Federal Court  Cour fédérale

Date: 20141210

Docket: T-754-14

Citation: 2014 FC 1187

Ottawa, Ontario, December 10, 2014

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

HELEN WANG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an appeal pursuant to section 14 of the *Citizenship Act*, RSC 1985, c C-29 (*Citizenship Act*) of a decision from Citizenship Judge Ann D. Dillon (Citizenship Judge) refusing the applicant's application for Canadian citizenship. For the reasons that follow the appeal is dismissed.

[2] The applicant is Helen Han Wang, a 44 year old citizen of China. She became a permanent resident of Canada on February 12, 2007, and subsequently applied for Canadian citizenship for her and her minor daughter on July 9, 2010.

[3] On September 22, 2011 the applicant passed a written citizenship test. After completion of the test, the applicant was told to fill out a residence questionnaire. The applicant completed and returned the questionnaire to Citizenship and Immigration Canada in October, 2011. I will return to the questionnaire and its significance in the disposition of this appeal later in these reasons.

[4] The applicant did not hear back regarding her application and the questionnaire until June, 2013, when she had made calls inquiring about the status of her application. Citizenship and Immigration Canada responded to the applicant's inquiry via letter, in which the applicant was told to "be advised that your file has been referred to a Citizenship Judge for a hearing to determine if you meet the residency requirements set out in the *Citizenship Act*". The letter also indicated that a hearing can take from 24 to 30 months to schedule, the applicant "will receive a Notice to Appear" once a hearing with a Citizenship judge is scheduled. The letter did not contain any further information regarding the purpose or content of the hearing.

[5] The Notice to Appear was issued on November 7, 2013, some five months after the June, 2013 letter from Citizenship and Immigration Canada and well before the estimated 24 to 30 month timeframe. The Notice to Appear stated:

> The Citizenship Judge needs more information to make a decision about your citizenship application and you must appear for a

> hearing. At this hearing, the Judge will determine whether you meet all the requirements for citizenship and **you will also be asked questions to determine if you have an adequate knowledge of English or French and an adequate knowledge of Canada.** [Emphasis in original]

[6] At the hearing on November 29, 2013 the Citizenship Judge advised the applicant that she would administer an oral knowledge test. The applicant requested time to study but the Citizenship Judge refused this request. The applicant again requested time to study after the test began and she realized the test was not a multiple choice test. The Citizenship Judge again refused. The applicant received a failing score of 6 out of 20. A passing mark for the knowledge test is 15 out of 20.

[7] At the end of the hearing, the Citizenship Judge told the applicant she was not entitled to medical coverage and directed her to cut up her BC Care Card. The Citizenship Judge also questioned the applicant about GST/HST and child tax credits. The applicant had continued to receive the credits while she was out of Canada, contrary to the *Income Tax Act* (RSC, 1985, c 1 (5th Supp)).

II. The Citizenship Judge's Decision

[8] The Citizenship Judge found that the applicant was physically present in Canada for at least 1,095 days during the relevant period of February 12, 2007 to July 5, 2010. As such she met the residence requirements under subsection 5(1)(c) of the *Citizenship Act*; however, as the applicant did not meet the requirements of subsection 5(1)(e) of the *Citizenship Act* she was not granted citizenship.

[9] In her decision, the Citizenship Judge concluded that, based on the answers to questions posed at the hearing the applicant failed to demonstrate an adequate knowledge of Canada and of the responsibilities and privileges of citizenship pursuant to subsection 5(1)(e) of the *Citizenship Act*.

[10] The Citizenship Judge noted that in the Notice to Appear of November 7, 2013 the applicant was advised in bold print of the possibility of a knowledge test, and that the knowledge test questions are "based on information provided in the study guide, *Discover Canada: The Rights and Responsibilities of Citizenship*".

[11] The Citizenship Judge justified the administration of a re-test because she did not accept that the previously completed written test was a "current reliable indicator" of the applicant's knowledge of Canada. The Citizenship Judge provided two reasons for this conclusion: first, she cited the fact that the applicant had not lived in Canada since the day of her application for citizenship as cause for concern. Second, the Citizenship Judge also commented that some of the applicant's actions suggested she did not understand the responsibilities of Canadian citizenship, such as the applicant's continued collection of GST/HST and child tax benefits while not residing in Canada.

