESDC, and 1 is from Aboriginal Affairs. Although the balance of the participants could not be associated with a specific department,[6] it seems as if there are no members from CIC on the TWG.

7. 6 June 2014: ESCD is Writing a Policy

On 6 June 2014, the Director responsible for LMIA policy, Mr. Collin Spencer, wrote an email to different Federal employees at ESDC headquarters as well as to the regions, and attached a draft policy about labour shortage.

My concern is that the draft policy attached to Mr. Spencer's email is only one page in length. A complex concept such as labour shortage cannot be summarized in one page. The result could be that officers will make decisions without clear guidelines.

8. November 2014: Service Canada in Western Territories

According to a telephone conference with Service Canada's management in the Western Territories, officers in Vancouver and Edmonton use several sources in assessing labour shortages: job bank outlook section; unemployment insurance claims; information obtained in discussions with an employer; the employer's recruitment report; newspaper reports; etc.

9. 10 December 2014: Service Canada in Ontario

As of December 2014, the Service Canada office in Ontario (Toronto) was refusing applications if there wasn't a shortage in a specific NOC as listed on 2 websites: the "outlook" tab of the Government's job bank website (http://www.jobbank.gc.ca/) and on Ontario Job futures (http://www.tcu.gov.on.ca/eng/labourmarket/ojf/).

A letter was sent by me to the regional manager of Service Canada in Ontario on 12 December 2014 in which the errors in their methodology were identified.[7] Two examples were quoted to demonstrate the lack of accuracy of this methodology:

a. These two sources of Service Canada indicate that there is not a shortage of dentists in Ontario. However, the TWG of ESDC (their own head office) indicates that there is a shortage of dentists in Ontario.

b. These two sources of Service Canada indicate that there is not a shortage of Computer numerical control ("CNC") Machinists in Ontario. However, recent research by the Ontario Manufacturing Learning Consortium (the founding organizations include the Ontario Aerospace Council, the Canadian Tooling & Machining Association, the Organization of Canadian Nuclear Industries, and Canadian Manufacturers & Exporter) has demonstrated that there is a shortage of 700 CNC machinists in Ontario.[8]

The response received from the manager was as follows: "Thank you for your feedback below and your further feedback dated December 10, 2014. It has been shared with the appropriate policy group at national headquarters."

My concern is that this response does not alleviate concerns that the errors have not been rectified.

10. 8 January 2015: Fat Burger Case

In the judgment in *Frankie's Burgers Lougheed Inc. v. Canada (Minister of Employment and Social Development)*,[9] references were made to a Service Canada officer that referred to two of the seven factors mentioned above in my discussion of Service Canada's Methodology in Western Canada. So it seems as if this formula is actually being used by at least one Service Canada officer in Vancouver.

11. 21 April 2015: Euro Railings Limited

In *Euro Railings Ltd v. Canada (Employment and Social Development)*,[10] a Service Canada officer in Ontario refused a Labour Market Opinion (LMO) for a welder from Euro Railings

6 Access to Information Requests: A-2014-00464/JL and A-2014-00465 and JL A-2014-00466/JL.

7 Navigate to http://www.matrixvisa.com/Content/Rules%20&%20Regulations/LetterLabourShortageONDec14.pdf to download the letter.

8 See http://www.plant.ca/general/ontario-manufacturing-industries-team-address-critical-skills-shortage-140217/.

9 Paragraph 50 on page 50 of *Frankie's Burgers Lougheed Inc. v. Canada (Minister of Employment and Social Development)*, IMM2996-14 and IMM2977-14, 2015 FC 27, 2015 CarswellNat 107 dated 8 Jan 2015.

10 2015 FC 507, 2015 CarswellNat 1108

Ltd. An application for Leave and Judicial Review of this decision was brought to the Federal Court of Canada.

