Federal Court  Cour fédérale

**Date: 20141120**

**Docket: T-495-14**

**Citation: 2014 FC 1101**

**Ottawa, Ontario, November 20, 2014**

**PRESENT: The Honourable Madam Justice Kane**

**BETWEEN:**

**KARIM AYYAD**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## JUDGMENT AND REASONS

[1] The applicant seeks judicial review of the decision of Citizenship Judge, Sharon Robertson, made on May 30, 2013 which found that the applicant did not have a good and sufficient cause not to appear to take the Oath of Citizenship.

[2] The facts are straightforward. An application for citizenship was made on behalf of the applicant, who was a minor at that time, on May 4, 2012. On April 5, 2013, his citizenship was granted by an Officer at Citizenship and Immigration Canada (CIC). On April 17, 2013, a Notice

to Appear was sent directing the applicant to attend a ceremony on May 9, 2013 to take his Oath of Citizenship. The notice was sent to the mailing address previously provided by the applicant's mother at their home in London, Ontario.

[3] The applicant, who was in London, England at that time, received the Notice to Appear shortly after May 9, 2013. He advised CIC by letter dated May 14, 2013 that he had been unable to attend as directed because he was in London, England preparing to take his exams at the end of his first year at the City Law School of City University where he was enrolled and attached a letter from the University confirming his enrolment. He requested that the Oath of Citizenship be rescheduled.

[4] The Citizenship Judge decided that the applicant's explanation for failing to attend to take his Oath did not constitute a good and sufficient cause. As a result, the application was then considered abandoned. After repeated requests about the status of the applicant's citizenship application, Counsel for the applicant was advised by letter dated February 24, 2014, from an unnamed Citizenship Official, that the file had been closed.

[5] The result of this determination – that his application for citizenship was abandoned – is that the applicant would have to make a new application for citizenship, now as an adult. The process would recommence and he would have to satisfy all the requirements, despite the fact that he had been granted citizenship in 2013 and the only remaining step was for him to take the Oath of Citizenship.

[6] For the reasons that follow, the application for judicial review is allowed.

**The decision under review**

[7] The decision of the Citizenship Judge is set out on a form dated May 30, 2013. It notes that the applicant was duly notified to attend on May 9, 2013 and did not attend, but notified CIC and submitted his explanation on May 28, 2013, which was within the 60 day period specified in the *Citizenship Regulations*, SOR/93-246.

[8] In the box provided to set out the explanation offered, the judge reiterates verbatim the content of the applicant's letter; he had travelled to London, England to prepare for his end of year Law School exams, which started the first week of May.

[9] The judge then reiterates verbatim the three examples of acceptable explanations provided in the Processing Manual (CP 13, section 6.5) regarding "good and sufficient cause" for missing the Oath Ceremony. The Citizenship Judge then ticked the box indicating that she did not agree that the applicant had good and sufficient cause not to appear.

**The Relevant Provisions**

[10] The *Citizenship Regulations*, SOR/93-246 (as of the date of this decision) provide:

| | |
|---|---|
| 23. (1) Where a person who fails to appear and take the oath of citizenship at the date, time and place appointed for that purpose fails, within 60 days after that date, to satisfy the citizenship judge or foreign | 23. (1) Lorsque la personne qui n'a pas comparu et n'a pas prêté le serment de citoyenneté aux date, heure et lieu fixés à cette fin ne parvient pas, dans les 60 jours qui suivent cette date, à convaincre le juge de la |

| | |
|---|---|
| service officer before whom the person was to appear, or the Minister where the person was to appear before a Minister of the Crown, that the person was prevented from appearing by some good and sufficient cause, the person's certificate of citizenship shall be returned to the Registrar. | citoyenneté ou l'agent du service extérieur devant lequel elle était censée comparaître, ou le ministre si elle était censée comparaître devant un ministre de la Couronne, qu'une raison valable l'a empêchée de comparaître, son certificat de citoyenneté doit être renvoyé au greffier. |
| (2) Where a person described in subsection (1) satisfies the citizenship judge or foreign service officer before whom the person was to appear, or the Minister where the person was to appear before a Minister of the Crown, of the matter referred to in that subsection, another date, time and place shall be appointed by the citizenship judge, foreign service officer or the Registrar for the person to appear and take the oath of citizenship | (2) Lorsque la personne mentionnée au paragraphe (1) réussit à convaincre le juge de la citoyenneté ou l'agent du service extérieur devant lequel elle était censée comparaître, ou le ministre si elle était censée comparaître devant un ministre de la Couronne, du bien-fondé de son empêchement à comparaître, le juge de la citoyenneté, l'agent du service extérieur ou le greffier fixe d'autres date, heure et lieu auxquels elle devra comparaître pour prêter le serment de citoyenneté. |

