Federal Court  Cour fédérale

Date: 20130715

Docket: T-145-13

Citation: 2013 FC 789

Ottawa, Ontario, July 15, 2013

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

HUI YING FAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an appeal of a decision of a Citizenship Judge ["Judge"], pursuant to subsection 14(5) of the *Citizenship Act*, RSC 1985, c C-29 ["Act"] and section 21 of the *Federal Courts Act*, RSC 1985, c F-7. The Judge denied the Applicant's application for citizenship by virtue of paragraph 5(1)(*c*) of the Act.

I. Facts and decision under review

[2] The Applicant became a landed immigrant on September 24, 2005 and applied for citizenship on June 6, 2010.

[3] The Applicant's physical presence was at issue. In order to meet the residency requirement pursuant to paragraph 5(1)(*c*) of the Act, the Applicant had to submit documentation that supports her presence during at least 1095 days over a period of four years.

[4] The Applicant declared 249 days of absence from Canada in her application form, which were recalculated to be 273 days, which leaves her with a physical presence in Canada of 1187 days.

[5] A hearing took place on May 23, 2012 and the Applicant was requested to provide additional documentation, within 30 days of the hearing and therefore, on or before June 25, 2012. The requested documents included the Ministry of Health's billing records from January 1, 2006 to present, a record of movement from China from September 24, 2005 to present, record of travel from the United States from September 24, 2005 to present, school records of her two children from September 24, 2005 to present, lease agreements from October 1, 2005 to present and a detailed proof of payment.

[6] In his decision, rendered July 23, 2012, but only communicated on December 14, 2012, the Judge noted that the onus of proof rests solely with the Applicant and that not all of the required additional documents were provided. The Judge determined that the documentation that was not

provided was essential as the documentation submitted did not help in establishing the Applicant's physical presence in Canada. The Payment Summary from the Ministry of Health only contained a few dates of usage, no later than November 15, 2007 and there were no report cards submitted for the Applicant's children after June 20, 2008.

[7] Therefore, the Judge determined that the Applicant had failed to establish that she has met the requirement under paragraph 5(1)(*c*) of the Act.

[8] The Judge also indicated that before deciding not to approve the Applicant's application, he has considered, pursuant to subsection 15(1) of the Act, whether to make a favourable recommendation under subsection 5(4) of the Act. He decided not to make such a recommendation as there were no inadequate circumstances of special and unusual hardship or services of an exceptional value to Canada warranting it.

[9] The Judge, in his decision, added that the information received after the decision date of July 23, 2012 was not taken into consideration.

II. Applicant's submissions

[10] The Applicant submits that she did provide documentation to demonstrate her travel history from Canada to the People's Republic of China and the United States of Canada. The Certified Tribunal Record ["CTR"] includes her travel history from the Canada Border Services Agency ["CBSA"] and her travel history from China.

[11] She was sent a notice by the United States Custom and Borders Services indicating that her request to obtain documents was denied and that she was instructed to submit further documentation.

[12] The Applicant submitted to the Judge three requests for an extension of time to provide the relevant documentation on May 28, 2012, June 6, 2012 and July 9, 2012. No decision was made in response to the requests except that the Judge noted in his decision that the evidence submitted up to July 23, 2012 had been considered. The Applicant also submits that on each instance the Respondent accepted and noted the request for an extension of time to provide the documents. However, there is no evidence in the CTR supporting this allegation.

[13] As noted above, the Applicant was only informed of the decision after it was mailed on December 14, 2012.

[14] The Applicant submits that her U.S. travel history was received by the Respondent on October 4, 2012 and was not considered, as the Judge stated in a postscript note that any documents received after July 23, 2012 were not considered.

[15] The Applicant submits that the Judge is required to take note of all the documents received prior to the decision and not the date at which the officer decides to make note of it in the file. Moreover, the Applicant argues that a decision has not been made until it has been communicated to the parties.

