Federal Court  Cour fédérale

Date: 20090522

Docket: T-1420-08

Citation: 2009 FC 507

Ottawa, Ontario, this 22nd day of May 2009

Present: The Honourable Mr. Justice Pinard

BETWEEN:

DEEPTI KOCHAR

Applicant

and

CITIZENSHIP AND IMMIGRATION CANADA (CIC)

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an appeal, pursuant to subsection 14(5) of the *Citizenship Act*, R.S.C. 1985, c. C-29 (the "Act"), of a Citizenship Judge's decision, dated August 8, 2008, denying the applicant Canadian citizenship.

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[2] Deepti Kochar (the “applicant”) is representing herself on this application. She is a citizen of India, and arrived in Canada from India on May 5, 2003 as a permanent resident.

[3] Between August 30, 2003 and January 25, 2007, the applicant left Canada on several occasions to visit family in India or to attend training in the United States.

[4] On January 14, 2007, the applicant applied for Canadian citizenship. However, her husband, who had filled out the application while she was away, miscalculated the number of days she had spent in Canada, coming up with the figure of 1,286, having forgotten to exclude certain periods when she was in the United States.

[5] When the applicant learned of this mistake, she decided to withdraw her application. She was counseled, however, by a Citizenship officer to recalculate the number of days she had resided in Canada: if they amounted to less than 1,095, she should withdraw, but if they added up to more than 1,095, then she should pursue her application and explain the discrepancy to the judge. The applicant’s recalculation gave her a total of 1,096; she therefore decided not to withdraw her application.

[6] The hearing before the Citizenship Judge took place on June 20, 2008. At the conclusion of the hearing, the Citizenship Judge granted the applicant an additional 21 days to submit supporting documents to demonstrate her physical presence in Canada. The applicant signed a document stating she would provide additional evidence (*i.e.*, proof of employment, proof of domicile, school

records, personal health records, banking records, and, medical records) to the Citizenship Judge by July 11, 2008.

[7] On June 23, 2008, the applicant called the Ministry of Health requesting the records, but was told that it would take at least a month to obtain them. She claims she was also told that the Citizenship Judge would be aware of this.

[8] The applicant subsequently called the Ministry of Citizenship and Immigration ("CIC"), informing CIC of the Citizenship Judge's request that she submit health records by July 11, and of the Ministry of Health's statement that this was not possible. She also mentioned that she had moved temporarily to Surrey, British Columbia. When asked, CIC indicated that they had no record of a meeting between the applicant and the Citizenship Judge on July 11. It was suggested that she change the address on her file and have it moved to Surrey.

[9] The applicant was in the process of waiting for her file to be moved to Surrey when she received the Citizenship Judge's decision.

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[10] In a letter dated August 8, 2008, the Citizenship Judge informed the applicant of her decision to reject her application for Canadian citizenship because she had not submitted sufficient proof of residence to meet the requirements of paragraph 5(1)(*c*) of the Act, which requires at least three years of residence within the four years preceding the date of the application. The applicant

had been given 21 days to submit supporting documents, but 49 days had passed at the time of the decision, and no documents had yet been received.

[11] The Citizenship Judge concluded that no evidence had been provided at the hearing of special circumstances warranting a recommendation that the Minister exercise his discretion under subsections 5(3) and 5(4) of the Act.

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[12] Citizenship appeals are not trials *de novo*, but instead proceed by way of application based on the record before the Citizenship Judge (*Canada (M.C.I.) v. Hung*, [1998] F.C.J. No. 1927 (T.D.) (QL), 47 Imm.L.R. (2d) 182, at paragraph 8). Exhibit A of the applicant's affidavit of October 10, 2008, as well as Exhibits G and H of her affidavit of October 8, 2008, cannot therefore be given any consideration by this Court, as they were not before the Citizenship Judge.

[13] The applicant argues that she was denied Canadian citizenship because of a breach of procedural fairness and misinterpretation of the law, on the part of the Citizenship Judge. She does not provide legal arguments in support of her allegations, but instead recites the events leading up to this appeal.

[14] I gather from the applicant's Memorandum of Argument that, in her view, the Citizenship Judge was unreasonable in expecting her to produce the requested medical records within 21 days, when it appears to have been well known that at least a month would be required to obtain them.

[15] However, the Certified Record discloses that, on June 20, 2008, the applicant and the Citizenship Judge signed a document wherein the applicant acknowledged that she would present to the Citizenship Judge documentation identified in a checklist on or before July 11, 2008. Moreover, she appended her signature beneath a line reading as follows: “I understand that should such documentation not be provided, my Citizenship Application may be non-approved by the Judge”.

[16] It was, therefore, incumbent upon the applicant to formally request an extension of time, based on the information she received from the Ministry of Health about the expected delay in obtaining the documents. The applicant may well have relied upon her communication with CIC to release her from the July 11th deadline. Unfortunately, this conversation did not lead to a request for additional time.

