Federal Court  Cour fédérale

Date: 20150901

Docket: T-19-15

Citation: 2015 FC 1036

Ottawa, Ontario, September 1, 2015

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

NAFISEH ZARANDI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of the refusal of the Applicant's application for Canadian citizenship under section 5 of the *Citizenship Act*, 1985, c C-29. The Applicant seeks to set aside the decision of a Citizenship Judge for failing to provide satisfactory proof of her residence in Canada.

I. Background

[2] The Applicant is a citizen of Iran and became a permanent resident of Canada on August 3, 2007. She applied for Canadian citizenship in February 2012. The relevant residency period was from February 2, 2008 to February 2, 2012. In her application for Canadian citizenship, the Applicant declared a total of 322 days of absences from Canada for a claimed physical presence of 1138 days.

[3] On March 11, 2013, the Applicant was sent a residency questionnaire [RQ] that was to be completed and returned to the CIC office in Vancouver. The RQ directed the Applicant to provide full copies of all pages of expired passports and travel documents. It also specified that all foreign stamps need to be translated into English or French by a certified translator. The Applicant failed to respond to this request.

[4] By letter dated February 26, 2014, the Applicant was sent a "LAST NOTICE" requesting the completed RQ, additional documentary evidence and certified translations of her passports in support of her application for citizenship.

[5] The Applicant, with the assistance of her designated representative, Mohammad Rouhi, submitted a completed RQ, a photocopy of the bio-pages from the Canadian passports belonging to her husband and their two children and a copy of a property tax bill. The Applicant did not include copies of pages of her passport and travel documents, nor translations of foreign stamps, as requested. No other supporting documentation was submitted.

[6] On August 19, 2014, Citizenship Officer E. Ko conducted a review of the Applicant's file and prepared a CIT 0509 – *File Preparation and Analysis Template – Long* form. The Officer concluded: "There is insufficient documentary evidence provided by the [sic] Ms. Zarandi on file to determine if she meets residence requirements as per 5(1)(c) […] I recommend a residence hearing with a Citizenship Judge". The Officer also remarked:

> The Citizenship Language Screening Tool (CLST) was completed in the process of interviewing the client. She demonstrated a minor inability of basic grammar [sic] and use of past tense. When asked "How did you learn English?" she responded "I at home". […] It is apparent that her low language skills inhibited her ability to communicate clearly at the interview. I recommend a language hearing for this application.

[7] On November 27, 2014, the Applicant appeared before a Citizenship Judge. The Citizenship Judge reviewed the Applicant's documents and answers to her questions given at the hearing, and reached the conclusion that she did not meet the requirements of the *Citizenship Act*. In addition, the Citizenship Judge decided that her case did not warrant making a favourable recommendation for the use of discretion.

[8] By letter dated December 23, 2014, the Citizenship Judge advised the Applicant of her decision and gave the following reasons for not approving the Applicant's application for citizenship:

a) the information provided by the Applicant did not accurately reflect the number of days that she was physically present in Canada;
b) there was insufficient objective evidence to establish the Applicant's residence in Canada during the relevant time period;
c) the pattern of physical presence clearly indicated a returning home to Iran and not to Canada;
d) the Applicant was not employed when she was in Canada and did not do any community or volunteer work, or engage in any groups or organizations;

e) the Applicant did not declare all of her absences from Canada during the relevant period and a number of her declared absences were incorrect.

[9] According to the testimony of the Applicant, the citizenship hearing ended up being a fundamentally unfair proceeding. Allegations have been made that during the hearing, the Citizenship Judge was belligerent and belittling towards both the Applicant and her counsel, creating a hostile hearing environment. It is alleged that the Citizenship Judge curtailed the Applicant's counsel's ability to speak in the hearing and thereby impaired, if not terminated, his ability both to translate for the Applicant and to act as counsel on her behalf. After the hearing was concluded, the Applicant's counsel wrote to the Citizenship Judge the next day to complain about the Citizenship Judge's conduct at the hearing.

