

Federal Court



Cour fédérale

Date: 20101027

Docket: T-557-10

Citation: 2010 FC 1060

Toronto, Ontario, October 27, 2010

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

KENE DON IFEPE

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an appeal under subsection 14(5) of the *Citizenship Act*, R.S.C. 1985, c. C-29 taken by way of an application, as prescribed by Rule 300(c) of this Court, from a decision of a Citizenship Judge dated February 9, 2010 denying the Applicant Kene Don Ifepe's application for Canadian citizenship. For the reasons that follow I am dismissing the appeal with costs to the Respondent fixed in the sum of \$1,500.00.

[2] The Applicant is a citizen of Nigeria. He emigrated to Canada where he now resides. His wife and children are Canadian citizens. The Applicant in the early 2000's completed certain courses in Counselling Skills and became an ordained minister in the Old and New Bible Holiness Church. He has founded a church called Believers Full Gospel Vineyard, has published a magazine, Miles and has appeared on televised religious programmes. Most of this activity occurred before the Applicant pled guilty and was convicted of fraud on November 3, 2005. He was sentenced to a term of imprisonment of 18 months to be served in the community. Such a sentence is commonly called "house arrest".

[3] On September 12, 2007 the Applicant applied for Canadian citizenship. That application was not approved. The decision dated February 9, 2010 which is the subject of this appeal stated, *inter alia*:

On January 26, 2010, you appeared before me for a hearing of your application for Canadian citizenship. At that time I reserved my decision. This letter is to inform you that I regret your application for Canadian citizenship is not approved.

According to the evidence on file and by your own admission, you were convicted on 3-11-2005 of the indictable offence of attempt fraud over (as per court documents and R.C.M.P.. Since this conviction occurred during the three year period preceding the date of your application, you are prohibited, as provided by subsection 22(2) of the Citizenship Act, from being granted Canadian citizenship.

This is not an appropriate case for the exercise of discretion under Subsection 5(3) and 5(4) of the Citizenship Act because Section 22(2) specifically provides that whenever it applies, "Notwithstanding anything in this Act, but subject to the Criminal Records Act, a person shall not be granted citizenship under section 5 or subsection 11(1) or take the oath of citizenship if,

(a) during the three year period immediately preceding the date of the person's application, or

(b) during the period between the date of the person's application and the date that the person would otherwise be granted citizenship or take the oath of citizenship, the person has been convicted of an offence under subsection 29(2) or (3) or of an indictable offence under any Act of Parliament, other than an offence that is designated as a contravention under the Contraventions Act."

Pursuant to the provision of subsection 14(3) of the Citizenship Act, you are, therefore, advised that, for the above reasons, your application for citizenship is not approved.

[4] Applicant's Counsel has essentially raised three issues on this appeal:

1. Was the Applicant, according to the record before the Citizenship Judge, convicted of an indictable offence of fraud over \$5,000.00?
2. Is the time spent under "house arrest" deducted from the time otherwise spent in Canada by the Applicant so as to disqualify him from having spent at least three (3) years in Canada before his application for citizenship?
3. Did the Citizenship Judge fetter his discretion to be exercised under subsections 5(3) and 5(4) of the *Citizenship Act* by his reliance upon section 22(2) of that *Act*?

Issue #1: Was the Applicant, according to the record before the Citizenship Judge, convicted of an indictable offence of fraud over \$5,000.00?

[5] Subsection 22(2) of the *Citizenship Act* provides that a person may not be granted Canadian citizenship if, within three years before the date of application for citizenship, that person had been convicted of an indictable offence:

Prohibition

(2) Despite anything in this Act, but subject to the Criminal Records Act, a person shall not be granted citizenship under subsection 5(1), (2) or (4) or 11(1) or take the oath of citizenship if,

(a) during the three year period immediately preceding the date of the person's application, or

(b) during the period between the date of the person's application and the date that the person would otherwise be granted citizenship or take the oath of citizenship,

the person has been convicted of an offence under subsection 29(2) or (3) or of an indictable offence under any Act of Parliament, other than an offence that is designated as a contravention under the Contraventions Act.

Interdiction

(2) Malgré les autres dispositions de la présente loi, mais sous réserve de la Loi sur le casier judiciaire, nul ne peut recevoir la citoyenneté au titre des paragraphes 5(1), (2) ou (4) ou 11(1) ni prêter le serment de citoyenneté s'il a été déclaré coupable d'une infraction prévue aux paragraphes 29(2) ou (3) ou d'un acte criminel prévu par une loi fédérale, autre qu'une infraction qualifiée de contravention en vertu de la Loi sur les contraventions :

a) au cours des trois ans précédant la date de sa demande;

b) entre la date de sa demande et celle prévue pour l'attribution de la citoyenneté ou la prestation du serment.

[6] Thus, regardless as to the other issues before this Court, if the Applicant had been convicted of an indictable offence at any time within three years before September 12, 2007, his date of application for citizenship, he could not become a Canadian citizen. He could reapply at a later date provided that he subsequently enjoyed a clear record for the three previous years.

