Federal Court  Cour fédérale

Date: 20160614

Docket: T-1902-15

Citation: 2016 FC 657

Ottawa, Ontario, June 14, 2016

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

GOLICHENKO, MIKHAIL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application by the Applicant, Mikhail Golichenko, seeking judicial review of a decision by Citizenship and Immigration Canada [CIC] dated October 26, 2015 [the Decision], refusing to process the Applicant's application for citizenship in accordance with the requirements of the *Citizenship Act*, RSC 1985, c C-29 [the Act] which were in effect prior to June 11, 2015.

[2] For the reasons that follow, this application is dismissed.

I. Background

[3] This application arises out of changes to the requirements for Canadian citizenship resulting from amendments to the Act that were effective on June 11, 2015. These amendments were made in *An Act to amend the Citizenship Act and to make consequential amendments to other Acts*, SC 2014, c 22, which changed the qualifying requirements for Canadian citizenship. These changes included requiring that a permanent resident be "physically present" rather than "resident" in Canada, changes to the number of days one has to live in Canada to fulfil this requirement and whether time spent in Canada other than as a permanent resident counts towards this requirement.

[4] The Applicant works as a Senior Policy Analyst at the Canadian HIV/AIDS Legal Network, as a result of which he often takes long trips overseas. He explains that he therefore did not have the number of days of physical presence in Canada to meet the requirements that existed prior to June 11, 2015 but expected that a citizenship judge would be able to review his circumstances and determine whether he met the residency requirements nevertheless. He refers to this possibility being identified in CIC's Residence Calculator that was in use prior to June 11, 2015.

[5] This is no doubt a reference to the fact that, in applying the Act as it existed prior to June 11, 2015, there have been different tests available to be applied by citizenship judges. As

explained as follows in paragraphs 19 to 20 of *Miji v Canada (Minister of Citizenship and Immigration)*, 2015 FC 142:

> [19] There are three separate tests to determine whether the requirements in paragraph 5(1)(*c*) of the Act have been met. One of these tests is quantitative and strictly based on an applicant's physical presence in Canada: *Pourghasemi*. The other two tests are so-called qualitative ones: (i) the test of "centralized mode of existence" established in *Re Papadogiorgakis*, [1978] 2 FC 208 (T.D.); and (ii) the test of determining in which location the person applying for Canadian citizenship "regularly, normally or customarily lives" established in *Koo (Re)*, [1993] 1 FC 286 (T.D.).
>
> [20] It is now established in recent case law that these three separate tests can be applied by a citizenship judge and that this Judge can choose to apply, at his or her discretion, any one of these three tests (*Huang v. Canada (Citizenship and Immigration)*, 2013 FC 576, at para 25; *Irani v. Canada (Citizenship and* Immigration*)*, 2013 FC 1273, at para 14; *Vinat v. Canada (Citizenship and Immigration)*, 2014 FC 1000, at paras 22-24).

[6] The Applicant's application for Canadian citizenship was received by the Case Processing Centre of CIC on June 9, 2015. By letter dated August 5, 2015, CIC informed him that his application was incomplete and was being returned to him, because the passports or travel documents provided did not cover the four year period preceding the date of his application. In this communication, CIC informed the Applicant that he had the option to resubmit his application in accordance with new requirements for Canadian citizenship that were effective on June 11, 2015.

[7] The Applicant received this letter on August 17, 2015 and resubmitted his application by letter dated that same day, including the passport documentation that CIC had identified as missing in their August 5, 2015 letter. The Applicant explained in his letter that his application

had previously been incomplete because the document checklist that existed prior to June 11, 2015 did not provide clear instructions as to the biographical pages of passports that were required, as it did not explicitly refer to requiring all passports for a prescribed number of years prior to the date of his application. He requested that his application be considered under the requirements of the Act that existed prior to June 11, 2015 and noted that he was submitting the requested passport documentation along with a new application form on the same date he received the notification of the incomplete application. The Decision refusing this request was conveyed to him by letter from CIC dated October 26, 2015.