[10] The Respondent did not cross-examine the Applicant on her affidavit or submit rebuttal evidence, but the Citizenship Judge stated in the last full paragraph of her decision:

> As a final matter, I would like to address certain concerns raised in Mr. Rouhi's letter dated November 28, 2014 (received in my office December 4, 2014). First, he argued that the evidence supported a finding that the Applicant's physical presence exceeded 1095 days. I do not agree and the deficiencies in Mr. Rouhi's analysis of the evidence concerning the Applicant's absences during the relevant period have been fully canvassed above. Second, I regret that the Applicant and her consultant found the hearing to be a difficult experience. However, I note that the Applicant's responses were consistently vague and often contradictory which required me to repeat many questions. I explained the material gaps in the Applicant's documentary evidence several times during the hearing yet neither the Applicant nor her consultant were responsive to the questions raised by such gaps. In large measure because of the apparent difficulty evidenced by the Applicant and her consultant in understanding this evidence, a hearing that was scheduled for the customary one and one half hours in fact continued for two hours. Further, the Applicant was given the opportunity to add any additional comments or thoughts at the end of the hearing.

[11] The Applicant asserts that the Citizenship Judge's decision was unreasonable, that there is a reasonable apprehension of bias by the Citizenship Judge against her, and that the hearing was procedurally unfair.

II. Issues

[12] The issues in the present application are as follows:

A. Did the Applicant satisfy the requirement prescribed under section 5(1)(c) of *Citizenship Act*?
B. Did the Citizenship Judge deny the Applicant her right to an interpreter and counsel, such that the citizenship hearing and decision was procedurally unfair?
C. Did the Citizenship Judge demonstrate a reasonable apprehension of bias?

III. Standard of Review

[13] The determination of sufficient residency by a Citizenship Judge is reviewable on a standard of reasonableness (*Kohestani v Canada (Minister of Citizenship and Immigration)*, 2012 FC 373 at para 12).

[14] The issues of procedural fairness, including an apprehension of bias, are reviewable on a standard of correctness (*Khosa v Canada (Minister of Citizenship and Immigration)*, 2009 SCC 12 at para 43; *Malik v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1283 at para 23; *Fletcher v Canada (Minister of Citizenship and Immigration)*, 2008 FC 909 at paras 6-8).

IV. Analysis

[15] For the reasons that follow, I find that the Applicant was denied a procedurally fair hearing and that the application for judicial review is allowed.

[16] Attached as Annex A is the relevant legislation.

A. *Preliminary Evidentiary Issues*

[17] Let me first deal with several evidentiary issues raised by the Applicant:

i. The Applicant's position is that the affidavit of the Applicant, Ms. Zarandi, sworn February 4, 2015, must be taken as true and accepted at face value, given there was no attempt to cross-examine her on her affidavit (*Mei v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1040 at para 6; *Zhen v Canada (Minister of Citizenship and Immigration)*, 2006 FC 408 at para 9). I agree. However, the presumption of truthfulness may be rebutted if facts on the record indicate credibility issues or other failures to provide sufficient evidence that would be expected to be provided in a particular case (*Lin v Canada (Minister of Citizenship and Immigration)*, 2010 FC 108 at para 23).

ii. The Applicant also argues that the Citizenship Judge's notes are not admissible as proof of their truth or content and cannot be used to establish controversial facts to the facts alleged in Ms. Zarandi's affidavit; the notes can only be used to prove the state of the Citizenship Judge's mind at the time of the interview, as they are not provided as affidavit evidence (*Kovacs v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 167 at paras 9-10). The Respondent argues that the notes are admissible, as part of the Certified Tribunal Record. I agree with the Respondent. Rule 17 of the *Federal Courts Citizenship and Immigration Refugee Protection Rules* governs the production and admissibility of material in the tribunal's possession. The Court will decide what weight should be given to the material within the certified tribunal record.

iii. The Applicant asks the Court to give weight to the allegations of fact in the letter submitted by the Applicant's agent, Mohammad Rouhi, dated November 28, 2014. This letter is provided as unsworn evidence, uses highly inflammatory language, and is not admissible as to the truth or content of the letter, as it does not meet the hearsay evidence admissibility requirement of being necessary and reliable.