[7] It is acknowledged that on November 3, 2005, that is within three years before September 12, 2007, the Applicant pleaded guilty to a charge of fraud and was convicted of that charge. The question is whether the conviction was for fraud over or under \$5,000.00? If it was over, the offence was an indictable one, if under, it was one of summary conviction. The copy of the Conditional Sentence Order on the record states that the conviction was for: "*Attempt Fraud Under*". This, Counsel for the Respondent argues, was a slip or error. A review of the record indicates that the Applicant pleaded guilty to a charge (count 3) which read:

(3) *and further that Kene IFEPE sometime between and including the 19th day of October in the year 2004 and the 1st day of November in the year 2004 in the City Toronto, in the Toronto Region did by deceit, falsehood or other fraudulent means attempt to defraud Scotia Bank of \$307,868.82 of a value which exceeded five thousand dollars contrary to the Criminal Code.*

[8] The record of the Court proceedings contains the following entry:

ELECTION READ

*CT.3
2 DAYS PRE SENTENCE CUSTODY
CONDITIONAL SENTENCE
18 MTHS
VICTIM SURCHARGE WAIVED*

*CT.1,2
W/D REQUEST CROWN*

[9] Information records provided by the RCMP to the Citizenship Court provides the following information:

<i>DATE AND PLACE OF DISPOSITION DATE ET LIEU DE LA DISPOSITION</i>	<i>CHARGE - ACCUSATION</i>	<i>DISPOSITION</i>	<i>DATE, PLACE, CHARGE AND DISPOSITION DATE, LIEU, ACCUSATION ET DISPOSITION</i>	<i>DISTRIBUTION</i>
<i>2005-11-03 TORONTO ONT</i>	<i>ATT FRAUD OVER \$5000 (TORONTO PS 012606-04)</i>	<i>18 MOS CONDITIONAL SENTENCE ORDER & (2 DAYS PRE- SENTENCE CUSTODY)</i>	<i>2005-11-03 UTTERING FORGED DOCUMENT SEC 368 CC (2 CHGS) -WITHDRAWN (TORONTO PS 012606-04) 2005-11-15 ASSAULT SEC 266 CC -WITHDRAWN & PEACE BOND OF \$500 FOR 1 YR (TORONTO PS 012606-04)</i>	<i>01 COURT OF CANADIAN CITIZENSHIP ETOBICOKE, ONT (CIVIL 2008-06- 06)</i>

[10] The record also contains a series of e-mails reflecting discussions between persons in Immigration Canada as to whether the conviction was for fraud over or under \$5,000.00.

[11] Applicant's Counsel argues that the only relevant document is the copy of the Conditional Sentence Order which states that the conviction was for under \$5,000.00. Respondent's Counsel argues that this was an error and, in reading the file, including the Count to which the Applicant plead guilty, it is clear that the conviction was for over \$5,000.00.

[12] The Citizenship Judge in his decision wrote that the Applicant had appeared before him at a hearing and, not only according to the evidence on the file but "*by your own admission*" the

Applicant was convicted of fraud over \$5,000.00. The record does not indicate such an admission however the Citizenship Judge's notes made during the hearing state *inter alia*:

“concern-applicant complies with residence BUT applicant has a criminal conviction – indictable offence – time to be served at house – no jail time ...”

[13] The Applicant provided a brief affidavit in the record before me, simply attesting to the authenticity of the copies of documents provided from the Tribunal Record. The Applicant does not address in any way the statement in the decision at issue that he admitted that he was convicted of an indictable offence.

[14] Given the state of the record it is most probable that the copy of the Conditional Sentence Order was in error in stating that the conviction was for fraud under \$5,000.00, and that it should have stated that it was for fraud over \$5,000.00, hence an indictable offence. Further, given the statement in the decision of the Citizenship Judge that the Applicant admitted that the offence was an indictable offence and that the Applicant has not, in the appeal before me, challenged that statement, I find that the decision of the Citizenship Judge to refuse the citizenship application, on the ground of having committed an indictable offence within three years of the date of application, is correct.

[15] Given that, on this ground alone the appeal must be dismissed, there is no need to consider the other grounds raised on this appeal.

[16] As to costs, Counsel for the Respondent suggested a sum of \$1,500.00 which I find appropriate and will so order.

JUDGMENT

For the reasons provided:

THIS COURT ORDERS AND ADJUDGES that:

1. The appeal is dismissed;
2. The Respondent is entitled to costs to be paid by the Applicant fixed in the sum of \$1,500.00.

“Roger T. Hughes”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-557-10

STYLE OF CAUSE: KENE DON IFEPE v.
MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: OCTOBER 26, 2010

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

DATED: OCTOBER 27, 2010

APPEARANCES:

Yehuda Levinson FOR THE APPLICANT

Prathima Prashad FOR THE RESPONDENT

SOLICITORS OF RECORD:

Yehuda Levinson FOR THE APPLICANT
Barrister & Solicitor
Toronto, Ontario

Myles J. Kirvan FOR THE RESPONDENT
Deputy Attorney General of Canada

