Federal Court  Cour fédérale

Date: 20130116

Docket: T-1984-11

Citation: 2013 FC 35

Montréal, Quebec, January 16, 2013

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

SEHER KHAN TAREEN

Applicant

and

CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION)

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] In this judicial review proceeding, Ms. Seher Khan Tareen [applicant], asks this Court to quash the administrative refusal on the part of an unidentified official of the Citizenship Unit of Citizenship and Immigration Canada [CIC] to reopen her application for citizenship after it was declared abandoned, and to direct the Minister of Citizenship and Immigration [respondent] to reopen it.

[2] Having carefully reviewed the file and the parties' submissions, the present application must fail. Simply put, I am not satisfied that there has been a breach of procedural fairness and that the respondent was obliged to reopen the applicant's application for citizenship in the particular circumstances of this case.

[3] The applicant has not submitted any affidavit in this matter. I accept the evidence tendered by Ms. Amy Armstrong, Supervisor of the Citizenship Unit of Citizenship and Immigration Canada, in her affidavit dated February 14, 2012.

[4] The applicant submitted her application for Canadian citizenship in June 2008. On December 23 of that year, the respondent mailed the applicant a notice at the address she provided in her application that she was to appear on January 13, 2009, for a citizenship test.

[5] The applicant did not attend. Instead, the applicant's counsel at the time wrote a letter to the respondent dated January 12, 2009 (i.e. the day before the test), requesting that her citizenship test be deferred until no earlier than March 15, 2009, since the applicant had given birth to a son on September 27, 2008, in Pakistan, and had not yet returned.

[6] In January 2009, the respondent mailed the applicant a residence questionnaire to complete because she had less than 900 days of physical presence in Canada during the relevant four-year period. In February 2009, the respondent also mailed the applicant a second notice to appear for her citizenship test, this time scheduled for March 16, 2009, in line with her counsel's above-mentioned request.

[7] The applicant attended the test this time, and passed. She also submitted her residence questionnaire with some supporting documentation four days later.

[8] In July 2010, the applicant's file was reviewed by a citizenship officer. Based on the information and materials provided by the applicant, the officer determined that a "residence hearing" before a Citizenship Judge would be required.

[9] On October 29, 2010, the respondent mailed the applicant a notice to the same address as it had mailed previous notices, directing her to attend a residence hearing on December 3, 2010, before a Citizenship Judge. That notice explained that:

> 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.** [bold in original]

[10] The applicant did not appear for this residence hearing.

[11] On February 24, 2011, the respondent mailed the applicant a second notice to the same address to appear for a residence hearing, this time scheduled for April 1, 2011. This second notice advised the applicant that it was the final notice to be provided, and that her failure to appear would result in her application being closed and the need to submit a fresh application.

[12] Once again, the applicant did not appear.

[13] Subsection 11(9) of the *Citizenship Regulations*, SOR/93-246 [Regulations], provides that "[w]here an applicant … fails to appear at the new date, time and place set pursuant to subsection (8) [i.e. the second notice described above], the applicant's application and any materials relating to it shall be forwarded to the Registrar, who shall record the application as having been abandoned, and no further action shall be taken with respect to the application." Thus, the Regulations dictate that the applicant's application should have been forwarded to the Registrar to be recorded as abandoned.

[14] However, though it need not necessarily do so, the respondent has opted to provide even more latitude and fairness to applicants in its operational policy. According to the respondent's affiant, Ms. Amy Armstrong, Supervisor of the respondent's Citizenship Unit, this policy requires that files such as the applicant's be administratively held in abeyance for thirty days before they are forwarded to the Registrar to be recorded as abandoned. The purpose of this additional thirty-day window is, according to Ms. Armstrong, to afford applicants an opportunity to give any reasonable explanation they may have, along with proof thereof, as to why they failed to appear at the hearings scheduled for them.

[15] The thirty-day administrative grace period passed without any word from the applicant.

[16] It is unclear what happened to the applicant's file next. Presumably the file changed hands administratively at some point between then and June 6, 2011, since the file was recorded as abandoned by the Registrar on the latter date.

[17] As I mentioned above, the applicant did not swear an affidavit in this proceeding. This is problematic. The evidence tendered has to be credible. Alleged breaches of procedural fairness are decided on a correctness standard. In view of the unchallenged evidence that notices were mailed to the applicant advising her that she had to appear, it is important to know why she did not inform CIC earlier that she could not attend and why more than 30 days elapsed before she retained her counsel. Properly speaking, the applicant has not personally explained to this Court why she did not appear for either residency hearing before a Citizenship Judge.

[18] One can only cobble together the applicant's excuse for failing to appear from a review of the Certified Tribunal Record [CTR], which are the documents in the applicant's citizenship file that were forwarded to this Court and the parties by the respondent pursuant to Rule 318 of the *Federal Courts Rules*.

[19] Before me, the applicant's learned counsel takes the position that the respondent had the duty, until the file was officially closed on June 6, 2011, to consider the explanation provided in his letter dated May 25, 2011, as well as his subsequent correspondence requesting that the file be reopened, since it would appear that his letter of May 25, 2011, had been ignored because of some administrative error.

[20] In the CTR, one finds a series of letters from the applicant's counsel, Mr. Christopher Roper, addressed to the Court of Canadian Citizenship. Original letters dated July 28, August 17,

September 14, and October 20, and December 5, 2011, are on file. These letters make reference to another letter, dated May 25, 2011, which is itself attached to the letter dated December 5, 2011.

[21] I will start with the letter dated May 25, 2011. Ms. Armstrong swears in her affidavit that if the May 25, 2011, letter was in fact sent her office (as a courier slip attached by Mr. Roper seems to confirm), it must have been lost by her office because no original is on file.

[22] The letter dated May 25, 2011, begins by stating that the author (Mr. Roper) has recently been retained by the applicant. It continues:

> We understand from our client that she was scheduled to attend Residence Hearings in conjunction with the ongoing processing of her Application on December 3, 2010 and April 1, 2011. Unfortunately, our client has only recently been made aware of the Notices to Attend for the Residence Hearings and, as such, was unable to attend either hearing.
>
> By way of background, our client has been obliged to travel to Pakistan to deal with pressing personal matters, including divorce proceedings which have been initiated in that country. Unfortunately, during her absence the arrangements that had been made to retrieve her mail at her home here in Canada were not adhered to. As a result, our client has only been made aware of the Notices in regards to both Hearings. Had she been aware of the Notices for both Hearings, she either would have attended or would have provided an explanation as to why she was unable to attend. The applicant is, however, available to attend a rescheduled Hearing.
>
> We note from a review of the CIC website that the Application is still "in process" and therefore we assume that procedures incidental to the abandonment of the Application have not been initiated. As such, we would be obliged if the abandonment procedures were not implemented as, based on the information provided by our client, we understand that there is a "reasonable explanation" as to why she was not able to attend at either of the Hearings. As such, we look forward to providing you with details of that "reasonable explanation" together with proof/evidence to support the explanation as specifically contemplated at Section 6.5 of the CP13 [manual] –

> Administration so as to allow for the ongoing processing of the Application and the scheduling of a new Residence Hearing. Further details in that regard will follow shortly. Also attached is documentation relating to Ms. Tareen's divorce proceedings in Pakistan.
>
> Needless to say, Ms. Tareen is anxious to proceed with the ongoing processing of her Application and were it not for the unfortunate situation of her not being provided with the Notices of the Hearings on a timely basis she would have been able to attend either of the Hearings or at least provide an explanation as to why she could not attend prior to each hearing date. As indicated above, Ms. Tareen is in a position to attend a rescheduled Hearing date at the Court's convenience.
> …

[23] It appears that the attached documentation referred to above is a divorce certificate, seemingly issued by the "Govt of Punjab Pakistan." The certificate shows that the dates of the "Notice of Divorce", "Effectiveness of Divorce", and of "Issuance" are all March 11, 2011. The only other date mentioned in English is May 18, 2006. That was the date of the "Failure of Conciliation".

[24] In any event, as mentioned above, this letter and its attachments were either never delivered, were lost, or were otherwise discarded. The next letter sent to the respondent by the applicant through counsel, which is the first of the originals in the respondent's file and the CTR, is dated July 28, 2011. This letter is written more than two full months after the first to elaborate on the "reasonable explanation" for the applicant's non-attendance, and says in part:

> We are now in receipt of "third party" verification of the circumstances which obliged Ms. Tareen to be outside of Canada during the period of the divorce proceedings in Pakistan. Specifically, correspondence from her matrimonial counsel in Pakistan … serves to confirm that Ms. Tareen was obliged to remain in Pakistan from December, 2010, until her divorce in March of this year and, as well, for a period of time thereafter so as to finalize

> certain of the legal procedures and filings incidental to the divorce and the granting of custody of [her] only child… .

[25] The letter from foreign counsel, itself dated July 11, 2011, provides essentially the same details as is paraphrased by Mr. Roper in his letter reproduced above. In other words, no particular dates are referred to by the applicant's foreign counsel beyond "December, 2010," "March 11, 2011," and an unspecified "period of time" "subsequent to the granting of the divorce."

[26] The July 28, 2011, letter from Mr. Roper also does not further elaborate as to how the "arrangements" the applicant made to have her mail forwarded were "not followed", or what those arrangements were in the first place. The next letter from the applicant's counsel is dated August 17, 2011. This relatively short letter seeks a response to the previous letters and a rescheduled date for a residence hearing.

[27] The next letter from the applicant's counsel is dated September 14, 2011. This five-page, single-spaced letter begins by expressing frustration that no reply had been received to the previous letters and that, despite the May 25, 2011, letter, the respondent's online services website displayed that the applicant's application had been marked abandoned on June 6, 2011. The letter eventually demands that the respondent "make immediate arrangements to have [the applicant's] file opened forthwith and, in any event, within the next ten days," failing which the author (Mr. Roper) had instructions to begin an application for judicial review.