II. Impugned Decision

[8] In its Decision, CIC stated that it was responding to the Applicant's request that it reconsider accepting his application for Canadian citizenship to be processed under the requirements of the Act that were in effect prior to June 11, 2015. CIC stated that the Applicant had claimed it erred in returning his original application as incomplete. However, it explained that the application was not returned in error but was incomplete because the passport or travel documents provided did not cover the four year period preceding the date of his application. CIC stated that it was therefore unable to reconsider accepting the application into processing under the former requirements.

[9] The Decision further stated that a complete application includes the required information and is accompanied by any supporting evidence and fees and that, in order to be processed under the former requirements of the Act, CIC should have received his complete application before

5PM on June 10, 2015. CIC advised that applications received on or after June 11, 2015 must be processed under the current requirements of the Act.

III. Issue and Standard of Review

[10] The sole issue articulated by the Applicant in his Memorandum of Fact and Law is whether CIC fettered its discretion when it deemed itself unable to reconsider accepting his citizenship application into processing with a "lock in" date of June 9, 2015, despite the very specific circumstances of his case. (I understand the term "lock in" date to be used by the parties to refer to the date an application is accepted for processing under the law as applicable at that date.) In oral argument, the Applicant also submitted that the Decision should be set aside as unreasonable.

[11] The Respondent's position is that the Decision is to be reviewed on a standard of reasonableness (see *Ma v Canada (Minister of Citizenship and Immigration)*, 2015 FC 159 [*Ma*] and *Su v Canada (Minister of Citizenship and Immigration)*, 2016 FC 51 [*Su*]). The Applicant concurs that the applicable standard is reasonableness, arguing that this supports his position that the Decision was a discretionary one, which must not be fettered. He also relies on the decision of the Federal Court of Appeal in *Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 at para 24, that a decision that is the product of a fettered discretion must *per se* be unreasonable.

[12] I note the authorities relied on by the Respondent and concur that the Decision is to be reviewed on a standard of reasonableness. I also note and agree with the Applicant's submissions

on the review of decisions in which it is argued that the decision maker fettered its discretion. Chief Justice Crampton recently addressed the standard of review applicable in such a context as follows at paragraph 24 of *Frankie's Burgers Lougheed Inc v Canada (Minister of Employment and Social Development)*, 2015 FC 27:

> [24] With respect to the fettering of discretion issue that has been raised, it is not necessary to definitively determine whether the standard of review is correctness or reasonableness, since the result is the same: a decision that is the product of a fettered discretion must *per se* be unreasonable (*Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299, at paras 20-24).

IV. Positions of the Parties

A. *Applicant's Submissions*

[13] The Applicant submits that CIC fettered its discretion by blindly following its guidelines and rejecting his application without giving consideration to the specific circumstances of his case. He relies on section 13 of the Act as indicating that there is discretion in taking a decision as to whether or not an application is complete. His position is that the use of the word "any" in section 13(c), in the requirement that an application be "accompanied by any supporting evidence and fees required under this Act", suggests that the decision about supporting evidence is discretionary. The complete text of section 13 is as follows:

13 An application is to be accepted for processing under this Act only if all of the following conditions are satisfied:	13 Les demandes ne sont reçues aux fins d'examen au titre de la présente loi que si les conditions ci-après sont réunies :

(a) the application is made in the form and manner and at the place required under this Act;	a) elles sont présentées selon les modalités, en la forme et au lieu prévus sous le régime de la présente loi;
(b) it includes the information required under this Act;	b) elles contiennent les renseignements prévus sous le régime de la présente loi;
(c) it is accompanied by any supporting evidence and fees required under this Act.	c) elles sont accompagnées des éléments de preuve à fournir à leur appui et des droits à acquitter à leur égard prévus sous le régime de la présente loi

[14] The Applicant also relies on two sets of CIC guidelines introduced into evidence as exhibits to an affidavit filed by the Respondent. The first document is described in the affidavit as the application guide posted on the CIC website prior to June 11, 2015 and is characterized by the Applicant as intended for external use by applicants. The second document is described in the affidavit as containing instructions relating to how citizenship applications are processed and is characterized by the Applicant as intended for internal use by CIC staff members. I did not understand the Respondent to take issue with this characterization. I will for simplicity refer to these documents as, respectively, the "External Guideline" and the "Internal Guidelines".

