

Federal Court



Cour fédérale

Date: 20110810

Docket: T-2172-10

Citation: 2011 FC 984

Toronto, Ontario, August 10, 2011

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

AHMAD AL-DARAWISH

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Al-Darawish appeals the decision by the Citizenship Judge, R. Monteith made on November 5, 2011 dismissing his application for Canadian citizenship because the Applicant was the subject of a one year probation order imposed on July 20, 2010 and therefore not eligible for citizenship pursuant to paragraph 22(1)(a)(ii) of the *Citizenship Act*, R.S.C. 1985, c. C-29 (the *Act*).

[2] The Citizenship Judge also found that the Applicant did not have an adequate knowledge of Canada and the responsibilities of citizenship because he was unable to correctly answer questions in respect of the history, geography of Canada, its government and citizenship responsibilities. The Citizenship Judge declined to make a recommendation for Ministerial exercise of discretion waiving the knowledge requirements on compassionate grounds. The Citizenship Judge advised Mr. Al-Darawish that he may make a new application for citizenship once he meets the requirements of the *Act*.

[3] Mr. Al-Darawish appeals the decision submitting that he is suffering from serious disability arising from serious injuries incurred in an automobile accident, from illness, and from traumatic experiences. He submits he completed his period of probation on July 19, 2011 and is now eligible for citizenship.

[4] I must conclude the Citizenship Judge was correct in that Mr. Al-Darawish was not eligible for a grant of citizenship while his probation order was in effect because of paragraph 22(1)(a)(ii) of the *Act*. My reasons are set out below.

[5] Given the operation of paragraph 22(1)(a)(ii), the Citizenship Judge need not have gone on to find Mr. Al-Darawish was ineligible because of an inadequate knowledge of Canada. More importantly, on the evidence before me, I am of the view that Mr. Darawish's case is one where consideration needs to be given for waiving the knowledge requirement on compassionate grounds now that he is no longer under probation.

Background

[6] The Applicant was born on August 20, 1957 in Doura, Hebron in the West Bank. He will be 55 years of age on August 20, 2012. I am advised by the Respondent that the significance of age 55 is that consideration is given to waiving the knowledge requirement for citizenship applicants who are 55 years of age or older. The difficulty is the Applicant, who is self-represented, fears he may not live that long.

[7] The Applicant is seeking his Canadian citizenship as part of his arrangements for his family; his wife is ill and he has several children who are still minors.

[8] The Applicant was a medical doctor. He graduated from Bethlehem University in Israel and worked in the United Arab Emirates for many years before moving to Canada. He and his wife have thirteen children. He has been a permanent resident and living in Canada with his spouse since June 5, 2006.

[9] The Applicant, his wife and three of their children were in a serious motor vehicle accident on September 26, 2008. He suffered significant injuries which necessitated surgery. In addition he was diagnosed as having cancer which resulted in a further operation. He is permanently disabled and says he has suffered memory problems ever since the accident.

[10] The Applicant applied for citizenship on July 22, 2009.

[11] The Applicant also pled guilty to a summary offence of assault under section 266 of the *Criminal Code of Canada*. He was given a conditional discharge and made subject to a probation order on July 20, 2010. The conditional discharge means he is deemed to have not been convicted of a criminal offence upon successfully completing probation.

[12] Among the many medical reports provided by the Applicant in this appeal is a note by his family physician who wrote on October 25, 2010: “This note confirms you do have a multitude of health issues that may impair your ability to perform well in your Canadian Citizenship examination.” However this evidence does not appear to have been part of the Record that was before the Citizenship Judge.

[13] The Applicant had an oral hearing before the Citizenship Judge on November 4, 2010. He was given an oral knowledge test which he failed.

Decision Under Review

[14] The Citizenship Judge informed the Applicant by letter dated November 5, 2010 that his application for Canadian citizenship had been refused on the basis that the Applicant had been convicted of assault under section 266 of the *Criminal Code* and was under a prohibition order. The Citizenship Judge explained that paragraph 22(1) of the *Citizenship Act* prohibited the Applicant from being granted citizenship.