[16] The Applicant also submits that the Judge failed to consider a letter from her eldest child's school, dated May 29, 2012 indicating that the Applicant's minor son had been a full-time student at that school from September 4, 2007 to June 30, 2011 and a letter from the University of Toronto indicating that the Applicant's son was a full-time student at that location. The Applicant further noted in her letter dated May 28, 2012 that her younger son's school had not cooperated with her request for the attendance records for her son, and thus she was only able to provide a few of them. The Judge determined that the Applicant failed to provide the attendance records for her minor children, yet makes no mention of neither the documents submitted in the alternative nor the explanation tendered by her.

[17] The Applicant further submits that the Judge breached procedural fairness. Given that the exit stamps by the Chinese authorities in her passport match the entries into Canada and that there are no open-ended sojourns, the evidence on the face of it shows that the Applicant was physically present in Canada for the required period. Therefore, the Judge could only arrive at his decision if and only if the Applicant's passport and stamps therein were deemed to be not credible. The Judge therefore had a duty to share these concerns with the Applicant prior to refusal.

III. Respondent's submissions

[18] The Respondent submits that the Applicant failed to meet her onus to prove that she was in Canada for the requisite number of days. The Applicant admits that she was unable to provide all the documentation that the Judge requested. The Judge considered that such documentation was essential and crucial to make an informed decision and that the additional documentation submitted did not help the declaration of physical presence. Finally, he specifically noted that the Payment

Summary from the Ministry of Health only contained a few dates of usage, none later than November 15, 2007 and that no report cards were submitted for her minor child after June 2008.

[19] The Judge's assessment of the evidence is within his knowledge and expertise. The Applicant did not discharge her onus to file a complete and accurate citizenship application listing the correct number of absences from Canada.

[20] The Respondent argues that it is to be borne in mind that the Applicant is not barred from Canadian citizenship as it is open to her to re-apply for citizenship once she meets the requirements as set out in the Act.

[21] The Respondent further submits that contrary to the Applicant's argument, she was clearly aware that the Judge had concerns about her claim that she met the residency requirements as this would be the only reason for the Judge to request additional documentation. Moreover, although she requested three extensions of time to provide the documentation, she was still unable to provide them all. There was no requirement for the Judge to advise the Applicant of his lingering concerns after he had reviewed the documentation submitted. Therefore, there was no breach of procedural fairness.

[22] Finally, the Respondent states that the Judge rendered his decision on July 23, 2012 and that there was no breach of procedural fairness by not considering documents submitted after this date as at some point, a decision had to be made and the Judge did so after the last extension of time requested by the Applicant. If the Applicant wanted a further extension of time or wanted the Judge

to consider additional documents, she should have requested a reconsideration of the decision. However, she did not do so.

IV. Issues

1. Did the Judge fail to consider relevant evidence submitted?

2. Did the Judge breach procedural fairness by failing to indicate to the Applicant the areas of concern that would affect his decision, thereby denying her the opportunity to answer the Judge's concerns?

V. Standard of review

[23] The standard of correctness applies to both issues as they raise questions of procedural fairness (*C.U.P.E. v Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 SCR 539).

VI. Analysis

A. *Did the Judge fail to consider relevant evidence submitted?*

[24] With regards to the evidence submitted on October 4, 2012, the Judge committed no error in rejecting it. It has been recognized by this Court that the Judge is only required to take into consideration the documents submitted before the decision is rendered (*Muhammad v Canada (Minister of Citizenship and Immigration)* (1998), 155 FTR 109 at para 23, 47 Imm LR (2d) 239; *Chandpuri v Canada (Minister of Citizenship and Immigration)* (2000), 12 Imm LR (3d) 98 at para 7, [2000] FCJ No 1850).

[25] As indicated in his letter and as the notice to the Minister pursuant to section 5 of the Act shows, the Judge rendered his decision on July 23, 2012 and it was sent to the Applicant in December. Although it would have been preferable to notify the Applicant of the negative decision at the earliest possibility, it remains that the decision was rendered on July 23, 2012. The Applicant was then able to appeal to this Court from the Judge's decision pursuant to subsection 14(5) of the Act.

