Federal Court  Cour fédérale

Date: 20130320

Docket: T-1394-12

Citation: 2013 FC 271

Ottawa, Ontario, March 20, 2013

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

KRZYSZTOF POLNIAK

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an appeal by Krzysztof Polniak (Applicant) of the decision of a citizenship judge denying the Applicant's application for citizenship. The denial was based on subsection 22(1)(a)(i) of the *Citizenship Act* which prohibits a grant of citizenship while an applicant is under a probation order. The appeal is brought pursuant to subsection 14(5) of *Citizenship Act*, RSC 1985 c C-29, and in accordance with section 18.1 of the *Federal Courts Act*, RSC 1985 c F-7 and Rule 300(c) of the *Federal Courts Rules*, SOR/98-106.

Background

[2] On May 29, 2009 the Applicant applied, pursuant to subsection 5(1) of the *Citizenship Act*, for Canadian citizenship. On November 29, 2010, the Applicant was charged with assault. On January 6, 2012, he was granted a conditional discharge and was made the subject of an eighteen month probation order. On May 16, 2012 he appeared before Citizenship Judge R. Brum Bozzi (the Citizenship Judge). During that hearing he advised the Citizenship Judge that he was under a probation order and asked the Citizenship Judge to postpone the rendering of his decision for two to three months by which time it was anticipated that the probation order would be lifted. The Citizenship Judge declined to delay his decision which was rendered on May 18, 2012 (the Decision).

Decision Under Review

[3] The Citizenship Judge found that when the Applicant appeared before him on May 16, 2012 the Applicant complied with all of the requirements of the *Citizenship Act* with one exception, subsection 22(1)(a). In that regard, the information on the Applicant's file indicated that, effective January 6, 2012, the Applicant was sentenced to 18 months of probation for offences that took place in November 2010. Therefore, he did not comply with subsection 22(1)(a) of the *Citizenship Act* which states that a person shall not be granted citizenship under subsection 5(1) while the person is under a probation order. Accordingly, the Applicant's application was denied.

[4] Pursuant to subsection 15(1) of the *Citizenship Act*, the Citizenship Judge then considered whether or not to recommend an exercise of the Minister's discretion under subsections 5(3) and 5(4) of the *Citizenship Act* to waive, on compassionate grounds, language or knowledge

requirements, or, to grant citizenship to alleviate special and unusual hardship. He found that there was no evidence of special circumstances presented to him at the hearing that would justify the making of such a recommendation.

Positions of the Parties

[5] The position of the Applicant is that had the Citizenship Judge delayed rendering the Decision until the probation order was lifted, as requested by the Applicant, then citizenship would have been granted. He seeks to have the Decision set aside and the matter referred back for reconsideration based on the new circumstance, being that the probation order was lifted two and a half months after the Decision was rendered.

[6] The position of the Respondent is that because the Applicant was subject to a probation order when he appeared for his citizenship hearing he falls squarely within the subsection 22(1)(a)(i) prohibition and, because subsection 22(1)(a)(i) is applicable, there is an implied exception to the general discretion otherwise conferred by subsection 5(4). Further, that pursuant to subsection 14(1) of the *Citizenship Act*, the Citizenship Judge was required to make his decision within sixty days of the application being referred to him and had no discretion to delay his decision as requested by the Applicant.

Issue

[7] I would phrase the issue in this appeal as being whether the Citizenship Judge's decision was reasonable.

Standard of Review

[8] The Supreme Court of Canada has held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis (*Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*]).

[9] The matter before this Court is whether the Applicant was properly denied, pursuant to subsection 22(1)(a)(i) of the *Citizenship Act*, a grant of citizenship. As this is a question of mixed fact and law the Decision is reviewable on the standard of reasonableness. See *Canada (Minister of Citizenship and Immigration) v Diallo*, 2012 FC 1537 at para 13 "the applicable standard of review for decisions of citizenship judges regarding questions of mixed fact and law, such as the question of whether an applicant has met the requirements of the Act, is reasonableness."

[10] Reasonableness is concerned with the existence of justification, transparency and intelligibility within the decision making process. It is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir*, above, at paras 45, 47-48; *Canada (Minister of Citizenship and Immigration*) *v Khosa*, 2009 SCC 12 at paras 59, 62)

Analysis

Subsection 22(1)

[11] The fact that the Applicant was the subject of a probation order when he appeared before the Citizenship Judge on May 16, 2012 is not at issue. The Applicant advised the Citizenship Judge of this and, in his written submissions to this Court, stated that the Citizenship Judge had stressed to him that because of this the Applicant could not obtain Canadian citizenship. The Applicant's submissions also state that he asked the Citizenship Judge to postpone his decision for two to three months as the Applicant was in the process of having the probation order lifted. He left the hearing with the impression that his plea for a delayed decision would be granted but on May 25th received the Decision denying his application.

[12] Subsection 22(1)(a)(i) reads as follows:

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	**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) while the person is, pursuant to any enactment in force in Canada,	a) pendant la période où, en application d'une disposition législative en vigueur au Canada :
(i) under a probation order,	(i) il est sous le coup d'une ordonnance de probation,

[13] I agree with the Respondent that the Applicant fell squarely within that provision which was determinative of his application. Indeed, at the hearing before this Court the Applicant acknowledged that it was the timing of the rendering of the Decision with which he takes issue and that the Decision itself was correct and reasonable in the context of subsection 22(1)(a)(i).