[15] In support of his position that CIC has a discretion in determining whether an application for citizenship is complete, the Applicant notes that the External Guidelines use the permissive word "may" in stating: "If any of the required documents are missing, or photocopies are not

clear, your application may be returned to you." In the Internal Guidelines, he refers to the statement: "For purposes of processing a citizenship application, the "lock-in" date is the date that a completed application is date stamped as received, and determined to be complete at the CPC-S." The Applicant argues that the use of the word "determined" again indicates a discretionary decision as to whether an application is complete.

[16] The Applicant refers to the law on the use of guidelines by administrative agencies as providing that the fact that a guideline is intended to establish how discretion will normally be exercised is not enough to make it an unlawful fetter, as long as it does not preclude the possibility that the decision maker may deviate from normal practice in the light of particular facts (see *Thamotharem v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198 [*Thamotharem*] at paras 55, 78). A decision made by reference to the mandatory prescription of a guideline, despite a request to deviate from it in light of particular facts, may be set aside on the ground that the decision maker's exercise of discretion was unlawfully fettered (see *Thamotharem* at para 62).

[17] The Applicant argues that the CIC fettered its discretion by governing its decision entirely by the following provision in the Internal Guidelines:

> All applications received are checked upfront for completeness, and when the CPC-S receives an application without the requisite fee and/or without the required documents, the mailroom staff will
>
> - not allocate the paid fees to the processing of the application;
> - not record any data in GCMS;
> - return the entire application package to the applicant with a notice letter indicating what information or document is missing in their application. Two options will be offered to them:

1. resubmit the application with the missing information or document; or

2. request the refund of the fees paid if the applicant no longer wishes to submit their application.

[18] The Applicant points to the following facts that he says CIC should have considered:

A. He fulfilled, as of June 9, 2015, all but one, minor condition for acceptance of his application pursuant to section 13 of the Act;

B. There were significant differences in the Act before and after June 11, 2015, which make it difficult for him to fulfil the new physical presence requirement. Due to his current job, under the new requirements he is at risk of not becoming a Canadian citizen despite his many contributions and connections to Canada;

C. He resubmitted his application with the requested documents immediately upon receiving the letter informing him that his application was incomplete; and

D. The document checklist employed by CIC prior to June 11, 2015 was not clear that the biographical pages of all passports which he had for a number of years prior to his application had to be included in his application.

[19] The Applicant argues that CIC's failure to consider these facts, following its guidelines without regard to its discretion, renders the Decision unreasonable.

B. *Respondent's Submissions*

[20] The Respondent takes the position that the onus was on the Applicant to submit a complete application and that the requirement to submit evidence in support of his residency is a requirement of section 13 of the Act and section 3 of the *Citizenship Regulations*, SOR/93-246, as amended [the Regulations]. The Respondent relies in particular on the former section 3(4)(d) of the Regulations, which provided as highlighted below:

3 (1) An application made under subsection 5(1) of the Act shall be	3 (1) La demande présentée en vertu du paragraphe 5(1) de la Loi doit :
(a) made in prescribed form; and	a) être faite selon la formule prescrite;
(b) filed, together with the materials described in subsection (4), with the Registrar.	b) être déposée auprès du greffier, accompagnée des documents visés au paragraphe (4).
[…]	[…]
(4) For the purposes of subsection (1), the materials required by this section are	(4) Pour l'application du paragraphe (1), les documents d'accompagnement sont les suivants :
(a) a birth certificate or other evidence that establishes the date and place of birth of the applicant;	a) le certificat de naissance ou autre preuve établissant la date et le lieu de naissance du demandeur;

(b) any document that has been or may be created by the Canadian immigration authorities, or other evidence, that establishes the date on which the applicant was lawfully admitted to Canada for permanent residence;	b) tout document qui a été ou qui pourrait être établi par les autorités de l'immigration du Canada, ou toute autre preuve établissant la date à laquelle le demandeur a été légalement admis au Canada à titre de résident permanent;
(c) two photographs of the applicant of the size and type shown on a form prescribed under section 28 of the Act;	c) deux photographies du demandeur correspondant au format et aux indications figurant dans la formule prescrite en application de l'article 28 de la Loi;
(d) evidence that establishes that the applicant has, within the four years immediately preceding the date of his or her application, accumulated at least three years of residence in Canada; and	d) une preuve établissant que le demandeur a, dans les quatre ans qui ont précédé la date de sa demande, résidé au Canada pendant au moins trois ans;