[26] Therefore, any document received after July 23, 2012 was not to be considered and the Judge committed no breach of procedural fairness in solely considering the documents submitted before the decision was rendered.

[27] Moreover, there is no evidence before this Court establishing that the Applicant was granted an extension of time to file the additional documents except for the Judge informing that only the evidence submitted up to July 23, 2012 had been considered.

[28] As for the Applicant's argument that it is apparent from the decision that the Judge failed to take into consideration relevant pieces of evidence such as a letter from her eldest child's school and from the University of Toronto and that he should have considered her explanation that her younger son's school had not cooperated with her request for the attendance records for her son, it cannot be accepted by this Court.

[29] All of this evidence was before the Judge and he is therefore presumed to have taken it in consideration (*Cheng v Canada (Minister of Citizenship and Immigration)*, (2000) 97 ACWS (3d)

393 at para 17, 2000 CarswellNat 214; *Kwan v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 738 at para 26, 107 ACWS (3d) 21). He specifically noted that the Payment Summary from the Ministry of Health only contained a few dates of usage, no later than November 15, 2007 and that there were no report cards submitted for the Applicant's children after June 20, 2008, which do not support the Applicant's statement that she has been physically present in Canada for a period of 1095 days during the four years preceding her application for citizenship. It was open to him to conclude on that basis, that the evidence was insufficient to establish the physical presence of the Applicant in Canada. The Judge therefore clearly explained why the submitted evidence was not found to be satisfactory and was not under a duty to discuss every element of evidence presented to him.

B. *Did the Judge breach procedural fairness by failing to indicate to the Applicant the areas of concern that would affect his decision, thereby denying her the opportunity to answer the Judge's concerns?*

[30] The Applicant argues that the Judge could only arrive at the impugned decision if and only if her passport and the stamps therein were found not to be credible. Therefore, the Applicant is of the view that the Judge erred in not making her aware of his concerns regarding the credibility of her passport.

[31] A reading of the decision shows that the Judge considered that the passport and stamps therein as well as the travel records from the CBSA and the Chinese authorities were, in his view, insufficient to reliably establish her physical presence in Canada of more than 1095 days and that a number of additional documents were needed to establish such presence. Although the Judge did not question the credibility of the passport and the other travel documents, he however determined

that on the balance of probabilities, it could not be reliably established that the Applicant had met the test of physical presence in Canada on the basis of the evidence submitted, which he considered as insufficient.

[32] Contrary to the Applicant's submission that the Judge failed to make him aware of his concerns regarding the submitted evidence, the steps that led to the decision point to an opposite finding. Indeed, following the hearing on May 23, 2012 the Judge made a detailed request granting the Applicant until June 25, 2012 to submit additional evidence in order to have the necessary evidence to render an informed decision. By doing so, the Judge clearly expressed his concerns and that is specifically why he requested a number of additional documents to make a fair assessment of the case. The Applicant was therefore fully aware of the case that had to be met in order to prove that she met the test of physical presence.

[33] Moreover, it is to be recalled that as the onus rests with the Applicant (*Shubeilat v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1260 at para 67, 381 FTR 63), she was under an obligation to submit the documents requested by the Judge to establish to his satisfaction that she had spent more than 1095 days in Canada during the four years preceding her application for citizenship. The Applicant submitted a number of documents but failed to comply with the entirety of the Judge's request, therefore leaving the Judge with only part of the evidence that he considered as essential to make the appropriate determination. The Judge, therefore, rendered a decision on the basis of the evidence before him, which he considered as insufficient (*Mizani v Canada (Minister of Citizenship and Immigration)*, 2007 FC 698 at para 19, 158 ACWS (3d) 879).

[34] As only the Applicant requested costs and considering the determination made, no costs will be granted.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The appeal is dismissed.

2. No costs will be granted.

"Simon Noël"

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Judge

FEDERAL COURT

SOLICITORS OF RECORD

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