[15] The Citizenship Judge also found that the Applicant did not have an adequate knowledge of Canada and of the responsibilities and privileges of citizenship as required under subsection 5(1)(e) of the *Citizenship Act* because he had been unable to correctly answer at the hearing questions on the history and geography of Canada, the three levels of government, and the responsibilities and privileges of Canadian citizenship.

[16] The Citizenship Judge considered whether or not to make a recommendation for an exercise of discretion under subsection 5(3) or 5(4) of the *Citizenship Act*, but found that there was no evidence of special circumstances that would justify making such a recommendation.

Relevant Legislation

[17] The *Citizenship Act*, R.S.C., 1985, c. C-29 provides:

5. (1) The Minister shall grant citizenship to any person who
...
(e) has an adequate knowledge of Canada and of the responsibilities and privileges of citizenship;
...
(3) The Minister may, in his discretion, waive on compassionate grounds,
(a) in the case of any person, the requirements of paragraph (1)(d) or (e);
(b) in the case of a minor, the requirement respecting age set out in paragraph (1)(b), the requirement respecting length

5. (1) Le ministre attribue la citoyenneté à toute personne qui, à la fois :
...
e) a une connaissance suffisante du Canada et des responsabilités et avantages conférés par la citoyenneté;
...
(3) Pour des raisons d'ordre humanitaire, le ministre a le pouvoir discrétionnaire d'exempter :
a) dans tous les cas, des conditions prévues aux alinéas (1)d) ou e);
b) dans le cas d'un mineur, des conditions relatives soit à l'âge

of residence in Canada set out in paragraph (1)(c) or the requirement to take the oath of citizenship; and
(c) in the case of any person who is prevented from understanding the significance of taking the oath of citizenship by reason of a mental disability, the requirement to take the oath.

Special cases

(4) In order to alleviate cases of special and unusual hardship or to reward services of an exceptional value to Canada, and notwithstanding any other provision of this Act, the Governor in Council may, in his discretion, direct the Minister to grant citizenship to any person and, where such a direction is made, the Minister shall forthwith grant citizenship to the person named in the direction.

...

15. (1) Where a citizenship judge is unable to approve an application under subsection 14(2), the judge shall, before deciding not to approve it, consider whether or not to recommend an exercise of discretion under subsection 5(3) or (4) or subsection 9(2) as the circumstances may require.

...

22. (1) Despite anything in this Act, a person shall not be granted citizenship under subsection 5(1), (2) or (4) or 11(1) or take the oath of citizenship
(a) while the person is, pursuant

ou à la durée de résidence au Canada respectivement énoncées aux alinéas (1)b) et c), soit à la prestation du serment de citoyenneté;
c) dans le cas d'une personne incapable de saisir la portée du serment de citoyenneté en raison d'une déficience mentale, de l'exigence de prêter ce serment.

Cas particuliers

(4) Afin de remédier à une situation particulière et inhabituelle de détresse ou de récompenser des services exceptionnels rendus au Canada, le gouverneur en conseil a le pouvoir discrétionnaire, malgré les autres dispositions de la présente loi, d'ordonner au ministre d'attribuer la citoyenneté à toute personne qu'il désigne; le ministre procède alors sans délai à l'attribution.

...

15. (1) Avant de rendre une décision de rejet, le juge de la citoyenneté examine s'il y a lieu de recommander l'exercice du pouvoir discrétionnaire prévu aux paragraphes 5(3) ou (4) ou 9(2), selon le cas.

...

22. (1) Malgré les autres dispositions de la présente loi, nul ne peut recevoir la citoyenneté au titre des paragraphes 5(1), (2) ou (4) ou 11(1) ni prêter le serment de citoyenneté :
a) pendant la période où, en

to any enactment in force in
Canada,
...
(ii) under a probation order,

application d'une disposition
législative en vigueur au
Canada :
...
(ii) il est sous le coup d'une
ordonnance de probation,

(emphasis added)

Issue

[18] I would frame the issue as: Did the Citizenship Judge err in finding that the Applicant was prohibited from being granted citizenship and, if not, did the Judge err in also assessing the Applicant's knowledge of Canada and declining to recommend waiver of that requirement?