In completing the judicial review, the Court essentially confirmed the erroneous labour shortage methodology of Service Canada in Ontario that I brought to the attention of the manager of Service Canada in Ontario on 12 December 2014, as stated above. Specifically, the judgment[11] provides:

> [2] To say that outlining the facts in this case is a challenge is to downplay the word "challenge". The Certified Tribunal Record can only be described as a mess. Its inadequacy was compounded by its incompleteness remedied only recently when the Officer found documents behind a cabinet.
>
> [3] The record in this case was sufficiently deficient that the Respondent, without leave of the Court, filed both an affidavit from the Officer purporting to explain the reasons for her decision and an affidavit from the Officer's supervisor [Director] in part explaining the program as she saw it and the duties of an officer assessing labour markets. Both affidavits are submitted to buttress the Officer's decision – to make up for the obvious deficiencies in it.
>
> [4] The Applicant was rightly concerned that the Respondent was trying to manipulate the process of judicial review. At the hearing I ordered the Director's affidavit struck from the record as improper evidence in a judicial review. I neglected to similarly strike the Officer's affidavit for the same reason. The final judgment will do so.
>
> [6] The Applicant is a specialty custom railing company. It began advertising for a welder in October 2013, requesting someone with five years' experience. Although the Applicant received numerous applications for the welding position, 90% were from individuals who did not meet the requirements.
>
> [7] The Officer informed the Applicant on April 9, 2014, of the negative LMO. The LMO letter was not sent that day so as to permit the Applicant's representative to make submissions. The submissions, made the next day, were to the effect that there was a labour shortage for welders and this occupation was listed as an occupation on the Federal Skills Trade Program [FSTP] indicating a need for such skills in Canada.
>
> [8] The LMO refusal letter was based on:
>
> • the absence of a demonstrable labour shortage in this occupation; and
>
> • Service Canada labour market information and analysis for the Ontario region indicates there is no demonstrable shortage of workers in this occupation in Ontario.
>
> [9] The Applicant has raised a breach of procedural fairness in this decision; firstly, because the decision had been made on April 9 despite accepting submissions on April 10; and, secondly, the reasons were either non-existent or inadequate. The first issue is a form of bias, the second is either part of a challenge to the reasonableness of the decision or a challenge to the procedural right to reasons itself – inadequacy of reasons is no longer a standalone grounds for review.
>
> [10] The overarching challenge is to the procedural fairness of the decision. As such, the standard of review is correctness (Canada (Citizenship and Immigration) v Khosa, 2009 SCC 12 (CanLII), [2009] 1 SCR 339).
>
> [11] The Applicant, particularly in oral argument, made a number of submissions suggesting that the record of decision had been manipulated. That allegation was not established in my view. The Respondent did attempt to manipulate the judicial review with improper evidence. That has been dealt with. The Applicant should be reminded of the saying "Do not attribute to malice that which can be explained by incompetence".
>
> [12] More importantly, turning to the substantive challenge, this Court in Frankie's Burgers Lougheed Inc v Canada (Employment and Social Development), 2015 FC 27 (CanLII), while holding that the procedural rights on a LMO application are minimal, held that an applicant has a right to reasons that are intelligible.
>
> [13] This means more than the grammar and syntax produce coherent sentences. It means that the reasons are intelligible against the background of the material before the Officer.
>
> [14] In this case, the reasons are not intelligible against the background of the material before the Officer. An applicant is at least entitled to an explanation – short, sharp and crisp – for the rejection of key evidence.
>
> [15] The Officer had before her the NOC list indicating that welders were in demand in Canada. The Officer also had

11 *Ibid.*

before her evidence from the Applicant showing the efforts to secure sufficiently skilled welders and the inability to find such persons.

[16] The Respondent's counsel has suggested that the reason for such an inability is because the Applicant was offering too low a wage. Not only does the Officer not say this but notes that the hourly rate criteria is "Met". The Applicant was entitled to at minimal an explanation of why its concrete evidence was rejected.

[17] The Officer, in her post-decision affidavit, attempts to explain why the NOC evidence – a basis upon which people seek work visas and on which they are granted – was rejected. Such evidence is too convenient and improper.