III. Issues and Standard of Review

[12] This case raises three issues on appeal:

a. Whether the Citizenship Judge had jurisdiction to re-test the applicant's knowledge of Canada at the oral hearing;

b. Whether adequate notice regarding the re-test was given to the applicant such that procedural fairness was observed; and

c. Whether there was a section 7, section 15, or section 3 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 (*Charter*) breach in denying the applicant's citizenship application.

[13] The Citizenship Judge's determinations under section 5 of the *Citizenship Act* are a combination of mixed fact and law, and should be reviewed on the reasonableness standard. Issues of procedural fairness and constitutional questions are reviewed on the correctness standard.

IV. Analysis

A. *The Jurisdiction of a Citizenship Judge to Re-test*

[14] Subsection 5(1)(e) of the *Citizenship Act* requires an applicant for Canadian citizenship to have an adequate knowledge of Canada:

Grant of citizenship	**Attribution de la citoyenneté**
5. (1) The Minister shall grant citizenship to any person who	5. (1) Le ministre attribue la citoyenneté à toute personne qui, à la fois:
[…]	[…]
(e) has an adequate knowledge of Canada and of the responsibilities and privileges of citizenship;	e) a une connaissance suffisante du Canada et des responsabilités et avantages conférés par la citoyenneté;

[15] Subsection 14(1) provides that a citizenship application "shall be considered by a citizenship judge who shall […] determine whether or not the person who made the application meets the requirements of this Act and the regulations". Under section 14(2), the citizenship judge shall approve or not approve the application.

[16] The *Citizenship Regulations*, SOR/93-246 (*Citizenship Regulations*) state:

11 (7) If it appears to a citizenship judge that the approval of an application referred to the citizenship judge under subsection (5) may not be possible on the basis of the information available, that citizenship judge shall ask the Minister to send a notice in writing by mail to the applicant, at the applicant's latest known address, giving the applicant an opportunity to appear in person before that citizenship judge at the date, time and place specified in the notice.	11 (7) Lorsque le juge de la citoyenneté saisi de la demande conformément au paragraphe (5) estime qu'il lui est impossible d'approuver celle-ci sans de plus amples renseignements, il demande au ministre d'envoyer un avis écrit au demandeur à sa dernière adresse connue, par courrier, l'informant qu'il a la possibilité de comparaître devant ce juge aux date, heure et lieu qui y sont précisés.

[17] Further, subsection 15(1) of the *Citizenship Regulations* states that a person is considered to have "an adequate knowledge of Canada if they demonstrate, based on their responses to questions prepared by the Minister, that they know the national symbols of Canada and have a general understanding of" the following subjects:

a. The chief characteristics of Canadian political and military history;

b. The chief characteristics of Canadian social and cultural history;

c. The chief characteristics of Canadian physical and political geography;

d. The chief characteristics of the Canadian system of government as a constitutional monarchy; and

e. Characteristics of Canada other than those referred to in paragraphs (a) to (d).

[18] Subsection 15(2) states that a person is considered to have "an adequate knowledge of the responsibilities and privileges of citizenship if they demonstrate, based on their responses to questions prepared by the Minister, that they have a general understanding of" the following subjects:

a. Participation in the Canadian democratic process;

b. Participation in Canadian society, including volunteerism, respect for the environment and the protection of Canada's natural, cultural and architectural heritage;

c. Respect for the rights, freedoms and obligations set out in the laws of Canada; and

d. The responsibilities and privileges of citizenship other than those referred to in paragraphs (a) to (c).

[19] The applicant submits that the Citizenship Judge did not have the jurisdiction to re-test the applicant's knowledge of Canada at the oral hearing, given that the applicant had already successfully passed the written knowledge test. Specifically, it is said that this was an error because section 5 of the *Citizenship Act* requires the Minister to grant citizenship to any person who meets the listed requirements. Citizenship is therefore a statutory right under the *Citizenship Act*. Once an applicant has satisfied all the requirements, as the applicant did, he or she must be granted citizenship (section 5). To withhold citizenship in the case of an applicant

who has met all the requirements is tantamount to an arbitrary decision on the part of the Citizenship Judge.

B. *Conclusion on the Jurisdiction to Re–test*

[20] In my view, the Citizenship Judge had the jurisdiction to test the applicant's knowledge of Canada at the oral hearing. The requirements set out in subsection 5(1) of the *Citizenship Act* are conjunctive: they must all be satisfied in order for the Citizenship Judge to recommend a grant of citizenship to the Minister: *Wang v Canada (Minister of Citizenship and Immigration*), 2005 FC 719. Further, the statutory requirements are contemporaneous. The statute does not provide that it is sufficient that *at one point in time* the applicant had an adequate knowledge of Canada; rather, the statute requires that the applicant *has* an adequate knowledge of Canada: *Huang v Canada (Minister of Citizenship and Immigration)*, 2013 FC 576 and *Santos v Canada (Minister of Citizenship and Immigration)*, 2008 FC 205. Thus, citizenship judges enjoy "a wide measure of discretion" to determine, pursuant to section 14(1) of the *Citizenship Act*, "whether or not the person who made the application meets the requirements of this Act", *Santos* at para 23.

[21] This conclusion is also consistent with established jurisprudence. Chief Justice Paul S. Crampton in *Huang* held that a Citizenship Judge may test an applicant's knowledge of Canada notwithstanding that the applicant previously passed a written test: *Huang* at para 35. Although the Citizenship Judge may re-test an applicant, fairness requires that, "at a minimum, applicants be re-tested where there is a valid reason to do so": *Santos* at para 26. In this case, the Citizenship Judge had a valid reason to re-test.

[22] In this case, the Citizenship Judge had more than ample reason to administer a retest. The answers to the questionnaire provided more than sufficient basis for the decision to retest. The applicant had been absent from Canada for 134 days during the relevant period, and met the residency requirement by a mere 9 days. Her husband had never lived in Canada and lost his permanent residency status in 2012. Curiously, although the citizenship test was conducted on September 22, 2011, the residency questionnaire completed by the applicant, and declared to be true, indicated that on September 17, 2011, the applicant was in Shanghai. Further, in part 11 of the questionnaire eliciting absences from Canada the reason "vacation of 321 days" was noted. This alone was sufficient to trigger a re-examination. An absence from Canada for nearly a full year is not a vacation. The Citizenship Judge concluded:

> You have not lived in Canada since the day of your application for citizenship on July 5, 2010, more than 3½ years ago, and since then you have only visited Canada for less than six weeks in total. Accordingly, a genuine concern arises that you have lost touch with Canada, its institutions, its people, its values and traditions. In order to find that you have met the knowledge requirement of the *Act*, I must be satisfied that you have preserved this basic understanding of Canada.

[23] The Citizenship Judge also concluded that the applicant did not understand the responsibilities of Canadian citizenship because of her collection of GST/HST credits and child tax benefits while she and her child were out of Canada for extended periods of time. In my view, no objection can be taken to the Citizenship Judge's decision to deny citizenship in these circumstances. The statutory scheme affords a wide measure of discretion to the Citizenship Judge to decide on proper information gathering procedures in order to satisfy herself that the applicant possesses the requisite knowledge and, consequently, the Citizenship Judge had sufficient reason to justify a re-test: *Santos* at para 23.

C. *There was no Breach in Procedural Fairness as the Applicant was given Adequate Notice Regarding the Re-test*

[24] The applicant contends that the Notice to Appear, dated November 7, 2013, is not clear that the applicant would be re-tested on her knowledge of Canada. The applicant argues that there was a distinct difference between the notice provided prior to the written knowledge test and the notice provided prior to the oral hearing. Specifically, prior to the written test the applicant was provided with the "Discover Canada" study guide. In addition, the applicant understood that the oral hearing would focus on examining residency requirements – not her knowledge of Canada. According to the applicant, this understanding was reasonable given that she had already successfully passed the written knowledge test.

[25] The applicant submits that procedural fairness requires the Minister to give notice that is unequivocally clear, such as: "Despite your passing the written test, at the interview the Citizenship Judge will still test you on your English or French and Canadian knowledge and for that reason you should re-study the study guide: Discover Canada". The applicant also argues that re-testing an applicant who has already passed the test presents problems, such as the extent, if any, that the results of the first test should be taken into account.

[26] The content of procedural fairness is variable and depends on the specific context of each case: *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 21-22. The five factors to be taken into consideration when assessing the content of procedural fairness in a given situation are: (1) the nature of the decision; (2) the statutory scheme; (3) the

importance of the decision to the individual affected; (4) legitimate expectations; and (5) the choice of procedures: *Baker* at paras 23-28.

[27] In the context of the *Baker* criteria, together with the fact that the degree of fairness required is mitigated by the applicant's ability to submit a new application for citizenship at a future date, I turn to the notices in question:

> NOTICE TO APPEAR – TO WRITE A CITIZENSHIP TEST *(dated 22 August 2011)*
>
> […]
>
> You will have to write a test about your knowledge of Canada and of the responsibilities and privileges of citizenship. You may write the test in English or French. To prepare for the test, you should review the study guide provided to you. At the same time, you will also be expected to demonstrate a knowledge of English or French.
>
> and
>
> NOTICE TO APPEAR – HEARING WITH A CITIZENSHIP JUDGE *(dated 7 November 2013)*
>
> […]
>
> The Citizenship Judge needs more information to make a decision about your citizenship application and you must appear for a hearing. At this hearing, the Judge will determine whether you meet all the requirements for citizenship and **you will also be asked questions to determine if you have an adequate knowledge of English or French and an adequate knowledge of Canada.** [Emphasis in original]

[28] Although the language of the second Notice to Appear is less exhaustive than the first, it is not vague. There is no uncertainty as to what the applicant might face – that is, it is clearly stated that at the hearing the applicant "will also be asked questions to determine if you have […] an adequate knowledge of Canada". At the very least, this notice is sufficient to trigger the

applicant's due diligence to contact Citizenship and Immigration Canada to inquire about what types of questions may be asked, or how those questions would be asked. The applicant did not engage in such an inquiry.

[29] Finally, this Court has affirmed that this type of Notice to Appear properly informs applicants of the potential to be subjected to re-testing by a citizenship judge. In a very thorough analysis of the interplay between the requirements of procedural fairness and citizenship hearings, Justice Simon Noël held that the very similar language of "the judge will ask you questions in order to determine whether you have […] adequate knowledge of Canada" in a Notice to Appear constitutes proper notice (*Al Koury v Canada (Citizenship and Immigration)*, 2012 FC 536). Similarly, the Chief Justice's decision in *Huang* confirms that this type of Notice to Appear does not breach an applicant's procedural fairness rights. The Citizenship Judge's decision to re-test the applicant's knowledge of Canada did not breach the duty of procedural fairness.

D. *Sections 7, 15 and 3 of the Charter are not Engaged in this Case*

[30] The applicant advanced three *Charter* arguments; however, I conclude that neither section 7, 15, nor 3, are engaged in this case.

[31] Section 7 is primarily, but not exclusively, concerned with the rights of individuals in the criminal justice context, including rights on search, seizure, detention, arrest, trial and imprisonment. No principle of fundamental justice has been identified here that can be said to have been breached. The ability to immigrate and obtain citizenship is not among the

fundamental choices relating to personal autonomy which would engage section 7. The interests of the applicant in obtaining citizenship are far removed from those considered in the jurisprudence with respect to section 7; *Tabingo v Canada (Minister of Citizenship and Immigration)*, 2013 FC 377 affd, *Shahid v Canada (Citizenship and Immigration)*, 2014 FCA 191.

[32] The applicant argues that section 15 is engaged because she is discriminated against as a woman in Canada seeking citizenship while her husband remains in China. This argument fails at the threshold requirement that the *Charter* applies to government action: *RWDSU v Dolphin Delivery Ltd.*, [1986] 2 SCR 573. The applicant's argument revolves around the applicant's own decision to pursue citizenship in Canada. This was a private family choice, outside the scope of government action.

[33] Finally, section 3 of the *Charter* only applies to "every citizen of Canada". As the applicant has not yet obtained citizenship, this provision of the *Charter* does not apply to her. Specifically, section 3 states:

3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.	3. Tout citoyen canadien a le droit de vote et est éligible aux élections législatives fédérales ou provinciales.

[34] The language of the provision is clear: only citizens have the right to vote. The applicant is not a citizen, and therefore this right does not apply to her; *Lavoie v Canada*, [2000] 1 FCR 3 at para 41 (CA).

JUDGMENT

THIS COURT'S JUDGMENT is that the appeal is dismissed with costs.

"Donald J. Rennie"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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