[11] The *Citizenship Act*, RSC1985, c C-29 (the Act), now provides in Section 13.2 that an application is abandoned where the applicant fails to attend without reasonable excuse. That determination would be made by the Minister or the Minister's delegate. While Section 13.2 of the Act does not apply to this application for judicial review, the respondent helpfully points out that, in the event the Court allows the application for judicial review, any reconsideration of the applicant's reason for not attending to take his Oath of Citizenship would be determined in accordance with Section 13.2 by the Minister and not by a Citizenship Judge. In addition, the wording of "good and sufficient cause" has been replaced by "reasonable excuse".

[12] Section 13.2 of the *Citizenship Act* now provides:

| | |
|---|---|
| 13.2 (1) The Minister may treat an application as abandoned | 13.2 (1) Le ministre peut considérer une demande comme abandonnée dans les cas suivants: |
| (*a*) if the applicant fails, without reasonable excuse, when required by the Minister under section 23.1, | *a*) le demandeur omet, sans excuse légitime, alors que le ministre l'exige au titre de l'article 23.1 : |
| (i) in the case where the Minister requires additional information or evidence without requiring an appearance, to provide the additional information or evidence by the date specified, or | (i) de fournir, au plus tard à la date précisée, les renseignements ou les éléments de preuve supplémentaires, lorsqu'il n'est pas tenu de comparaître pour les présenter, |
| (ii) in the case where the Minister requires an appearance for the purpose of providing additional information or evidence, to appear at the time and at the place — or at the time and by the means — specified or to provide the additional information or evidence at his or her appearance; or | (ii) de comparaître aux moment et lieu — ou au moment et par le moyen —fixés, ou de fournir les renseignements ou les éléments de preuve supplémentaires lors de sa comparution, lorsqu'il est tenu de comparaître pour les présenter; |
| (*b*) in the case of an applicant who must take the oath of citizenship to become a citizen, if the applicant fails, without reasonable excuse, to appear and take the oath at the time and at the place — or at the time and by the | *b*) le demandeur omet, sans excuse légitime, de se présenter aux moment et lieu — ou au moment et par le moyen — fixés et de prêter le serment alors qu'il a été invité à le faire par le ministre et qu'il est tenu de le faire pour avoir la qualité |

| | |
|---|---|
| means — specified in an invitation from the Minister. | de citoyen. |
| (2) If the Minister treats an application as abandoned, no further action is to be taken with respect to it. | (2) Il n'est donné suite à aucune demande considérée comme abandonnée par le ministre. |

[13] Processing Manual CP 13 – Administration, section 6.5, provides:

| | |
|---|---|
| **Exceptions** | **Exceptions** |
| If an applicant provides CIC officials with a reasonable explanation for failure to respond within requested timeframes AND provides proof or evidence to support the explanation, additional time may be granted. At the discretion of the citizenship officer and depending on the nature of the circumstance, an applicant may be given up to six months from the date specified on the original notice by which to comply with the request to provide required documents to appear. | Si un demandeur founit à un fonctionnaire de la citoyenneté une explication raisonnable de l'absence de réponse dans le délai prescrit ET une preuve à l'appui de son explication, il peut obtenir un délai supplémentaire. L'agent de la citoyenneté peut, selon les motifs de l'absence de réponse, accorder un délai supplémentaire maximal de six mois, à compter de la date précisée dans l'avis original, dans lequel le demandeur devra fournir les documents exigés ou se présenter. |
| Example: If the date on the original notice was June 5, 2004, the applicant would have up until December 5, 2004 to comply. This means that clients cannot be made unavailable in GCMS for more than six months. Clients should not be given more than six months "grace" to comply with the requirements of the Act. | Exemple : Si la date dans l'avis original était le 5 juin 2004, le demandeur pourrait avoir jusqu'au 5 décembre 2004 pour se conforme à l'avis. Cela signifie que le dossier d'un client ne peut pas rester inactif dans le SMGC plus de six mois. Il ne faut pas accorder plus de six mois « de grâce » aux clients pour se conformer aux exigences de la Loi. |

| **Acceptable explanations (examples)** | **Explication acceptables (exemples)** |
|---|---|
| Applicant must be away for an extended period to care for a dying parent. | Le demandeur doit s'absenter pour une période prolongée afin de s'occuper d'un parent mourant. |
| Applicant is unable to appear as a result of health constraints following an illness/accident. | Le demandeur ne peut pas se présenter pour des raisons de santé (maladie ou accident). |
| Other extenuating circumstances as deemed reasonable by CIC (e.g. applicant called out of country to sort out family/ business affairs as a result of death in the family). | D'autres circonstances indépendantes de la volonté du demandeur que CIC jugera raisonnables (par exemple, le demandeur a été appelé à l'étranger pour une affaire familiale ou autre, à la suite d'un décès dans la famille). |
| **Unacceptable explanations (examples)** | **Explication inacceptables (exemples)** |
| Applicant lives or continually travels abroad and wants to wait until next trip to Canada. | Le demandeur vit ou voyage continuellement à l'étranger et veut attendre d'être revenu au Canada. |
| Applicant has not prepared for language /knowledge assessment and needs more time to complete classes. | Le demandeur ne s'est pas préparé pour l'examen (connaissance de la langue et connaissance du Canada) et a besoin de plus de temps pour suivre les cours. |
| Applicant neglected to appear on scheduled date. | Le demandeur ne s'est tout simplement pas présenté à la date prescrite. |
| On occasion, there may be reasons put forward by the applicant which are difficult to assess. If a citizenship officer is unsure whether or not to initiate abandonment procedures, advice should be sought from the Integration | Il peut arriver qu'un demandeur fournisse une explication qui est difficile à évaluer. En case de doute, l'agent de la citoyenneté doit demander conseil à la Division de la citoyenneté, de la Direction générale de |

Branch, Citizenship Division. l'intégration.

(I note that CP 13 applied to the provisions in effect prior to August 1, 2014, including section 23 of the Regulations.)

**The Applicant's position**

[14] The applicant argues that the decision is not reasonable because the Citizenship Judge fettered her discretion by considering the examples in the Guidelines to be the only acceptable explanations that would constitute "good and sufficient cause" for failing to attend to take the Oath rather than considering whether the applicant's explanation would be a good and sufficient cause. The applicant notes that CP 13 is a guideline only and there is nothing in the Act or the Regulations to limit the discretion of the Citizenship Judge.

[15] The applicant also argues that the Citizenship Judge failed to provide adequate reasons; the information provided does not reveal an intelligible, transparent or justifiable decision. The reasons do not demonstrate any analysis about why the applicant's explanation is not a good and sufficient cause or would not fall within "extenuating circumstances", which is provided as an example in CP 13.

[16] The applicant submits that the respondent has attempted to provide additional reasons that are not on the record at all – i.e., that the Notice was sent to the applicant's last known address and that the Judge considered his explanation more analogous to one of the unacceptable explanations. The applicant also argues that the reasons should not require the Court to speculate

to provide additional support for the reasonableness of the decision (*Canada (Citizenship and Immigration) v Jeizan*, 2010 FC 323, 386 FTR 1 [*Jeizan*]).

**The Respondent's Position**

[17] The respondent submits that the decision is reasonable and that the reasons, although brief, are adequate.

[18] The respondent notes that there is no statutory requirement to provide reasons when denying an applicant's explanation or request for a new date to take the Oath, unlike decisions made pursuant to section 14 of the *Citizenship Act* which require that reasons be provided.

[19] Alternatively, the respondent submits that, if there is a duty to provide reasons, it is minimal and it was satisfied by the letter sent to the applicant in February 2014, attaching the Citizenship Judge's decision.

[20] The respondent submits that this decision, which sets out the examples of acceptable explanations, along with the record, which includes the applicant's letter and the letter from City University, make it possible to understand why the Citizenship Judge found that the explanation did not constitute good and sufficient cause. She considered the applicant's explanation, was guided by the examples, but found that his reason for not appearing was not a good and sufficient cause.

[21] The respondent submits that the Notice to Appear was sent to the applicant at the address his mother had very recently provided and the fact that he was out of the country when the Notice was sent was not an adequate explanation.

[22] The respondent argues that the Guidelines do not fetter the Citizenship Judge's discretion, noting that they specifically include, as an example of a good and sufficient cause, "other extenuating circumstances as deemed reasonable by CIC". Nor did the Citizenship Judge fetter her discretion by referring to the Guidelines. The respondent argues that by setting out the applicant's explanation and the examples of acceptable explanations, the reasons show that the Citizenship Judge considered the applicant's circumstances, but concluded that these did not constitute a good and sufficient cause.

**The Issues**

[23] The applicant challenges both the reasonableness of the decision to refuse his explanation as a good and sufficient cause and the adequacy of the reasons provided by the Citizenship Judge, which consist of a cut-and-paste from his letter and the CP Guidelines.

[24] The issue is whether the decision is reasonable; this includes whether the Citizenship Judge fettered her discretion, whether the reasons are adequate to allow the Court to understand why the Citizenship Judge reached the decision and whether the decision is within the range of acceptable outcomes (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 [*Newfoundland Nurses*]).

**Standard of Review**

[25] The applicant submits that issues related to fettering of discretion are issues of procedural fairness, reviewable on the standard of correctness.

[26] The respondent submits that both issues – the adequacy of the reasons and whether the judge fettered her discretion – are reviewable on the reasonableness standard.

[27] The standard of reasonableness applies to the Citizenship Judge's decision as it involves an exercise of discretion based on questions of fact and law.

[28] The role of the Court is to determine whether the decision "falls within 'a range of possible, acceptable outcomes which are defensible in respect of the facts and law' (Dunsmuir, at para 47). There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome": (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59, [2009] 1 SCR 339, citing *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*]).

[29] The inadequacy of the reasons is not a stand alone ground to allow an application for judicial review. In *Newfoundland Nurses*, the Supreme Court of Canada elaborated on the requirements of *Dunsmuir*, noting that the reasons are to "be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes" (at

para 14). In addition, where necessary, courts may look to the record "for the purpose of assessing the reasonableness of the outcome" (at para 15). The Court summed up their guidance at para 16:

> In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the Dunsmuir criteria are met.

[30] However, a Court is not expected to look to the record to fill in gaps to the extent that it rewrites the reasons. In *Pathmanathan v Canada (Citizenship and Immigration)*, 2013 FC 353 at para 28, 430 FTR 192 [*Pathmanathan*], Justice Rennie noted that *Newfoundland Nurses* "is not an invitation to the supervising court to re-cast the reasons given, to change the factual foundation on which it is based, or to speculate as to what the outcome would have been had the decision-maker properly assessed the evidence."

[31] Similarly in *Kamolafe v Canada (Citizenship and Immigration)*, 2013 FC 431, 16 Imm LR (4th) 267, relied on by the applicant, Justice Rennie noted, at para 11, that "Newfoundland Nurses is not an open invitation to the Court to provide reasons that were not given, nor is it licence to guess what findings might have been made or to speculate as to what the tribunal might have been thinking."

**The decision is not reasonable**

*The Citizenship Judge fettered her discretion*

[32] The applicant relies on *Singh Bajwa v Canada (Citizenship and Immigration)*, 2012 FC 864 at para 46, 415 FTR 107, as support for his position that the Citizenship Judge limited her

consideration to the Guidelines rather than considering the law and, as a result, fettered her discretion. In that case, Justice O'Keefe found that the fettering of discretion was reviewable on the standard of correctness and the decision-maker was owed little deference.

[33] I agree that the Citizenship Judge's narrow consideration of the examples in the Guidelines as the only possible good and sufficient causes demonstrates a fettering of her discretion.

[34] The Guidelines are meant to provide guidance, as the name suggests, and not to dictate the decision or to provide a checklist. The Guidelines, on their own, do not fetter the decision-maker's discretion; rather, it is the reliance on the Guidelines instead of the law and the Regulations that is the problem. The Citizenship Judge has the discretion to consider a range of explanations, some of which would be analogous to the examples and others which would not; then must determine if the explanation provided by the applicant is a good and sufficient cause.

[35] Whether the correctness or reasonableness standard of review applies does not change the outcome in the present case. However, I prefer the approach of Justice Stratas in *Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 at paras 22-23, 341 DLR (4th) 710, where he first explained the notion of fettering of discretion and then found that this should be considered in the context of assessing the reasonableness of the decision. He offered this approach at para 24:

> [24] *Dunsmuir* reaffirms a longstanding, cardinal principle: "all exercises of public authority must find their source in law" (paragraphs 27-28). Any decision that draws upon something other

> than the law – for example a decision based solely upon an informal policy statement without regard or cognizance of law, cannot fall within the range of what is acceptable and defensible and, thus, be reasonable as that is defined in *Dunsmuir* at paragraph 47. A decision that is the product of a fettered discretion must per se be unreasonable.

[36] I agree that, in the present case, the decision is the product of fettered discretion and is, therefore, unreasonable.

[37] If I am wrong in this finding, I would also find that the decision is unreasonable because the reasons do not permit the Court to understand why the Citizenship Judge made the decision or whether the decision falls within the range of acceptable outcomes.

*The Reasons are not adequate*

[38] Although the adequacy of reasons is not a stand alone ground for judicial review, the pasting in of a paragraph from the applicant's letter setting out the reason he missed the Oath Ceremony, followed by the pasting in of the examples of acceptable explanations from CP 13, section 6.5 cannot be considered reasons. Although there is no statutory requirement to provide reasons, there remains a basic requirement to advise the applicant why his explanation is not a good and sufficient cause. The cut-and-paste approach does not disclose the reasoning of the Citizenship Judge. The respondent has offered potential reasons to fill in this gap, but these are not on the record and call for speculation, which the Court may not engage in.

[39] As noted in *Jeizan*, above, by Justice de Montigny at para 17:

> [17] Reasons for decisions are adequate when they are clear, precise and intelligible and when they state why the decision was

> reached. Adequate reasons show a grasp of the issues raised by the evidence, allow the individual to understand why the decision was made and allow the reviewing court to assess the validity of the decision: see *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, [2008] S.C.J. No. 23 at para. 46; *Mehterian v. Canada (Minister of Employment and Immigration)*, [1992] F.C.J. No. 545 (F.C.A.); *VIA Rail Canada Inc. v. National Transportation Agency*, [2001] 2 F.C. 25 (F.C.A.), [2001] 2 F.C. 25 (C.A.), at para. 22; *Arastu*, above, at paras. 35-36.

[40] In *Canada (Citizenship and Immigration) v Arastu*, 2008 FC 1222 at paras 35-36, 174 ACWS (3d) 336, Justice Russell explained the benefits of reasons. Although that case dealt with a decision made under section 14 of the Act, for which there is a requirement for reasons to be provided, that decision affected the status of the applicant, as it does in the present case:

> [35] The duty to provide reasons is a salutary one. Not only do reasons foster better decision-making by ensuring that the issues and judge's reasoning are well-articulated, but they also provide a basis for an assessment of possible grounds for appeal or review. This is particularly important when the decision is subject to a deferential standard of review: *VIA Rail Canada Inc. v. National Transportation Agency*, 193 D.L.R. (4th) 357 (F.C.A.) at paragraphs 17 and 19.
>
> [36] The duty requires that the reasons be adequate. They must set out the findings of fact and must address the major points in issue. The reasoning process followed by the decision maker must be set out and must reflect consideration of the main relevant factors. Further, a determination of whether reasons are adequate must be considered in light of the particular circumstances of each case. Where a person's status is at issue, the requirements are more stringent: *Baker* at paragraphs 25, 75 and *Via Rail* at paragraphs 21-22.

[41] The reasons required of the Citizenship Judge to either agree or disagree with an applicant's explanation for failing to attend to take the Oath need not be detailed but should disclose not only that the judge has considered the explanation offered but why the judge found that the explanation was not a good and sufficient cause. In the present case, the decision affects

the status of the applicant. He is no longer one small step from Citizenship. Given the consequences, more than the brief reference to his explanation, the examples and the check mark indicating lack of agreement is required.

[42] The guidance provided by *Newfoundland Nurses* calls on the Court to consider whether the reasons, supplemented by the record, allow it to understand why the Citizenship Judge made the decision and determine whether the decision falls within the range of acceptable outcomes. I have looked to the sparse record to supplement and support the outcome, but it does not assist. The Court cannot rewrite the decision with reasons which are not there (*Pathmanathan*, above).

**Conclusion**

[43] The application for judicial review is allowed. The applicant's explanation for not attending to take the Oath of Citizenship must be reconsidered in accordance with the statutory provisions now in force. Once the decision is made, it should be communicated to the applicant promptly. No costs are ordered.

## JUDGMENT

**THIS COURT'S JUDGMENT is that**:

1. The application for judicial review is allowed.

2. The applicant's explanation for not attending to take the Oath of Citizenship must be reconsidered in accordance with the statutory provisions now in force. Once the decision is made, it should be communicated to the applicant promptly.

3. No costs are ordered.

"Catherine M. Kane"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | T-495-14 |
| **STYLE OF CAUSE:** | KARIM AYYAD v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | NOVEMBER 17, 2014 |
| **JUDGMENT AND REASONS:** | KANE J. |
| **DATED:** | NOVEMBER 20, 2014 |

**APPEARANCES:**

| | |
|---|---|
| Cheryl Robinson | FOR THE APPLICANT |
| Nicole Paduraru | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| Gregory J. Willoughby<br>Barrister and Solicitor<br>London, Ontario | FOR THE APPLICANT |
| William F. Pentney<br>Deputy Attorney General of Canada<br>Toronto, Ontario | FOR THE RESPONDENT |