It is important to note that Justice Pelan referred to the following when identifying the reason for the refusal:

a. Lack of procedural fairness

b. Reasons are not intelligible

c. Reasons are non-existent

d. Attempt to manipulate evidence in the judicial review

12. Possible Reasons for the Lack of Uniform Definition

The lack of a single definition and lack of clear direction given to officers from ESDC could be the result of several factors:

a. There could be a lack of political oversight by elected leaders. Alternatively, it may be a deliberate attempt to allow policy chaos to exist so that officers can refuse applicants. A high refusal rate of LMIAs would allow the existing political leadership to state at the next federal election that the number of foreign workers has been brought down drastically. The first 4 months of 2014, 71 percent of all LMO's for Federal Skilled Worker Class applications at the New Brunswick office of Service Canada were refused and 68 percent for the same period for the Federal Skilled Trades Class.[12] I believe that these figures could win votes.

b. I informed the Senior Policy Advisor of the Minister of ESDC in a letter dated 14 August 2013 that there is no single definition of labour shortage. On 13 September 2013, I discussed this shortage with the Senior Policy Advisor of the Minister of ESDC in person in Gatineau, Quebec. That is eighteen months ago and the matter has not yet been resolved. This is possibly an indication of a lack of leadership.

12 Access to Information Act Request at ESDC, File number A-2014-00094/CL.

13. What is the Solution?

A clear policy should describe the many possible methodologies available as there is not a single, simple definition. Typically, it should be several pages in length. It should advise officers against using one single concept; for example, not to rely solely on the number of EI claims submitted in a specific NOC in refusing.

It should also advise officers that all jobs in a specific occupation are not the same. In the Middle Ages, a cobbler was a cobbler and blacksmith was a blacksmith. However, in the modern economy, the labour market is very different and specializations have resulted in many nuances. Another example of the importance of industry-specific experience is the occupation of heavy-duty mechanics. The market for heavy duty mechanics is not a homogeneous market. There are agriculture mechanics and earth-moving mechanics. While the NOC is the same, these journeymen have vastly different experiences. Repairing a combine for a grain farm and repairing a bulldozer require two very different skills sets. Certain employers require earth-moving, heavy-duty mechanics with experience in earth-moving equipment and sometimes even experience with specific brands of equipment. Some mining shovels cost CAD$20 million each, and a mechanic working on farming equipment would be out of his/her depth.

A policy should also guide officers to provide actual reasons for a refusal based on a claim that there is a labour shortage. Otherwise, these decisions may be viewed as lacking transparency, which may lead to claims of abuse of administrative power.

14. Conclusion

In this paper, I have shown that a variety of different definitions of "labour shortage" are being used throughout Canada by various organizations. In September 2010, several years after the current *Immigration and Refugee Protection Regulations* came into effect, ESDC acknowledged that they do not have a formal definition of the concept of "Labour Shortage". A TWG that was

formed by the ESDC head office used their own definition of labour shortage. Service Canada in Western Canada developed their own policy to define a labour shortage. In 2014, Service Canada indicated that this methodology was not being used . However, in the *Frankie's Burger* case, reference was made to at least one officer that used this methodology. Service Canada in the Atlantic provinces, Newfoundland, Quebec, and Ontario each uses their own methodologies for determining what a "labour shortage" is. Ontario relies on the information of two websites: the government Job Bank and Ontario Job Futures. Research was provided to the regional manager of Service Canada in Ontario that clearly demonstrated that there are serious errors with the province's methodology. The case of the *Euro Railings* provides strong support that the concept of "labour shortage" has not yet been resolved within ESDC and Service Canada.

Following the decision of the Federal court on the *Euro Railings* matter, it is hoped that ESDC will now resolve its problems with regards to its "labour shortage" methodology. Otherwise, as set out in the introduction to this paper, I remain concerned that officers of Service Canada will continue to refuse LMIA's based on a dubious and inconsistent definition of "labour shortage".