Analysis

[19] The Applicant asks the Court to review his situation on the basis of his permanent disability. He says that he has had memory problems since his accident and therefore could not pass the citizenship exam. He submits that the Citizenship Judge did not look to any of his medical reports which he had with him at the hearing.

[20] The Respondent acknowledges that the Citizenship Judge may have made errors with regards to finding that the matter was not an appropriate case for the exercise of discretion. However, the Respondent takes the position that the fact that the Applicant is subject to a probation order is the determinative issue, as it places him squarely within subsection 22(1) which prohibits the granting of citizenship on a person subject to a probation order.

[21] Paragraph 22(1)(a)(ii) clearly precludes a grant of citizenship while an applicant is under a probation order. It states: “Despite anything in this Act, a person shall not be granted citizenship under subsection 5(1), (2) or (4) or 11(1) ... while the person is ... under a probation order.”

[22] In result, I conclude the Citizenship Judge was correct in concluding the Applicant was precluded from being granted citizenship while the probation order was in effect.

[23] In light of my conclusion, the Citizenship Judge’s going on to analyze the matter in respect of the Applicant’s knowledge and assessing whether to recommend the Minister exercise discretion to waive the knowledge requirement while the probation order was in effect was superfluous and could not be undertaken in any event.

[24] In *Frankowski v Canada (Minister of Citizenship and Immigration)*, [2000] 187 FTR 92, Justice Rothstein examined the apparent conflict between subsection 5(4) of the *Citizenship Act* providing for Governor in Council discretionary granting of citizenship which states “notwithstanding any other provision of this Act”, and another provision, subsection 22(2), prohibiting the granting of citizenship “notwithstanding anything in this Act” if the person has been convicted of an indictable offence. Justice Rothstein noted that when two provisions are in conflict with each other, the specific provision, subsection 22(2), should be applied to the exclusion of the more general subsection 5(4).

[25] As such, I consider paragraph 22(1), more specifically 22(1)(a)(ii), to be similarly applicable which means this is not a case for Ministerial exercise of discretion under subsection 5(3) while the Applicant was under the probation order.

Conclusion

[26] In result the Applicant's appeal must be dismissed.

[27] However, that is not the end of this matter. Although I have concluded the appeal must be dismissed, I consider it appropriate to recommend that the Applicant be given timely and appropriate consideration on his re-application for citizenship.

[28] The probation order expired July 19, 2011 and is no longer a bar to the Applicant proceeding with his application for citizenship other requirements being satisfied.

[29] As the above discussion discloses, there is evidence which supports consideration for a recommendation for Ministerial discretion in regards to waiving the paragraph 5(1)(e) knowledge requirement for this Applicant.

[30] The Applicant is a man who achieved much, achieving a medical degree and serving for many years as a medical doctor, but he has suffered injury and illness that has rendered him permanently disabled. He is not the man he was. His memory which served him well as a doctor is unreliable. His performance on the knowledge test bears that out. He is 53 years old but appears to

be twenty years older. His health is precarious. He fears that he will not live to see the day he gains his Canadian citizenship should the process become drawn out and that his family will be denied that beneficial outcome.

[31] The Applicant did answer one challenging question correctly during his oral knowledge test. He identified two fundamental freedoms that Canadians enjoy: freedom of expression and freedom of belief. He then added “Best country in world”.

[32] In my view compassion is a vital part of the Canadian makeup that makes Canada the best country in the world.

[33] All legal requirements being satisfied, I recommend the Applicant’s renewed application for citizenship be expedited and due consideration be given to waiving the knowledge requirement for the Applicant.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The appeal is dismissed.
2. The renewed application by the Applicant for citizenship be processed in a timely manner with consideration given to the question of waiver of the 5(1)(e) knowledge requirement as provided in the *Act*.
3. No order for costs.

“Leonard S. Mandamin”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-2172-10

STYLE OF CAUSE: AHMAD AL-DARAWISH v. THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: AUGUST 9, 2011

**REASONS FOR JUDGMENT
AND JUDGMENT:** MANDAMIN, J.

DATED: AUGUST 10, 2011

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