B. *Did the Applicant satisfy the requirement prescribed under section 5(1)(c) of Citizenship Act?*

[18] Three tests for meeting residency requirement under section 5(1)(c) have been used by this Court and the Citizenship Judge has discretion to apply any one of those three tests. Here, the Citizenship Judge adopted the test set out in *Re Koo*, [1993] 1 FC 286 at para 10. The *Koo* test requires a citizenship judge to determine whether Canada is the place where the applicant "regularly, normally or customarily lives". Another formulation of the same test is whether Canada is the country in which he or she has centralized his or her mode of existence. Questions that assist in such a determination are:

> (1) Was the individual physically present in Canada for a long period prior to recent absences which occurred immediately before the application for citizenship?
>
> (2) Where are the applicant's immediate family and dependents (and extended family) resident?
>
> (3) Does the pattern of physical presence in Canada indicate a returning home or merely visiting the country?
>
> (4) What is the extent of the physical absences? If an applicant is only a few days short of the 1,095-day total it is easier to find deemed residence than if those absences are extensive.
>
> (5) Is the physical absence caused by a clearly temporary situation such as employment as a missionary abroad, following a course of study abroad as a student, accepting temporary employment abroad, accompanying a spouse who has accepted employment abroad?
>
> (6) What is the quality of the connection with Canada: is it more substantial than that which exists with any other country?

[19] The Citizenship Judge gave a negative decision in response to all six of these questions. The Applicant had not accumulated at least three years of residence in Canada in the four years

immediately preceding the date her application was received by the Citizenship Court, as required by section 5(1)(c) of the Act, did not show a central, quality connection to Canada, and nor could the Citizenship Judge exercise her discretion to approve the application based on humanitarian or compassionate grounds.

C. *Did the Citizenship Judge deny the Applicant her right to an interpreter and counsel, such that the Citizenship hearing and decision was procedurally unfair?*

[20] It is not disputed that the Applicant was entitled to an interpreter (*R v Tran*, [1994] 2 SCR 951 at para 77 [*Tran*]; *Indran v Canada (Minister of Citizenship and Immigration*), 2015 FC 412 at para 12 [*Indran*]).

[21] The Applicant argues that given the Citizenship Judge's interference with her interpreter and counsel during the course of her hearing, his ability to serve as her interpreter was effectively extinguished early on in the hearing. As such, the Applicant's failure to understand and fully reply to the Citizenship Judge's questions led to an unfair hearing given her inability to meaningfully participate in the proceeding.

[22] According to the Applicant's uncontested evidence, the Applicant's interpreter, Mr. Rouhi, was:

i. prohibited from speaking unless he was being directly looked at by the Citizenship Judge;
ii. repeatedly stopped from speaking throughout the course of the interview; and
iii. constantly prohibited from providing translation services in all but three instances.

[23] The Applicant also states that the Citizenship Judge's own observations during the course of the hearing indicate that the Applicant had trouble understanding and communicating, as did

her interpreter and counsel, Mr. Rouhi. As such, there was no "continuous, precise, competent, impartial and contemporaneous interpretation, which the Applicant was entitled to, during the hearing" (*Mohammadian v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 191 at para 4; *Tran*, above, at paras 58-67).

[24] The Applicant further argues that if the Citizenship Judge believed that the interpreter, Mr. Rouhi, was at fault as not being capable as an interpreter, then the Citizenship Judge should have rescheduled the hearing until a competent interpreter could be engaged by the Applicant (*Indran*, above, at paras 10-13; *Kalkat v Canada (Minister of Citizenship and Immigration)*, 2012 FC 646 at paras 46-48).

