Federal Court  Cour fédérale

Date: 20140606

Docket: T-139-13

Citation: 2014 FC 550

Ottawa, Ontario, June 6, 2014

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

KOUSAR ABRAR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an appeal under subsection 14(5) of the *Citizenship Act*, RSC, 1985, c C-29 [Act], section 21 of the *Federal Courts Act*, RSC, 1985, c F-7, and Rule 300(*c*) of the *Federal Courts Rules*, SOR/98-106 [Rules], from the decision of a Citizenship Judge, dated October 31, 2012, denying the applicant's Canadian citizenship application for failing to meet the knowledge requirement, pursuant to paragraph 5(1)(*e*) of the Act. The Citizenship Judge further considered whether to recommend the exercise of the respondent's discretion under subsections 5(3) or 5(4)

of the Act, but found that the applicant had not presented evidence as to any special circumstances or hardship to justify it.

[2] The applicant, who represented herself at the hearing before the Citizenship Judge, argues that she had not been aware that a request for special relief could be made and that she was not afforded the opportunity to present such evidence. Had it been the case, she would have presented medical evidence demonstrating that she suffers from anxiety and panics attack when in a crowd.

[3] For the reasons discussed below, this appeal will be dismissed.

Background

[4] The applicant, Kousar Abrar, is a citizen of Pakistan who landed in Canada as a permanent resident on August 14, 2006. Her application for Canadian citizenship was received by Citizenship and Immigration Canada on September 29, 2010.

[5] The Certified Tribunal Record shows that the applicant failed the written test administered by the Immigration Officer and that as a consequence, she was referred to a Citizenship Judge for a hearing that was held on October 31, 2012. At the hearing, the Citizenship Judge administered an oral knowledge test.

[6] By letter dated October 31, 2012, the Citizenship Judge notified the applicant that her citizenship application was non-approved, as she failed to demonstrate through her responses to the test questions the requisite knowledge of Canada and of the responsibilities and privileges of citizenship as per paragraph 5(1)(*e*) of the Act. The applicant had answered 12 out of 20 questions correctly thereby failing to obtain the required passing grade of 75%.

[7] The Citizenship Judge further explained that, as he found the applicant to have failed the knowledge requirement under paragraph 5(1)(*e*) of the Act, he proceeded, in accordance with subsection 15(1), to consider whether to make a favourable recommendation to the Minister of Citizenship and Immigration [Minister] to exercise his discretion to grant citizenship under subsections 5(3) or 5(4) of the Act. Upon the review and assessment of all of the applicant's materials before him, including the supporting information filed by her, the Citizenship Judge found that the applicant failed to present sufficient evidence of any compassion-worthy circumstances or special hardship warranting a favourable recommendation.

Issues and Standard of Review

[8] The respondent raises a preliminary argument, objecting to the introduction of the applicant's affidavit, as it fails to conform to Rule 80(2.1) of the Rules, which requires a jurat in a prescribed form to be appended to an affidavit by someone who does not speak English or French. The respondent argues that the applicant's affidavit, as it has no translator's jurat attached, should carry little or no weight (*Liu v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 375 at paras 9-13; *Velinova v Canada (Minister of Citizenship and*

Immigration), 2008 FC 268). Considering that the facts found in her affidavit form the heart of this judicial review, adds the respondent, her appeal ought to be dismissed.

[9] While I agree that the facts found in the applicant's affidavit are crucial for this appeal, I have a hard time understanding how she passed the language requirement for citizenship, as set forth in paragraph 5(1)(*d*) of the Act, if she does not somewhat understand English. Under those circumstances, I will exercise the discretion granted to me by section 3 of the Rules and accept the applicant's affidavit, as it is in the interest of justice to do so (*Zaldana v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1156).

[10] That said, this appeal raises the issue as to whether the Citizenship Judge's decision was reasonable, in that:

i) it was not based on an erroneous finding of fact made in a perverse or capricious manner or without regard to the evidence before him; and

ii) the Citizenship Judge's reasoning was adequate.

[11] The applicant argues that the standard of review for adequacy of reasons is correctness (*Pourzand v Canada (Minister of Citizenship and Immigration)*, 2008 FC 395 at para 21). However, since the decision of the Supreme Court of Canada in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*Newfoundland Nurses*], the adequacy of reasons is to be subsumed under an analysis of reasonableness. As such, the respondent argues that the decision is only amenable to judicial review in the following instances: if the applicant demonstrates that the written reasons preclude understanding of how

the Citizenship Judge arrived at his final determination; if the decision has no basis in the evidence; and if the reasons exclude the result from the range of acceptable, rational and possible outcomes.

[12] Consequently, the applicable standard of review for the issue raised by this appeal is reasonableness. The law is well established that a Citizenship Judge's findings with regard to the adequacy of an applicant's knowledge of Canada, as well as his decision to recommend a waiver by the Minister under subsection 5(3) or 5(4) of the Act, are to be accorded a substantial degree of deference (*Zhou v Canada (Minister of Citizenship and Immigration)*, 2013 FC 313 at paras 10-11).

Analysis

[13] The applicant argues that at the oral interview, the Citizenship Judge failed to ask her to present evidence of her special circumstances, which could justify a positive recommendation under subsections 5(3) or 5(4) of the Act. The applicant states that she suffers from anxiety and panic attacks, which not only affected her test performance, but rendered her unable to raise these issues on her own. The applicant filed medical letters to support her affidavit, which note her health problems. She also further submits that, in addition to her health problems, she raises and cares for her five children (three still being under 18 years of age), as well as works a full time job. These special circumstances warrant a discretionary granting of citizenship. None of this evidence was before the Citizenship Judge.

[14] In support of her position, the applicant cites two cases: *Navid Bhatti v Canada (Minister of Citizenship and Immigration)*, 2010 FC 25 [*Bhatti*] and *Chaudhary v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1003 [*Chaudhary*]. In both cases, the Court granted the applicant's appeal as the Citizenship Judge failed to consider evidence that was before him.

[15] As for the respondent, he considers the Citizenship Judge's decision to be reasonable, reminding the Court that a grant of citizenship from a country where one was not born is a privilege, not a right (*Arif v Canada (Minister of Citizenship and Immigration)*, 2007 FC 557). An ability to have a basic fundamental knowledge of the history, political structure, and characteristics of Canada are reasonable requirements to be granted the privilege of citizenship.

[16] The applicant's situation differs from that of the applicants in *Bhatti* and *Chaudhary*, as in both these cases, a specific request was made to the Citizenship Judge to consider special or extenuating circumstances for which evidence was adduced by the applicant. In addition, it should be noted that Justice Mandamin's decision in *Bhatti* is essentially based on the inadequacy of the Citizenship Judge's reasons, and that, as it was rendered before the Supreme Court's decision in *Newfoundland Nurses*, it may no longer stand as a precedent.

[17] The applicant bears the onus of satisfying the Citizenship Judge with sufficient evidence that she fulfils all the requirements under the Act or that her circumstances warrant an exercise of the Minister's discretion. The evidence of any special or extenuating circumstances must be brought to his attention before or at the time of the hearing—not after the decision has been

made. I reproduce Justice Harrington's reasons on these criteria in full (*Huynh v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1431):

> [5] All this information was available to Mrs. Huynh when she applied for Canadian citizenship. One of the boxes in the form required her to state "yes" or "no" whether she had special needs and if so, to explain. Mrs. Huynh, who was not represented by counsel at that time, indicated that she had no special needs. Consequently the Citizenship Judge can hardly be criticized for not considering whether to make a recommendation to the Minister to grant Mrs. Huynh's citizenship on compassionate grounds on material which was not before him.
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> [6] However, Mrs. Huynh submits that the process is unfair. If the Applicant does not fare well on the writing test, she is called to appear in person before a Citizenship Judge. The forms do not specifically state that she is entitled to bring material which would at least give rise to the consideration of humanitarian issues. The imperfections of the forms were noted by Gibson J. in Maharatnam v. Canada (Minister of Citizenship and Immigration), [2000] F.C.J. 405. He said, and I agree, that since "most applicants appear before a Citizenship Judge without counsel, and are likely to be unfamiliar with the existence of humanitarian and compassionate discretion, in the interests of fairness, it might be useful to include a brief notice regarding the existence of discretion in the "NOTICE TO APPEAR"".
>
> [7] I am sure that in fact Mrs. Huynh was not fully aware of her legal rights. However, in law she is deemed to have as much knowledge as the Minister (Anticosti Shipping Co. v. Saint-Amand, 1959 CanLII 61 (SCC), [1959] S.C.R. 372). [Emphasis added]

[18] The applicant's factual situation mirrors that of Mrs. Huynh rather closely. She had not retained counsel. She failed to make the Citizenship Judge aware, by way of a doctor's note or other evidence, that her medical condition and other demanding personal circumstances impeded her ability to study and perform well on knowledge tests. Similarly, it was incumbent on the applicant to alert the Citizenship Judge to her struggles with anxiety and intimidation during the citizenship interview. Finally, in her application for citizenship, she checked off "No" in

response to the question about any special needs (Certified Tribunal Record at page 17). There was simply no way for the Citizenship Judge or anyone to know of these special circumstances.

[19] With respect to the adequacy of reasons, the applicant argues that subsection 14(3) of the Act requires the Citizenship Judge to provide more detailed reasoning in denying her application. She cites *Canada (Minister of Citizenship and Immigration) v Li*, 2008 FC 275 at para 6 for the proposition that the reasons must be sufficient to enable the appeal court to discharge its appellate function. With respect, in that case Justice Blanchard was discussing the following factual scenario:

> [7] In the instant case, the Notice of the Decision to the Minister, under the heading "Reasons", is left entirely blank. Since there are no other statements or endorsements which explain the Citizenship Judge's thought process, I am left to conclude that the Judge failed to discharge his duty under subsection 14(2) of the Act. […] [Emphasis added]

[20] The applicant also argues that the Citizenship Judge failed to specifically note how he found her answers to his oral test inadequate. This is all the more the case since the Minister has not released the test.

[21] In communicating the negative decision to an applicant, a Citizenship Judge is required to explain the criteria used to find the applicant lacking adequate knowledge of Canada and to specify the percentage of correct test answers necessary to satisfy the requirement of paragraph 5(1)(e) of the Act (*Abdollahi-Ghane v Canada (Attorney General)*, 2004 FC 741 at para 23). In the case at bar, the Citizenship Judge did just this.

[22] It was the Minister who refused to disclose the questionnaire when it filed the Certified Tribunal Record in this Court. I agree with the respondent that since the applicant never objected to the refusal of the Minister to provide her with her test answers, she cannot now submit that the Citizenship Judge erred in failing to explain the questions put to the applicant (*Liu v Canada (Minister of Citizenship and Immigration)*, 2008 FC 836 [*Liu*]). The burden was on her to establish any error on the part of the Citizenship judge. As Justice Dawson explains in *Liu*:

> [20] In my view, these submissions fail to take into account that the burden is upon Ms Liu to establish any error on the part of the citizenship judge. If Ms Liu was of the view that the redactions to the tribunal record were improper, her remedy was to proceed under Rule 318(3) of the Federal Courts Rules, SOR/98-106. She cannot fail to challenge the tribunal's objection to disclose information and then rely on the omissions from the tribunal record to argue that there is no evidence to support the conclusion of the citizenship judge. […]
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> […]
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> [28] There is no discrepancy between the decision letter and the citizenship judge's notes. The four questions listed in the decision letter were expressly stated to be illustrative – not exhaustive. The balance of Ms Liu's complaints do not detract from the fact that the reasons allowed her to know why her application for citizenship was refused and to consider whether to pursue an appeal. The reasons fulfill the functions for which they are required. The reasons are, therefore, adequate. […]

[23] In conclusion, the Court finds that the applicant has failed to identify any basis upon which her appeal could be allowed.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The applicant's appeal is dismissed; and

2. No costs are granted.

"Jocelyne Gagné"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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