(e) evidence that demonstrates that the applicant has an adequate knowledge of one of the official languages of Canada, including language test results or other evidence that demonstrates that the applicant meets the criteria set out in section 14.	e) une preuve établissant que le demandeur possède une connaissance suffisante de l'une des deux langues officielles du Canada, notamment les résultats obtenus lors d'un test linguistique ou toute autre preuve démontrant qu'il répond aux exigences énoncées à l'article 14.
[…]	[…]
[Emphasis added]	[Je souligne]

[21] The Respondent cites *Hamza v Canada (Minister of Citizenship and Immigration)*, 2013 FC 264; *Kamchibekov v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1411; and *Rukmangathan v Canada (Minister of Citizenship and Immigration)*, 2004 FC 284 in support of this position. In reply, the Applicant argues that, as he submitted all the evidence in support of his residency in Canada and the missing biographical passport page is not relevant to establishing his residency, the Respondent's reliance on section 13 of the Regulations is misplaced. He contrasts the present case with the situations addressed in the authorities cited by the Respondent, which were considering mandatory requirements under the *Immigration and Refugee Protection Regulations*, SOR/2002-227 in an immigration visa context.

[22] The Respondent also refers to the recent judgment of this Court in *Padhiar v Canada (Minister of Citizenship and Immigration)* (October 13, 2015), IMM-595-15 (FC) [*Padhiar*] for the proposition that an applicant is not entitled to notice than an application is incomplete before

it is returned, as this would thwart the clear instructions in the application form and document checklist. The Applicant contests the Respondent's reliance on *Padhiar* on the basis that, in that case, there were clear instructions regarding what should be included in the application on the application form and document checklist. The Applicant argues that the document checklist in his case was unclear. However, the Respondent notes that the document checklist refers to the External Guidelines which expressly indicate that an applicant should provide the biographical pages of all passports and/or travel documents for the relevant four year period immediately preceding the date of application.

[23] The Respondent also submits that there is no discretion on the part of a CIC officer to treat a completed application as if it was filed on a different date. An incomplete application does not act as a place holder for a subsequent complete application. The Respondent relies on *Ma* as authority that an application which is missing key components is not an application and points out that the Act is clear that the relevant period used to determine presence in Canada is that which immediately precedes the date of an applicant's application. Therefore, application dates are critical and cannot be altered just because an applicant submitted an incomplete application at an earlier date.

[24] The Applicant's perspective on *Ma* is that it favours his positon, as the decision as to when an application was complete was reviewed in *Ma* on a standard of reasonableness, suggesting that the decision involves an exercise of discretion. He also submits that *Ma* is distinguishable from the present case because key components of the application were missing in that case. In the present case, he argues that the missing passport biographical page was not a key

component because it was expired, did not support any of the information in the forms, and did not support any information that CIC did not know or could not infer from the application. He also notes that he had provided the passport to CIC in relation to previous immigration applications.

[25] The Respondent also notes that *Su*, relying on *Ma*, held that there is no duty to process an unperfected application and that an incomplete application is not immune from the impact of regulatory changes that come into force before the application is perfected.

[26] The Applicant would distinguish *Su* as having been decided in an immigration visa context. He again argues that the missing document in the case at hand was not material to his application, that the impact upon the applicant in a visa case like *Su* is less significant than the impact upon him of being unable to meet the requirement for citizenship, and that the administrative burden upon CIC in contacting him to request the missing document would have been very small. In the context of the change in the requirements of the Act, that CIC knew was coming, he argues that CIC should have taken that step to contact him and processed his application under the requirement that existed prior to June 11, 2015. Finally, the Applicant would distinguish the immigration visa cases relied on by the Respondent on the basis of an argument that *Charter* principles should be taken into account in the context of an application for citizenship.