[25] Finally, the Applicant takes the position that this is not a case where the rationale of *Mobil Oil Canada Ltd v Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202 at para 53, can apply: this is not a case where the matter on redetermination, being a question of fact as to whether the Applicant's centralized mode of living is in Canada or not, is a "particular kind of legal question, viz., one which has an inevitable answer" and "the demerits of the claim are such that it would in any case be hopeless". I agree.

[26] The Respondent's position is that the Applicant had a fair and meaningful hearing and was represented by her interpreter and counsel, Mr. Rouhi. The fact that Mr. Rouhi proved not to be effective or persuasive as her representative does not result in a denial of procedural fairness.

[27] In my opinion the Applicant was denied procedural fairness. While the right to counsel is not guaranteed in citizenship hearings, the right to continuous and contemporaneous interpretation is a fundamental right and is necessary for ensuring a full and fair hearing.

[28] Mr. Rouhi was at the hearing to both represent and interpret for the Applicant. The Applicant's evidence describes a hearing where Mr. Rouhi was repeatedly stopped from speaking throughout the interview and was prohibited from providing translation services. Clearly, this would impede his ability to translate. Without his translation, the Applicant – who had "low language skills" that inhibited her ability to communicate clearly – was unable to meaningfully participate, a requirement for procedural fairness.

[29] The Citizenship Judge notes that she provided an additional 30 minutes for the hearing, and provided an opportunity to provide comments at the end. One wonders, though, realistically how effective this would have been to rectify the procedurally unfair hearing to that point. It clearly did not provide the interpreter with an opportunity to clear up misunderstandings that had occurred over the previous two hours.

D. *Did the Citizenship Judge demonstrate a reasonable apprehension of bias?*

[30] As stated above, I give no weight to the letter of Mr. Rouhi, given the letter amounts to unsworn statements which are neither reliable nor necessary. Ms. Zarandi's affidavit also makes serious allegations of misconduct on the part of the Citizenship Judge, resulting in a reasonable apprehension of bias – this is a question of procedural fairness. I must decide whether the

process followed by the Citizenship Judge satisfied the level of fairness required (*Khosa v Canada (Citizenship and Immigration)*, 2009 SCC 12 at para 43).

[31] Ms. Zarandi alleges that the Citizenship Judge was belligerent and belittling towards both the Applicant and her counsel, creating an "intensely hostile hearing environment". It is the Applicant's position that the Citizenship Judge's conduct shows antagonism and open hostility towards the Applicant and her counsel throughout the proceeding, effectively denying the Applicant her right to her interpreter and counsel, and repeatedly berated her for not understanding the questions put forward, or for providing vague or nonsensical responses.

[32] Given that the Applicant's affidavit regarding the conduct of the Citizenship Judge is uncontroverted, and the Respondent elected not to cross-examine her on her affidavit, the Applicant states that I must accept this evidence.

[33] As stated by Justice Mactavish in *Shahein v Canada (Minister of Citizenship and Immigration)*, 2015 FC 987 at paras 19-21:

> [19] The test for determining whether actual bias or a reasonable apprehension of bias exists in relation to a particular decision-maker is well known: the question for the Court is what an informed person, viewing the matter realistically and practically - and having thought the matter through - would conclude. That is, would he or she think it more likely than not that the decision-maker, either consciously or unconsciously, would not decide the matter fairly: see *Committee for Justice and Liberty v. Canada (National Energy Board)*, 1976 CanLII 2 (SCC), [1978] 1 S.C.R. 369, at p. 394, 68 D.L.R. (3d).
>
> [20] Dr. Shahein notes that the evidence in his affidavit regarding the conduct of the Citizenship Judge is uncontroverted, and that the respondent elected not to cross-examine him on his

> affidavit. As a consequence, Dr. Shahein submits that I must accept his evidence on this point. I do not agree.
>
> [21] An allegation of bias, especially an allegation of actual, as opposed to apprehended, bias, is a serious allegation. Indeed, it challenges the very integrity of the adjudicator whose decision is in issue. As a consequence, the threshold for establishing bias is high: *R. v. S. (R.D.)*, 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484, at para. 113, 151 D.L.R. (4th) 193.