Quick Bites

Life after an ITA

Chi-Young Lee, B.B.A. (Hons.), LL.B.

27 May 2015

The excitement of receiving an Invitation to Apply (ITA) for Permanent Residence (PR) under the new Express Entry (EE) system quickly dissipates once applicants realize the work that is required afterwards. Similar to the EE profile, all information and documents related to a PR application under the EE system has to be entered and uploaded through an applicant's online EE account. All information and documents must be submitted within 60 days of receiving an ITA.

PR applications under the EE system consist of mainly two components—biographical information and the various documents that Citizenship and Immigration Canada (CIC) requires to be uploaded via an applicant's EE account.

Biographical Information

CIC has eliminated the requirement for applicants to complete traditional application forms; and repackaged the way they require this information to be submitted. Applicants are now required to complete "boxes" where all information is entered into the EE system. The method of collecting the biographical information is similar to that of the EE profile stage. In fact, once an ITA is issued, the online system automatically transfers some of the information entered by the applicant for their EE profile into the applicable sections of their PR "profile".

It is important to note that the information required by the new online PR system is much more cumbersome than its paper counterpart. In particular, with both previous address and travel histories, exact dates are now required. Previously only the month and year were requested. For those who have had frequent addresses and travel histories, it's recommended that they start combing through their passport stamps and previous tenancy leases now to document exact dates of moves and travels.

Document Checklist

Only after all the online biographical information that has been entered is complete, a "personalized" document checklist is generated. This checklist will be based on the information entered by an applicant earlier in the EE profile as well as the biographical information stage of the process. Some of the typical documents that will be requested are listed below:

1) Employment Documents for all employers listed in your EE profile for both you and your spouse (if applicable). This includes items such as letters of employment, pay-stubs, tax documents;
2) Copies of passport bio-page and stamps;
3) Education Diplomas/Degrees and transcripts;
4) English Language Test results;
5) Education Credential Assessments (if applicable);
6) Proof of Medical Examination having been completed;
7) Police Clearances for any country you have lived in for more than 6 months since the age of 18 for both you and your spouse (if applicable);
8) Proof of settlement funds in the form of bank statements/ letter indicating financial profiles for the past 6 months; and
9) Digital Photo.

60-Day Deadline

The most important thing to remember is that all of the online PR requirements need to be completed within 60 days of receiving an ITA. Given the extensive information and documents required once an ITA is issued, we highly recommend that applicants start on information/document collection even before an ITA is issued. After all, if you are unable to gather the necessary information/documents in the 60 days provided, there is no guarantee that you will be issued another ITA.

The Birth of Ontario PNP Express Entry Streams

Veronica Wilson, B.A. (Hons.), J.D.

10 June 2015

The Express Entry (EE) family is quickly expanding! Their newest member is Opportunities Ontario with the introduction of two new EE streams under their current Provincial Nominee Program (PNP) regime.[1] Both of these new Ontario PNP EE streams do not require supporting job offers. The two streams are:

1) The Human Capital Priorities (HCP) Stream; and
2) The French-Speaking Skilled Worker (FSSW) Stream

How it works:

Step One: Register for Express Entry

If you qualify for one of two Citizenship and Immigration (CIC) economic immigration programs, Federal Skilled Worker Program (FSWP) or the Canadian Experience Class (CEC), you must first create an online EE profile. It is important to note that Ontario PNP will only be reviewing EE profiles that have been submitted on or after 1 June 2015 for eligibility under their two new streams.