V. Analysis

[27] The starting point in analyzing this application is to consider the nature of the Decision made by CIC, as informed by the statutory foundation for the Decision. As noted above, that foundation is found in section 13 of the Act and section 3 of the Regulations. Important to the analysis is the fact that section 13 states that an application is to be accepted for processing only if all of the conditions set out in that section are satisfied. Those conditions require that the application include the information required under the Act and be accompanied by any supporting evidence required under the Act.

[28] In oral argument, the Respondent submitted that, if there is any discretion on the part of CIC in making a decision of the sort currently under review, that discretion relates to determining whether an application is compete, not to the consideration of other factors in deciding whether to process an application as of a particular lock-in date.

[29] I consider the Respondent's position to be supported by the language of section 13 of the Act. Some degree of decision making is involved in determining whether the conditions prescribed by section 13 are satisfied, i.e. a determination whether the information and supporting evidence required under the Act have been included with the application. This can be characterized as a decision whether the application is complete. This is also consistent with the reference in the Internal Guidelines, as noted by the Applicant, to there being a determination whether an application is complete.

[30] However, there is no statutory foundation for a discretion to select a lock-in date other than the date the application has been determined to be complete based on the conditions prescribed by section 13 having been satisfied. Such a discretion would be inconsistent with the language of section 13 which permits acceptance of an application for processing only if those conditions have been met. This analysis is also consistent with the Internal Guidelines' reference to the lock-in date being the date that an application is determined to be complete.

[31] It is this decision, whether an application is complete, that is reviewable on a standard of reasonableness. I note that, in the Decision under review, CIC describes the Applicant's letter of August 17, 2015 to which it was responding as a request that it reconsider accepting his application for citizenship to be processed under the requirements of the Act that were in effect prior to June 11, 2015. While the Applicant's letter is not expressly framed as a request for reconsideration, CIC's characterization of the request appears apt. Its previous letter dated August 5, 2015, in which CIC informed him that his application was incomplete and was being returned to him, represents a determination that his application did not satisfy the conditions of section 13 of the Act. CIC was therefore treating his August 17, 2015 request as seeking a reconsideration of that determination. It was only by determining that his application for citizenship was complete as of a date prior to June 11, 2015 that the result sought by the Applicant could potentially be achieved.

[32] The Decision concludes that the Applicant's application was not complete when previously submitted, because the passport documentation previously provided did not cover the four year period preceding the date of the application. The question therefore becomes whether

the Decision, in reaching that conclusion, is unreasonable, either as a product of fettered discretion or for failing to take into account the factors the Applicant says should have been considered.

[33] I accept the Applicant's statement of the principles applicable to fettering an exercise of discretion, in reliance on *Thamotharem*. However, those principles do not undermine the Decision in this case. The Applicant argues that CIC was over-reliant on the Internal Guidelines in reaching the Decision. I note there is no reference in the Decision to CIC being governed by the Internal Guidelines. However, the Applicant's argument fails not for this reason but rather because, to the extent the Internal Guidelines refer to not accepting an application for processing if it is incomplete, this is entirely consistent with, and indeed required by, section 13 of the Act. As such, my assessment is that the Decision's consistency with the Internal Guidelines does not represent an improper fettering of CIC's discretion but rather a performance of its statutory mandate, which was to assess the completeness of the application.

[34] It is still necessary to assess whether the Decision was reasonable in reaching the conclusion that the application was incomplete. In doing do, I have considered the various factors that the Applicant says should have been taken into account by CIC.

[35] The Applicant argues that there were significant differences in the Act before and after June 11, 2015, which make it difficult for him to fulfil the new physical presence requirement. Due to his current job, under the new requirements he is at risk of not becoming a Canadian citizen despite his many contributions and connections to Canada. I note that this factor was not

expressed in this level of detail in the Applicant's letter to CIC dated August 17, 2015. However, regardless, I can see no basis for a conclusion that CIC was obliged, or indeed entitled, to take this factor into account in assessing the completeness of the application.

[36] The Applicant noted in his August 17, 2015 letter that he was resubmitting his application with the requested documents immediately upon receiving the letter informing him that his application was incomplete. While this shows diligence on the part of the Applicant in responding to CIC, it is not a factor relevant to the completeness of the application prior to June 11, 2015.