[17] In my view, there was no breach of procedural fairness in this regard.

[18] The applicant also appears to contest the reasonableness of the decision itself, insisting that she met the residency requirement. The assessment of residency under paragraph 5(1)(*c*) of the Act involves a mixed question of fact and law, and therefore attracts review on a reasonableness standard. In *The Minister of Citizenship and Immigration v. Khzam*, 2001 FCT 513, [2001] F.C.J. No. 800 (QL), I stated, as I have stated on several other occasions:

> [5] This Court has held that a correct interpretation of s. 5(1)(*c*) of the Act does not require an individual to be physically present in Canada throughout the 1,095 [-day] period prescribed when special and exceptional circumstances exist. However, I consider that actual presence in Canada is still the most relevant and important factor in establishing whether a person was “resident” in Canada within the meaning of this provision. As I have said many times, an unduly long

> absence, though temporary, during this minimum period is contrary to the spirit of the Act, which already allows a person legally admitted to Canada as a permanent resident not to reside in Canada for one of the four years preceding the date on which he or she applies for citizenship.
>
> [My emphasis.]

[19] In this case, the Citizenship Judge appears to have applied the most stringent of the available tests, namely the physical residency requirement, which requires an applicant to prove physical presence in Canada for a minimum of 1,095 days within the four years preceding her application for citizenship. In the letter informing the applicant of her decision, the Citizenship Judge essentially disposes of the matter in the following sentence:

> Although you stated in your application that you were physically present in Canada during the relevant period for 1,286 days, you failed to provide this office with proof of residence in Canada and related documentation.

[20] The Certified Record (at page 22) includes the results generated by the applicant using a Residence Calculator, an on-line tool provided by CIC to assist would-be applicants to determine whether they are eligible to apply for Canadian citizenship. The applicant obtained a total of 1,096 days, one day over the minimum. The Citizenship Judge appears to have marked out that total and replaced it with 1,085 days, based on a discrepancy in the application date indicated. This brought the applicant's numbers down so that she was 11 days shy of the minimum.

[21] Notably, other evidence provided by the applicant at the hearing was not referred to in the decision. This includes evidence of car insurance, credit card account history, employment and

earnings, tax returns from 2004 to 2007, her daughter's 2006 birth certificate, and copies of the applicant's passport.

[22] I am not satisfied that the decision in question provides sufficient detail to allow me to assess the basis on which the applicant fell short of the minimum residency requirement. The Citizenship Judge seems to have relied heavily, if not exclusively, on the Residence Calculator in reaching her result. Even though the Citizenship Judge was entitled to apply the stringent physical residence test, she nevertheless had a duty to apply it based on all the evidence before her, including the oral testimony of the applicant and the documents provided by her at the hearing. There is no indication that she did this. She has not applied that test correctly, which allows me to consider another less stringent, but valid, test also accepted by the Court. Indeed, although physical presence is a crucial factor in determining residency, as I have stated, a shortfall of 11 days cannot be said to constitute a "considerable absence" that necessarily runs contrary to the spirit of the Act. Under the circumstances, the evidence submitted by the applicant before the Citizenship Judge, viewed as a whole, was sufficient to grant the applicant Canadian citizenship. The applicant's failure to submit the requested new evidence in a timely manner did not, in my view, free the Citizenship Judge from her obligation to provide adequate justification for her decision, given the evidence actually in her possession.

[23] Consequently, the application for judicial review is granted. Given the particular circumstances of this case and my above findings, I see no purpose in sending the applicant's request for Canadian citizenship back for "re-determination" by another Citizenship Judge. In my opinion, the expenditure of time and resources in doing so would be inordinate. I find that the

interests of justice require me to return the matter to the same Citizenship Judge, and if unavailable, to another duly designated Citizenship Judge, with the direction to simply grant, as soon as possible, the applicant Canadian citizenship.

JUDGMENT

The application for judicial review of the decision of a Citizenship Judge, dated August 8, 2008, is allowed. The interests of justice require me to return the matter to the same Citizenship Judge, and if unavailable, to another duly designated Citizenship Judge, with the direction to simply grant, as soon as possible, the applicant Canadian citizenship.

"Yvon Pinard"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-1420-08
STYLE OF CAUSE:	DEEPTI KOCHAR and CITIZENSHIP AND IMMIGRATION CANADA (CIC)
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	May 6, 2009
REASONS FOR JUDGMENT AND JUDGMENT:	Pinard J.
DATED:	May 22, 2009

APPEARANCES:

Ms. Deepti Kochar	THE APPLICANT ON HER OWN BEHALF
Ms. Charmaine de los Reyes	FOR THE RESPONDENT

SOLICITORS OF RECORD:

	THE APPLICANT ON HER OWN BEHALF
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT