Date: 20080729

Docket: T-2239-07

Citation: 2008 FC 909

Ottawa, Ontario, July 29, 2008

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

CHRISTINE SIMONE FLETCHER

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Ms. Fletcher wants to become a citizen of Canada. Her present circumstances are such that she has not been physically present in Canada for at least three of the previous four years preceding her application. She believed that her connections to Canada would overcome the lack of physical presence. The Citizenship Judge disagreed. In conducting the hearing the Judge made comments

that lead Ms. Fletcher to believe that he had made up his mind before she had the opportunity to present evidence of her connections and make submissions. She asks that the decision of the Judge be set aside and that she be permitted a rehearing before another.

BACKGROUND

[2] Ms. Fletcher is a citizen of Jamaica and became a permanent resident of Canada on October 2, 2002. She applied for citizenship on February 17, 2006. The relevant period to determine whether she met the residency requirement under paragraph 5(1)(c) of the *Citizenship Act*, R.S.C. 1985, c. C-29, is from February 17, 2002 to February 17, 2006. The Citizenship Judge found that the Applicant had been present 575 days, absent 659 days since the date she became a permanent resident, and that she was short 520 days of the required 1,095 days of residency during the period. It was acknowledged by counsel for the Respondent that the Citizenship Judge erred in failing to include the time Ms. Fletcher spent in Canada in the four year period prior to becoming a permanent resident. Regardless, she failed to meet the required 1,095 days in Canada required under the Act.

[3] Ms. Fletcher raises two grounds on this appeal. She submits that the decision rejecting her application for citizenship ought to be overturned because:

a. she was denied procedural fairness as a result of comments made by the Citizenship Judge which raise a reasonable apprehension of bias; and
b. the Citizenship Judge failed to apply the proper test of residency when determining whether she had established the period of residency in Canada required for citizenship.

ANALYSIS

[4] Ms. Fletcher, in her affidavit filed in support of her appeal, states that the following comments were made by the Citizenship Judge:

a. Upon entering the hearing room with her counsel, the Citizenship Judge commented to her counsel that he "always" submitted applications that the Citizenship Judge was unable to grant;

b. Prior to the commencement of the hearing, the Citizenship Judge said that the Applicant "had applied prematurely" and should have waited until she had the requisite number of days in order to apply, but that he would proceed with the hearing and review the file with her and her counsel present; and

c. After reviewing her connections to Canada and just prior to the conclusion of the hearing, the Citizenship Judge stated that he thought she would make a good citizen, however because she had more "outs" than "ins", if he were to approve the application, "the Minister would later reverse that decision".

There is no written record of the proceeding before the Citizenship Judge but the Respondent did not challenge that these statements were made.

[5] Ms. Fletcher, in her affidavit, says: "I felt it was clear that his decision had been made before my hearing had commenced". She submits that these comments, individually and collectively, provide a foundation for the conclusion that there was a reasonable apprehension of bias on the part of the Citizenship Judge in that he had pre-determined the result of her application before the hearing commenced.

[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.

[9] The Respondent admits that some of the comments were inappropriate, but submits that others were mere statements of fact and do not demonstrate a reasonable apprehension of bias. Counsel candidly acknowledged that the first comment made at the commencement of the hearing

might reasonably lead a person to the view that the Judge had already determined the outcome but submitted that, as the Citizenship Judge carried on with the hearing and considered the evidence and submissions presented, these would be allayed. The Applicant argues that the last comment of the Judge effectively undoes any ameliorating effect the conduct of the hearing would have had.

[10] The Respondent also submits that in failing to raise her concerns regarding her apprehension of bias at the earliest opportunity, the Applicant had impliedly submitted to the jurisdiction of that judge and effectively waived a right to subsequently raise allegations of apprehended bias: *Re Human Rights Tribunal and Atomic Energy of Canada Limited*, [1986] 1 F.C. 103 (F.C.A.) at pp. 110 and 113; *Cougar Aviation Ltd. v. Canada (Minister of Public Works and Government Services)*, [2000] F.C.J. No. 1946 (F.C.A.) at para. 43; *Frenette v. Canada (Attorney General)*, 2004 FC 879 at para. 30; *Bouaouni v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1211 at para. 19; *Ranganathan v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1367 at paras. 18-20; *Cota v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 872 (T.D.) at para. 26; and *Bassila v. Canada*, 2003 FCA 276 at para. 10.

[11] The Applicant submits that those cases are distinguishable on their facts. She argues that one must distinguish between allegations of institutional bias, as in the *Human Rights Tribunal* decision, and attitudinal bias, which is claimed in this case. Further, she submits, one must consider the statements made within the context of the procedure which, in this instance is highly informal and of short duration.

[12] The Supreme Court of Canada has indicated that the question to be asked when assessing if there is a reasonable apprehension of bias is whether the litigant would think that it was more likely than not that the decision-maker, whether consciously or unconsciously, would not decide fairly.

> … the apprehension of bias must be a reasonable one held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically--and having thought the matter through--conclude. Would he think that it is more likely than not that Mr. Crowe [the Chairman], whether consciously or unconsciously, would not decide fairly." (*Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369 at 394).

[13] In my view, the comments of the Citizenship Judge in this case arguably do create a reasonable apprehension of bias.

[14] The first comment that counsel “always” brings cases to the Citizenship Court Judge where citizenship cannot be granted, might well cause a reasonable person to think that her application had been pre-determined. The Respondent submits that the Judge was merely expressing his preliminary view of the matter before him and that he is obligated under the scheme of the Act to review the application file prior to the hearing. Thus, it is argued, it is not surprising or unexpected that he would have formed some preliminary opinion on the merit of the application.

[15] While I agree that the Citizenship Judge is required to review the file before the meeting with an applicant, and he will have undoubtedly formed some impression of the merits of the application, the statement made in this case, in my view, goes too far. The statement is

embarrassing and probably unfair to counsel. More importantly, it would lead a reasonable person hearing it to conclude that the evidence to be lead and submissions to be made by counsel would not matter at all, as this counsel always loses in front of this judge. In my view, this comment, standing alone, would reasonably lead an applicant for citizenship to the view that, like Don Quixote, she would be tilting at windmills in trying to convince this judge of the merit of her application.

[16] The other comments complained of could serve to reinforce that perception. However, standing alone, I cannot find that the subsequent comments are likely to lead to a reasonable apprehension of bias and had the first comment not been made, I doubt that they would have been taken as anything other than a comment that the Applicant needed to wait until she had more days of physical residence in Canada, coupled with a positive comment as to her personal qualities.

[17] The law requires that allegations of bias be made promptly, whether they are institutional, as in the case of the *Human Rights Tribunal* case, or attitudinal, as in this case and as in the *Bassila* case. This procedure permits the Judge to recuse him or herself and have the matter referred to another decision-maker and avoids an unnecessary waste of Court time and resources. Because these objections were not raised before the Citizenship Judge, the Applicant may not raise them now. Nonetheless, the comments of the Judge were, in my view, inappropriate and should not have been said.

[18] The term "residence" has been given different interpretations by this Court. One involves actual physical presence in Canada for a total of three years, calculated on the basis of a strict

counting of days (*Pourghasemi (Re)*, [1993] F.C.J. No. 232 (T.D.)). The others involve a less stringent requirement of physical presence so long as the applicant's connection to Canada remains strong. The Citizenship Judge in this case applied the strictest of the tests for residency, the *Pourghasemi* test that requires a physical presence in Canada and involves a strict counting of days. The fact that the Judge listened to and considered the Applicant's ties to Canada notwithstanding she failed to have sufficient actual presence in the country, suggests that he was open to be persuaded, had the evidence been sufficient, to use one of the lesser residency tests. However, the fact remains that he did not – he chose to use the stricter test.

[19] The Citizenship Judge is entitled to considerable deference and his decision is reviewable on the standard of reasonableness. In the circumstances before him and given the jurisprudence of this Court, his decision cannot be said to have been unreasonable. Accordingly, this appeal is dismissed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this appeal is dismissed.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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