[37] The Applicant's letter also noted that the document checklist employed by CIC prior to June 11, 2015 was not clear that the biographical pages of all passports which he had for a number of years prior to his application had to be included in his application. It could represent a procedural fairness concern, or result in an unreasonable decision, if the Decision was made without the Applicant having been informed of the documentation that was required by CIC. However, the relevant CIC publications were before the Court and, in my view, are clear as to the applicable requirement. While the Applicant notes that the document checklist attached to the application form refers to a requirement for photocopies of biographical pages of passports and/or travel documents, but does not explain the number of years these must cover, he acknowledged in argument that the checklist refers to step 1 of the External Guidelines, which in turn refer to a requirement for the biographical pages to be provided for the four year period preceding the date of the citizenship application. I therefore cannot conclude the Decision to be in any way undermined based on this argument.

[38] Finally, the Applicant argues that he fulfilled as of June 9, 2015 all but one, minor, condition for acceptance of his application pursuant to section 13 of the Act. That is, his application was incomplete only by missing the biographical page of one expired passport. The Applicant's argument before the Court was to the effect that this was a trivial piece of documentation in the overall context of the application.

[39] I have considered whether this is a factor that should have been taken into account by CIC in assessing the completeness of the application. At the hearing, I asked the Respondent to identify the statutory authority for the requirement for an applicant for citizenship to provide the biographical pages of his or her passports. The Respondent referred to section 3(1)(d) of the Regulations as requiring that an application for citizenship be filed together with "evidence that establishes that the applicant has, within the four years immediately preceding the date of his or her application, accumulated at least three years of residence in Canada." The Respondent argues that the information contained in the biographical page of a passport, including the passport number, forms part of the evidence establishing residence, as it supports investigations by CIC on time spent by the applicant in and out of the country. I accept this argument, and I note that the Applicant acknowledged that the biographical page could be relevant to some applications, such as by indicating that the applicant had a previous name, although he argues this does not apply in his case.

[40] As the relevant sections of the Act and Regulations do not expressly require the submission of biographical passport pages in order to constitute a complete application, I can conceive that, in an appropriate case, CIC may have an obligation to consider a submission by an

applicant for citizenship as to whether this particular documentation is required in order to constitute a complete application. However, it is not necessary for me to decide this point, as this argument was not put to CIC by the Applicant in his August 17, 2015 letter. I therefore cannot conclude the Decision to be unreasonable for having failed to consider this argument.

[41] Having not been convinced that there is any basis to conclude that the Decision is unreasonable, this application for judicial review must be dismissed.

VI. Certified Question

[42] The Applicant submits the following two questions for certification as serious questions of general importance:

> A. Whether the CIC officer's over-reliance on guidelines, in complete disregard of other evidence and the context of a citizenship application, was a reasonable exercise of discretion; and
>
> B. Whether the weight accorded to competing factors by the decision maker can be reasonable despite the established fact that the decision amounted to virtually fettering the discretion.

[43] Pursuant to section 22.2(d) of the Act, an appeal to the Federal Court of Appeal may be made only if, in rendering judgment, the Federal Court judge certifies that a serious question of general importance is involved and states the question. The test for certifying a question, as developed in jurisprudence under the comparable provision in the *Immigration and Refugee*

Protection Act, SC 2001, c 27, is that it "must (i) be dispositive of the appeal and (ii) transcend the interests of the immediate parties to the litigation, as well as contemplate issues of broad significance or general importance" (see *Zhang v Canada (Minister of Citizenship and Immigration)*, 2013 FCA 168 at para 9).

[44] Neither of the questions proposed by the Applicant involves a serious question of general importance that transcends the interests of the parties to this litigation. The principles governing the appropriate role for administrative guidelines and when reliance thereon can amount to a fettering of discretion is already well developed law, including as expressed in the decision of the Federal Court of Appeal in *Thamotharem*, relied upon by the Applicant in this application. The questions proposed by the Applicant relate to the application of those principles to the facts of this particular case. As such, I decline to certify either question.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

No question is certified for appeal.

"Richard F. Southcott"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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