Step Two: Ontario PNP may issue a Notification of Interest to those eligible

Ontario PNP will be searching the EE pool of eligible candidates to identify those who have the following eligibility criteria:[2]

- **Express Entry Points:** Have a minimum Express Entry score of 400 on the Comprehensive Ranking System (CRS);
- **Education:** Have a Canadian Bachelor's, Master's or PhD degree or an Educational Credential Assessment report indicating the foreign education is equivalent;
- **Language:**
  - For the HCP stream: Applicants must have a Canadian Language Benchmark (CLB) of level 7 or above in all

1 For further information, please visit: <http://www.ontarioimmigration.ca/en/pnp/OI_PNP_EE.html>.
2 For further information, please visit: <http://www.ontarioimmigration.ca/prodconsum/groups/csc/@oipp/documents/document/oi_en_hcps.pdf>.

language competencies (reading, writing, listening, and speaking)

- For the FSSW stream: Applicants must have a CLB of level 7 or above in French language capability as well as a CLB of level 6 in English language capabilities.

- **Funds:** Have sufficient funds to support yourself and your dependents in Ontario;
- **Work Experience:** Meet the requirements for either CEC or FSWP;
- **Ties to Ontario:** Demonstrate your intention to reside in Ontario.

If you meet the criteria above, Ontario PNP may send you a Notification of Interest from Ontario through your MyCIC account. This notification will invite you to apply for a nomination certificate through Ontario PNP.

Step Three: Apply to Ontario PNP under one of their EE streams

After you receive your Notification of Interest, you will have 45 days to apply to Ontario PNP under the stream you have been selected for. This involves completing the Nominee Application Form and providing the required supporting documents.

Step Four: Accept the Ontario PNP nomination and apply for Permanent Residence

If your application is approved by Ontario PNP, a letter will be sent to your MyCIC account notifying you of your nomination certificate, and you will have 30 days to accept it. This nomination will provide you with an additional 600 CRS points which will significantly increase your chances of receiving an Invitation to Apply (ITA) from CIC on the next draw. Upon receipt of your ITA, you will have 60 days to submit your application for permanent residence through CIC.

Quota:

Ontario's allocation of nominations for the 2015 year has already been set at 5,200. Of these, 2700 nominations will be used under Ontario Express Entry. This quota fills quickly and so it is important to act fast if you are eligible.

Case Tracker: Cases You Should Know!

Mario D. Bellissimo, LL.B., C.S.

Citizenship

Case: *Canada (Minister of Citizenship and Immigration) v. Zakaria*
Decider: Cecily Y. Strickland J.
Court: Federal Court
Citation: 2014 CarswellNat 3670, 2014 FC 864
Judgment: 10 September 2014
Docket: T-1104-13

34 The Plaintiff submits that because this Court has never ruled on the issue of whether or not it is possible to revoke the citizenship of a person who obtained it as a minor child, regardless of whether they had any knowledge of the false representation, fraud or concealment of material circumstances, the matter should not be determined by summary judgment. In that regard, I note *Teva Canada Ltd. v. Wyeth LLC*, 2011 FC 1169, 99 C.P.R. (4th) 398 (F.C.), appeal allowed on other grounds 2012 FCA 141 (F.C.A.). There, in the context of a motion seeking summary trial, Justice Hughes found that summary disposition is warranted if: the issues are well defined and their resolution will allow the action, or whatever remains of it, to proceed more quickly or be resolved; the facts necessary to resolve the issues are clearly set out in the evidence; the evidence is not controversial and there are no issues as to credibility; and the questions of law, though novel, can be dealt with as easily as they would be after a full trial (at para 34). Further, the Federal Court of Appeal in *ITV Technologies Inc.*, above, at para 3, held that voluminous material and novel questions of law would not be valid grounds for refusing summary judgment.

76 I have some difficulty with this position. It seems to lack logic that, if some but not all of these terms have been found to include intent by the Court, this demonstrates that Parliament would not have intended intent to be an element of the whole of the provision. It seems more likely that if intent is an element of one of these terms then, viewed in the context of the object of the section in whole, intent would be an element of all of them. I also

note that none of the cases cited addressed this issue. Further, section 10 reads: "...obtained...citizenship... *by* false representation or fraud or *by* knowingly concealing ..." (emphasis added) which appears to group false representation together with fraud, the latter of which clearly includes intent.

77 In view of the foregoing, I find that sections 10 and 18 do include a mental element and, based on the evidence, that Sami and Karim Zakaria did not have intent in these circumstances. However, this is not the determinative issue on this motion for summary judgment.

80 In this case question 11 was signed by Rim Sawaf on both of her sons' applications. While not determinative, this supports my view that section 10 is to be interpreted such that a misrepresentation of a parent, by which a minor obtains citizenship, can result in revocation of the minor's citizenship.

81 The difficulty with this conclusion, of course, is that to determine how Sami and Karim Zakaria obtained citizenship requires an analysis of their mother's actions and a determination of whether her failure to identify this comprises false representation or fraud or knowing concealment of material circumstances which resulted in her sons obtaining citizenship. Subsumed within this is the issue of her intent and the question of whether the omitted information amounts to a material circumstance in this situation. However, the facts needed to make those determinations are not before this Court.

84 In conclusion I find that:

i. Sami and Karim Zakaria had no knowledge of the fact that their mother, Rim Sawaf, had used the assistance of an immigration consultant;

ii. Sections 10 and 18 of the Citizenship Act do include a mental element but that, based on the evidence before me, Sami and Karim Zakaria did not have the requisite intent;

iii. While the question of whether or not sections 10 and 18 of the Citizenship Act require a mental element is a question of law, which I have determined, this is not dispositive of this motion for summary judgment;

iv. The Citizenship Act and the Citizenship Regulations permit a parent to make a citizenship application on behalf of their minor child. Therefore, any allegation of false representations or fraud or knowing concealment of material circumstances must pertain to the acts or omissions of the parent which, in this case, concerns Rim Sawaf, the mother of Sami and Karim Zakaria;

v. Based on the evidence before me I am unable to determine whether the acts or omissions of Rim Sawaf establish that she made a false representation or knowingly concealed material circumstances, as alleged, by which Sami and Karim Zakaria obtained their citizenship; and

vi. Accordingly, this matter is not appropriate for disposition by way of summary judgment as there is a genuine issue for trial.

Case: *Dias v. Canada (Attorney General)*
Decider: Pelletier J.A., David Stratas J.A., Webb J.A.
Court: Federal Court of Appeal
Citation: 2014 CarswellNat 3739, 2014 FCA 195
Judgment: 10 September 2014
Docket: A-102-14

8 The Director did disbelieve what Mr. Dias told him in response to his letter of invitation to make submissions. But disbelief in what Mr. Dias said, without more, does not support a finding that Mr. Dias himself committed the section 117 offence, *i.e.*, that all elements of the section 117 offence are present. In some circumstances, disbelief might cause the Director to have reasonable grounds to believe or to develop suspicions that a section 117 offence has been committed. But the *Canadian Passport Order* does not allow the Director to act on the basis of reasonable grounds or suspicions.

9 The appellant urged upon us the very great importance of preventing and redressing the misuse of passports and maintaining the integrity of the passport system. That is true: see, *e.g.*, *Kamel c. Canada (Procureur général)*, 2008 FC 338 (F.C.) at paragraph 41. But regulatory powers such as this can be exercised only to the extent authorized and permitted by law.

Case: Deldelian v. Canada (Minister of Citizenship and Immigration)
Decider: Sean Harrington J.
Court: Federal Court
Citation: 2014 CarswellNat 3632, 2014 FC 854
Judgment: 9 September 2014

Docket: T-84-14

9 The Citizenship Judge concluded that one could not leave the country and also claim EI benefits. She was also most concerned with the fact that Mr. Deldelian did not provide a satisfactory explanation as to why he departed from Canada the very day he submitted his citizenship application. This concern was irrelevant, as the four years in question ended the day before. Had the Citizenship Judge been dealing with the Act, as amended by the *Strengthening of the Canadian Citizenship Act*, this would have been a relevant consideration as one of the requirements is that the applicant intends to continue to reside in Canada.

13 If the Citizenship Judge had limited her analysis to the four years immediately preceding Mr. Deldelian's application, it would have been necessary for me to determine whether her decision was sufficiently reasonable to withstand review in accordance with *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.), particularly at paragraph 47. However, in addition to raising an issue with respect to his departure from Canada on the day he filed his application, she dealt with his son's schooling the year following, and the exact role of his wife in his business following his citizenship application. It is not at all clear that the Citizenship Judge limited herself to the four years in issue. Indeed, she considered events which took place after he applied for citizenship. As stated by Mr. Justice O'Keefe in *Shakoor v. Canada (Minister of Citizenship & Immigration)*, 2005 FC 776 (F.C.), at paragraphs 39 and 40:

> [39] From a perusal of the reasons, it cannot be determined whether the citizenship judge was referring to the extensive absences from Canada after February 14, 2003, the date of the applicant's application, or just the absences prior to the date of his application. I cannot tell whether the citizenship judge took into account the absences after the date of the application in arriving at a conclusion on the applicant's application. If she did, it would constitute a reviewable error.
>
> [40] Accordingly, the appeal of the citizenship judge's decision must be allowed, as there is a live issue as to the actual number of days the applicant was absent from Canada. I will refer the matter back to a different citizenship judge for redetermination.

See also *Zamzam v. Canada (Minister of Citizenship & Immigration)*, 2009 FC 959 (F.C.).

Case: Qin v. Canada (Minister of Citizenship and Immigration)
Decider: Alan Diner J.
Court: Federal Court
Citation: 2014 CarswellNat 3795, 2014 FC 846
Judgment: 10 September 2014
Docket: T-290-14

36 The Applicant stated that she relied on the undertaking in presenting her case regarding the extent of her significant "Canadianization". It was certainly reasonable to do so based on the hearing, and the entire history of the matter before both the Citizenship Commission and this Court. Case law supports this position, given the Applicant's attachment to Canada, and reason for her absences, under the qualitative *Koo* test: See *El-Kashef v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 1151 (F.C.) at para 30; *El Ocla v. Canada (Minister of Citizenship & Immigration)*, 2011 FC 533 (F.C.).

37 In this case, the switching of the test once the condition precedent had been met, resulted in a breach of the Applicant's legitimate expectations and therefore yielded a breach of procedural fairness: *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.) at para. 26.

38 Finally, with respect to the second issue, suffice it to say that absent the undertaking to the Applicant at the hearing under review, it would have been completely open to Judge Babcock to use whatever test he chose. Therefore, in ordinary circumstances, the Applicant could have been properly refused citizenship due to the fact that she did not meet the strict residency standard required by *Pourghasemi*, as upheld in recent case law: *Huang v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 1074 (F.C.); *Martinez-Caro v. Canada (Minister of Citizenship & Immigration)*, 2011 FC 640 (F.C.).

Case: Bolivar v. Canada (Minister of Citizenship and Immigration)
Decider: Douglas R. Campbell J.
Court: Federal Court
Citation: 2014 CarswellNat 3949, 2014 FC 973
Judgment: 14 October 2014
Docket: T-1933-13

5 Thus, in the present case, because the Citizenship Judge applied the test in *Pourghasemi, Re* [1993 CarswellNat 77 (Fed. T.D.)] rather than that in *Koo*, without first considering all the

evidence presented by the Applicant, and without providing the Applicant with an opportunity to persuade the Citizenship Judge to apply *Koo* rather than *Pourghasemi*, I find that the decision rendered was in breach of the duty of fairness owed to the Applicant.

Case: Magalong v. Canada (Minister of Citizenship and Immigration)
Decider: Jocelyne Gagne J.
Court: Federal Court
Citation: 2014 CarswellNat 3954, 2014 FC 966
Judgment: 10 October 2014
Docket: T-1871-13

50 Since the respondent was not under a statutory duty to take the applicant's oath within a specific timeframe and since he is not under a public duty to act at the present time and under the present circumstances, the main remedy sought by the applicant will not be granted.

51 The applicant alternatively asks that I stay the removal proceedings at the ID until such time as he has completed his probation and is again entitled to take his oath and effectuate his citizenship grant, and that I quash the November 20, 2013 decision by CIC to close his citizenship application.

52 Although I find that I have the power to quash the November 20, 2013 decision, I do not think that I should issue an order to stay the removal proceedings at the ID as they are already stayed by a decision of that tribunal.

53 The fact that the applicant is presently barred from taking the oath has no impact on the fact that he was, for all intent and purposes, granted Canadian citizenship. Although I can refuse to exercise my discretion to issue a *mandamus* order based on that fact alone, it will not prevent the applicant to seek from the ID a new stay of that hearing until he is no longer on probation, just as it will not prevent him to simply argue that he is not inadmissible as he was granted citizenship. Decisions of the ID on both these issues could be reviewed by this Court at the request of the loosing party.

54 In addition, I find that it would not be wise on my part to order the respondent to administer oath to the applicant at the end of his probation period, as this would be to assume that the applicant's situation will not change meanwhile.

Conclusion

55 For the reasons provided herein, this application for judicial review will be granted, solely for the purpose of quashing the November 20, 2013 decision by CIC to close the applicant's citizenship application. Considering the mitigated outcome of this application, no costs will be granted.

PRRA

Case: Peter v. Canada (Minister of Public Safety and Emergency Preparedness)
Decider: Peter Annis J.
Court: Federal Court
Citation: 2014 CarswellNat 4597, 2014 FC 1073
Judgment: 13 November 2014
Docket: IMM-12508-12

314 In considering the factors described above and balancing the interests involved, I conclude that the principle against removal of an unsuccessful refugee claimant in the face of alleged unprotected risks, based on the removals process under the *IRPA* presently in place with a removals test assessing for an exposure to a risk of death, extreme sanction or inhumane treatment, is not a principle that is vital or fundamental to our societal notions of justice, such that it deprives the applicant of his rights under the *Charter*.

320 In any event, I question the appropriateness of a practice that I have seen occur with some degree of regularity in refugee cases of a law firm introducing affidavit evidence on significant substantive issues, such as the circumstances of Tamil returnees in Sri Lanka in this case. Besides blurring, and probably crossing, the lines between the firm's role as advocate and witness before the decision-maker, evidence of this nature has little to no probative value. It raises issues of bias and provides no means of corroboration because, as in this case, the source is privileged client information. It is also inherently unreliable for its hearsay and out-of-court deficiencies. Moreover, one must recognize that an affidavit is merely evidence in chief. Without an appropriate opportunity for cross examination to test its accuracy and reliability, in all but the most exigent cases, it should be rejected out of hand; even more so where no reliable corroboration is provided.

327 With the view to stating the constitutional issues at their highest level of generalization for consideration, I shall certify the following two questions for appeal:

1. Does the prohibition contained in section 112(2)(b.1) of the *Immigration and Refugee Protection Act* against bringing a Pre-Removal Risk Assessment application until 12 months have passed since the claim for refugee protection was last rejected infringe section 7 of the *Charter*?

2. If not, does the present removals process, employed within 12 months of a refugee claim being last rejected, when determining whether to defer removal at the request of an unsuccessful refugee claimant for the purpose of permitting a Pre-Removal Risk Assessment application to be advanced, infringe section 7 of the *Charter*?

** Amendment to the April edition of *ImmQuest*: Please be advised that Ms. Zahra Kaderali, author of the article "The Intersection of Immigration and Family Law - A Critical Analysis of "Conditional Permanent Residence"" is a member of the Faculty at Sheridan College. That article expanded on many of the concerns and recommendations as found in: Immigration and Refugee Protection Regulations: Conditional Permanent Residence, *Canada Gazette* Part 1, March 10, 2012, online: The Canadian Bar Association, <http://www.cba.org/cba/submissions/pdf/12-24-eng.pdf>.

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Publications Mail Agreement No. 40065782