[14] Given the facts in this case, the Citizenship Judge made no error in his application of the facts to the law (*Al-Darawish v Canada (Minister of Citizenship and Immigration)*, 2011 FC 984 at paras 20-22, 26).

Subsection 5(4)

[15] In the Decision the Citizenship Judge stated that there was no evidence before him at the hearing that would justify the making of a subsection 5(4) recommendation.

[16] The Respondent submits that, in any event, the Citizenship Judge was precluded from exercising his discretion under subsection 5(4) of the *Citizenship Act* to recommend the granting of citizenship to alleviate special and unusual hardship because the subsection 22(1)(a)(i) prohibition against granting citizenship to a person under a probation order is an implied exception to the general discretion conferred on the Governor in Council by subsection 5(4) to direct the Minister to grant citizenship (*Frankowski v Canada* (*Citizenship and Immigration*), 192 DLR (4th) 187 at paras 15-16; *Al-Darawish*, above, at paras 24-25).

[17] The Applicant makes no specific submission on this point. However, his appeal of the Decision centers around his request that the Citizenship Judge delay the issue of his decision until

the probation order had been lifted. In other words, the exercise of any discretion that the Citizenship Judge may have had in that regard given the Applicant's special circumstances.

[18] The Respondent submits that *Al-Darawish* at paras 24-25 and *Frankowski* at paras 15-16, both above, resolve the issue of whether the "notwithstanding any other provisions of this Act" reference in subsection 5(4) prevails over a similar notwithstanding reference in the prohibitions at subsection 22(1) of the *Citizenship Act*. The Respondent refers to Justice Rothstein's finding in *Frankowski* as follows:

> [15] Applying the implied exception technique to resolve the apparent conflict between subsection 5(4) and paragraph 22(2)(a) and considering subsection 5(4) the more general and paragraph 22(2)(a) the more specific provision, I conclude that the prohibition against the grant of citizenship to a person within three years of conviction for an offence referred to in paragraph 22(2)(a) is an implied exception to the general discretion conferred on the Governor in Council in subsection 5(4) to direct the Minister to grant citizenship.
>
> [16] In the result, I think the learned Citizenship Court Judge was correct in finding that because paragraph 22(2)(a) was applicable, this was not a case for the exercise of discretion under subsection 5(4). As there was no discretion to be exercised by the Governor in Council under subsection 5(4) in this case, there was no obligation on the Judge under subsection 15(1) to do more than he did.

[19] In my view this reasoning is equally applicable in this case. Thus, even if the Citizenship Judge had recommended that the Minister exercise his discretion under subsection 5(4) to grant citizenship in these circumstances to alleviate special and unusual hardship, because subsection 22(1)(a) applies so does the implied exception. Therefore, the Minister had no discretion to do so in this case.

Section 14

[20] Subsection 14(1)(a) of the *Citizenship Act* states that an application for a grant of citizenship under subsection 5(1) or (5) shall be considered by a citizenship judge who, within sixty days of the day the application was referred to that judge, determine whether or not the person who made the application meets the requirements of the *Citizenship Act* and the regulations with respect to the application.

[21] When the Applicant appeared before this Court he asserted, the first time, that the Citizenship Judge had verbally represented to him that he would delay the rendering of his decision while the Applicant sought to have the probation ordered lifted. Further, that the Citizenship Judge asked the Applicant to keep him apprised of the status of that effort and that the Applicant wrote three letters to the Citizenship Judge in that regard. This assertion does not appear in the Applicant's Memorandum of Fact and Law or supporting affidavit.

[22] The Applicant submits that this representation, and the failure to honour it, gives rise to a question of procedural fairness. He submits that it took three years for the Minister to consider his application and that the Citizenship Judge's failure to honour his representation to the Applicant to delay his decision for a mere three months to accommodate the lifting of the probation order is unfair, particularly as he had complied with all of the other citizenship requirements as acknowledged by the Citizenship Judge.

[23] The Respondent takes the view that there is no affidavit or other evidence to support the Applicant's claim and, in any event, any breach of procedural fairness is immaterial because

Citizenship Act required the Decision to be rendered within the 60 day time frame stipulated in subsection 14(1).

[24] In my view, the issue of a lack of procedural fairness does not arise in this matter given that there is no evidence that the Citizenship Judge did represent that he would delay the rendering of his decision; the application of the subsection 22(1)(a) implied exception to subsection 5(4); and, the subsection 14(1) requirement that the Citizenship Judge render a decision within sixty days. Even if the Citizenship Judge did represent to the Applicant that he would delay the rendering of his decision pending the lifting of the probation order and even if subsection 14(1) were interpreted such that the sixty days period would start to run from the date of the citizenship hearing on May 16, 2012, then the outcome would have been the same as the probation order was not lifted until August 2, 2012 being outside the permissible sixty day period.

[25] In conclusion, this case there was no erroneous finding of fact, reviewable error or breach of procedural fairness. At the time of his hearing, the Applicant was subject to a probation order. The Decision correctly applied the law to the facts and was justified, transparent and intelligible and the outcome was defensible based on the law and the facts.

[26] The Applicant represented himself before this Court and did so in a straight forward and efficient manner. Although the relief he seeks is not available to him, I make no order as to costs in these circumstances.

[27] The original style of cause in this action identified the Respondent as "Citizenship Judge (Commission)". That has been revised in this judgment to correctly describe the Respondent as the Minister of Citizenship and Immigration.

JUDGMENT

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

There is no order as to costs.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	POLNIAK v MCI
PLACE OF HEARING:	Toronto
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