[34] This approach to questioning whether an apprehension of bias exists has been considered by Justice Zinn as well, in *Fletcher v Canada (Minister of Citizenship and Immigration)*, 2008 FC 909 at paras 6-8:

> **6** Allegations of an apprehension of bias must be examined within the context of challenges to the right to procedural fairness. As the Supreme Court of Canada noted in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, "the more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated". I can think of few processes more important to the lives of immigrants to Canada than the citizenship process.
>
> **7** The other four factors discussed in Baker - the closeness to the judicial process, the nature of the statutory scheme, the expectations of the parties, and the choices of procedure made by the decision-maker - do not suggest that in the citizenship process the applicant is to be afforded less than a high degree of procedural fairness.
>
> **8** The burden of showing that there is a reasonable apprehension of bias is on the party who alleges it. While that burden may be high, the Court must not hesitate to find that the allegation has been made out where the facts warrant, even in circumstances where the result reached was reasonable and appropriate based on the facts. The issue is a party's right to receive procedural fairness; not the decision reached.

[35] As well, in *Zhou v Canada (Minister of Citizenship and Immigration)*, 2013 FC 313 at paras 34, 35, 37, Justice Strickland found:

> **34** In *Lin v Canada (Minister of Citizenship and Immigration)*, 2010 FC 108 at para 23, Justice Zinn canvassed the presumption that allegations are true, unless there is reason to doubt their truthfulness:
>
> > [23] "[W]hen an applicant swears to the truth of certain allegations, this creates a presumption that those allegations are true unless there be reason to doubt their truthfulness": *Maldonado v. Canada (Minister of Employment and Immigration)*, [1980] 2 F.C. 302 at 305 (C.A.). "The 'presumption' that a claimant's sworn testimony is true is always rebuttable, and, in appropriate circumstances, may be rebutted by the failure of the documentary evidence to mention what one would normally expect it to mention" [emphasis added]: *Adu v. Canada (Minister of Employment and Immigration)*, [1995] F.C.J. No. 114 (F.C.A.) (QL) at para. 1. [...]
>
> **35** In this case, the Applicant's affidavit evidence was not challenged by the Respondent by way of cross examination or by the filing of an affidavit by the Citizenship Judge denying the allegation of bias. However, there is reason to doubt the truthfulness of the allegations contained in the Applicant's affidavit. As is argued by the Respondent, the Applicant's claim to have answered all of the questions on the Citizenship exam correctly is not borne out by the record. Further, given that the record indicates she failed to answer two of the questions, she cannot reasonably claim to have mistakenly stated that she correctly answered every question nor does she make such a claim. Rather, she contends that the citizenship test is inadmissible, she has declined to review the test when it was made available by way of the confidentiality order and relies on her unchallenged affidavit as evidence that she did correctly answer all of the questions. This undermines the Applicant's credibility.
>
> **37** Given the uncertainty attached to the Applicant's credibility, and the fact that her statements are the only evidence on record regarding bias, I find that the Applicant has failed to meet the high threshold for establishing a reasonable apprehension of bias.

[36] Given the many credibility concerns raised not only by the Citizenship Judge, but also by Officer Ko during his interview with the Applicant, I do not find that there was any basis for actual bias or a reasonable apprehension of bias.

THIS COURT'S JUDGMENT is that:

1. The application is allowed and the Applicant's citizenship application is remitted to a different citizenship judge for re-determination;

2. No costs.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-19-15
STYLE OF CAUSE:	NAFISEH ZARANDI V MCI
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	AUGUST 27, 2015
JUDGMENT AND REASONS:	MANSON J.
DATED:	SEPTEMBER 1, 2015

APPEARANCES:

Anthony Navaneelan	FOR THE APPLICANT
Neeta Logsetty	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Mamann, Sandaluk & Kingwell Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT