Federal Court  Cour fédérale

Date: 20150331

Docket: T-1953-14

Citation: 2015 FC 412

Vancouver, British Columbia, March 31, 2015

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

VIJAYAKUMARI INDRAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The sole issue in this matter is whether the applicant was denied procedural fairness in an interview with a Citizenship Judge. For the reasons that follow, I find that she was not treated unfairly and that the application must be dismissed.

I. Facts

[2] The applicant, Mrs Indran is a Tamil-speaking citizen of Sri Lanka. She first entered Canada in 1998 and became a permanent resident in 2008. Her husband is a Canadian citizen. On July 9, 2012, Citizenship and Immigration Canada [CIC] received Mrs Indran's application for citizenship.

[3] Paragraph 5(1)(e) of the *Citizenship Act*, RSC 1985, c C-29 [the Act], establishes a knowledge requirement for a grant of Canadian citizenship. A candidate must have an adequate knowledge of Canada and of the responsibilities and privileges of citizenship. Subsections 15(1) and 15(2) of the *Citizenship Regulations*, SOR/93-246, list various subjects relevant to the knowledge requirement such as the chief characteristics of Canadian history, geography and our system of government.

[4] Mrs Indran failed her first two attempts at the written knowledge test in November 2012 and July 2013. On July 16, 2014, she attended a hearing with a Citizenship Judge for a third try at the test. This time, it was administered orally. The test consists of 20 questions and the pass mark is 75% (15 questions answered correctly out of 20).

[5] Mrs Indran had been notified that she could bring an interpreter. She brought her husband, who speaks English better than she does and had already qualified for citizenship. He signed an interpreter's oath before the hearing began.

[6] According to Mrs Indran, her husband experienced some difficulty in translating the questions spontaneously. She alleges that the Citizenship Judge suspected that her husband was telling her the answers and cautioned him several times that this was forbidden, threatening to eject him from the hearing if he continued. Mrs Indran further alleges that her husband eventually stopped translating altogether. It is undisputed that the Citizenship Judge administered the entire test to Mrs Indran and that she failed again, answering correctly only 6 questions out of 20. As she erred in answering 6 of the first 7 questions, she failed as soon as she answered question 7 incorrectly.

[7] The results were conveyed to her in a decision letter dated July 22, 2014. The applicant was advised of her right to appeal the decision or to reapply. The Citizenship Judge further stated that she would not make a favourable recommendation under subsections 5(3) or 5(4) of the Act, as there was insufficient evidence of special circumstances that would justify such a recommendation.

[8] There is no record of the oral test other than the question and answer sheet which bears the Citizenship Judge's notations about the answers provided and whether they were correct or not. The applicant submitted an affidavit. She was cross-examined by counsel for the respondent and the transcript was filed in evidence. Neither the husband nor the Citizenship Judge provided affidavit evidence as to what occurred during the test.

II. Standard of Review

[9] Procedural unfairness is reviewable on the standard of correctness: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 129; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Mission Institution v Khela*, 2014 SCC 24 at para 79. If the Court is of the view that the Citizenship Judge behaved unfairly, it must grant the application for judicial review.

III. Analysis

[10] The applicant argues that her right to procedural fairness was breached in two ways. First, the Citizenship Judge interfered with her right to interpretation during the hearing without just cause. Second, the Citizenship Judge did not follow the procedure of suspending the hearing and directing the applicant to return with a different interpreter on a rescheduled date, as is required in circumstances where interpretation is problematic.

[11] Candidates for Canadian citizenship may have legitimate expectations, as the applicant argues, that Citizenship Judges will follow the guidance provided by the CIC policy manual prescribing procedures for citizenship hearings (CP 13 Administration, dated 2008-01-17). This was accepted in *Hernandez v Canada (Minister of Citizenship and Immigration)*, 2005 FC 429 at para 67 (albeit in the context of inadmissibility reports) and is consistent with the principles set out by the Supreme Court in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 26-27 and *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras 93-98.

[12] Section 3 of the manual pertains to the use of interpretation. It recognizes that applicants have the right to an interpreter pursuant to section 14 of the *Canadian Charter of Rights and Freedoms* and section 2(g) of the *Canadian Bill of Rights*. Section 3.7 provides that the decision to permit an interpreter at a hearing rests with the Citizenship Judge. It goes on to state:

> The citizenship judge, at any time during a hearing or ceremony, or a citizenship officer, at any time during an interview, may decide to suspend the proceedings if the judge/officer feels that the interpreter is not providing a faithful interpretation of the questions asked or the answers provided by the client. The appointment will be rescheduled and the client will be directed to provide a different interpreter.

[13] The CIC website provides similar information. It explains that a Citizenship Judge or Officer "has the discretion to stop the proceedings if they feel that the interpreter is not providing a faithful interpretation… The appointment will be rescheduled and the client will be directed to provide a different interpreter."

[14] The applicant argues that the Citizenship Judge took hesitation and pauses as signals that misconduct was occurring. She says that her husband explained that he was having difficulty finding the right words. He then stopped interpreting entirely, which prevented her from properly understanding and answering the questions.

[15] Even if the Citizenship Judge had reasonable suspicions, the applicant submits, she should have followed CIC's policy of suspending and rescheduling the hearing to allow the applicant to find a qualified interpreter. Such recourse would strike a proper balance between the applicant's right to a fair hearing and the Minister's interest in ensuring honest examinations.

Instead of following this protocol, the Citizenship Judge moved forward with the examination – even though the husband had stopped interpreting due to her admonitions. This infringed the applicant's right to interpretation.

[16] I agree with the respondent that the evidence is not sufficient to support the applicant's allegations. First, her right to an interpreter was respected. She selected her husband as her interpreter and he was permitted to perform that role. Unfortunately, as the applicant herself acknowledged on cross-examination, he was not very good at it. Secondly, the applicant's evidence is unclear as to when her husband stopped interpreting. Her evidence does not convincingly establish the moment her husband allegedly ceased to interpret. In her affidavit, she says that this occurred "after a few questions". Under cross-examination, she was even more vague and non-committal.

[17] At best, the applicant's evidence indicates that the Citizenship Judge warned her husband against providing her with the answers and that, at some point in time, he stopped interpreting. It does not establish that, on a balance of probabilities, the husband stopped by reason of intimidation by the Citizenship Judge.

[18] It is clear from the test results that Mrs Indran failed 6 out of the first 7 questions, thereby determining the outcome. Even if the Court were to accept that the Citizenship Judge breached the duty of fairness, it would be unable to determine whether that breach had a material effect on the outcome. If Mrs Indran's husband had gone mute after the eight or ninth or seventeenth question, nothing would turn on it. I note that the applicant states in her affidavit that she had

studied the citizenship guide assiduously whenever she had spare time, yet on cross-examination she stated that she did not know she would be questioned on the guide and had no idea what kind of questions would be asked. This admission, combined with the answers Mrs Indran actually gave to the questions she got wrong, suggests that the problem with her performance on the test did not lie with the interpretation.

[19] It is trite law that sworn testimony must be presumed to be true unless there exist valid reasons to question its truthfulness: see e.g., *Maldonado v Canada (Minister of Employment and Immigration)*, [1979] FCJ No 248 (FCA). In this matter, the issue is not so much the credibility of Mrs Indran's testimony as it is the probative value which it deserves. She bears the burden of proof. She cannot establish a breach of procedural fairness just by asserting that it occurred, in the absence of any corroborating evidence and in the presence of ambiguous and inconsistent sworn statements. When it was put to her on cross-examination that her husband did interpret the questions and she simply failed to answer them, the applicant stated that she did not know what happened.

[20] Each party invited me to draw an adverse inference from the other's failure to submit evidence from the husband or the Citizenship Judge, respectively, citing *R v Starr*, 2000 SCC 40 at paras 153, 160 and 162; *Ellis-Don Ltd v Ontario (Labour Relations Board)*, 2001 SCC 4 at paras 73 and 88. The applicant further urged that I draw such an inference from the failure of the respondent to record the test interview. I will draw no adverse inference, although I note that the respondent bears no onus to prove that a procedural breach did not occur. The party which seeks to invalidate an administrative decision must persuade the Court that the decision contains some

error. In this instance, it would have been helpful to the applicant's case to have submitted an affidavit from her husband.

[21] Since the applicant has failed to prove that the Citizenship Judge deprived her of her right to an interpreter, she has necessarily failed to prove that the Citizenship Judge should have rescheduled the hearing. The CIC manual only prescribes that course of action in cases where a Citizenship Judge decides that an interpreter is not performing his task faithfully. On the face of the record, it would appear that the Citizenship Judge did not believe that line was crossed. Nothing prevents a Citizenship Judge from warning an interpreter when she suspects error or cheating, instead of summarily terminating the examination and rescheduling it. In the circumstances, the applicant has not proven that the Citizenship Judge prevented her husband from continuing, so she has not proven that the duty to adjourn the matter was triggered.

[22] Having reached these conclusions, it is unnecessary for me to decide whether Mrs Indran waived her right to complain of procedural unfairness, as the respondent argued in the alternative. However, I do agree with the Minister that she should have spoken up if she was dissatisfied with her husband's performance. As her final answer on cross-examination indicates, he was not doing a good job. But she was aware that she could bring the interpreter of her choosing and he was her choice. She could have reasonably brought the problem to the Citizenship Judge's attention at some point by mentioning that she could not understand the questions.

[23] The relevant provisions of the *Strengthening Canadian Citizenship Act*, SC 2014, c 22 governing applications for judicial review of Citizenship Court judges came into force on August 1, 2014, by Order in Council (PC Number: 2014-0891) – before Mrs Indran applied for judicial review in this case. The parties were therefore given an opportunity to propose serious questions of general importance in keeping with section 22.2 of the Act as it now reads. No questions were proposed and none will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed without costs. No questions are certified.

"Richard G. Mosley"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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