[28] This letter did not elaborate on the applicant's "reasonable explanation", though curiously the following passage seems to backtrack on an explanation initially given:

> [W]e note from a review of our client's file and in consultation with our client that our client was not in receipt of the second Notice to Appear for an Interview and may not have been in receipt of the initial Notice to Appear for an Interview [emphasis added].

[29] The next letter from the applicant's counsel is dated October 20, 2011. That letter requested a response no later than fourteen days hence, failing which an application for judicial review in this Court would be commenced, and that costs would be sought on a solicitor-client basis. No further elaboration on the "reasonable explanation" was provided.

[30] The next and final letter from the applicant's counsel is dated December 5, 2011. It provided the respondent "one last opportunity to reactivate [the applicant's] Application," failing which an application in this Court would be launched and that they would "be seeking costs on a solicitor and client basis, i.e. at the writer's hourly rate of $450.00 per hour." Again, no further detail on the applicant's "reasonable explanation" was provided.

[31] The applicant followed through on her ultimatum; the present application for judicial review was launched on December 7, 2011.

[32] The applicant's argument in this Court is relatively simple and straight forward.

[33] Applicant's counsel has insisted before me on the fact that the application for citizenship was not recorded as abandoned by the Registrar until June 6, 2011. Prior to that date, i.e. before it was abandoned, the respondent was provided with a letter – the May 25, 2011 letter (apparently delivered the next day) – that said there was a reasonable explanation as to why the applicant could not attend either of the residence hearings, and that details of that reasonable explanation would

follow in a separate letter. Those details were later provided by counsel in a letter dated July 28, 2011. Therefore, applicant's counsel argues that the respondent was under a duty to consider the applicant's "reasonable explanation". Moreover, since her explanation was fully satisfactory, the respondent was also under a duty to reopen the applicant's file. This Court should therefore quash any decision made not to reopen the application, and direct that it be reopened by the respondent.

[34] I fully endorse the views taken by the respondent who submits that there has been no breach whatsoever to procedural fairness in closing the file and refusing that it be reopened. In my view, there are many flaws in the applicant's argumentation, each one of which is sufficient to justify dismissing this application. The applicant's key premise is that an application for citizenship is not abandoned until such time as that application is forwarded to the Registrar pursuant to subsection 11(9) of the Regulations:

(9) Where an applicant fails to comply with a notice given pursuant to subsection (4) or fails to appear at the new date, time and place set pursuant to subsection (8), the applicant's application and any materials relating to it shall be forwarded to the Registrar, who shall record the application as having been abandoned, and no further action shall be taken with respect to the application.	(9) Si le demandeur ne se conforme pas à l'avis donné en application du paragraphe (4), ou ne comparaît pas aux date, heure et lieu visés au paragraphe (8), sa demande et les documents d'accompagnement sont transmis au greffier qui inscrit la demande comme étant abandonnée, après quoi il n'est plus donné suite à celle-ci.

[Emphasis added]

[35] For one, the plain wording of subsection 11(9) of the Regulations is that the event triggering abandonment is an applicant's failure to attend a second hearing, not the act of the file being recorded as abandoned in the Registrar's computer system. Support for this interpretation comes

from the wording "shall record the application as having been abandoned [emphasis added]," i.e. past tense. Moreover, common sense dictates that abandonment be tied to a relevant event that is ascertainable in advance, such as a failure to appear. If an administrative backlog meant there was a ten-month queue in applications to be processed by the Registrar as having been abandoned, is the respondent under a duty to consider any explanation that might be proffered in these ten months? Of course not.

[36] As I mentioned above, the respondent has adopted a policy of keeping abandoned applications in administrative abeyance for thirty days, during which time it will consider explanations provided by applicants, but it turns out here that the letter from the applicant's counsel (assuming that it was in fact received and not simply lost) was not provided until May 26, 2011, and was well outside that period. At the hearing before this Court, applicant's counsel insisted on the high level of procedural fairness applicable to cases of citizenship and on the prejudice caused to an applicant, to reapply for citizenship in the case of abandonment, since the residency requirements applicable to the new period of consideration may not be met by the applicant.

[37] While the result of abandonment may be unfortunate, in my humble opinion it does not translate into a higher level of procedural fairness. Indeed, while not determinative, there is no clear evidence on record that the applicant had met the residency requirements in the former period since she had less than 900 days of physical presence in Canada. Accordingly, a "residence hearing" was required. Procedural fairness has been amply satisfied in this case by the sending to the applicant of two letters advising her that she had to present herself at the residency hearings, and, in case of the

second notice for the hearing of April 1, 2011, that if she did not present herself at the residency hearing, the file will be closed and she will have to reapply.

[38] Moreover, I fail to see any reviewable error in the subsequent administrative refusal to reopen the file. This was certainly a discretionary decision; no such request having been made in the 30-day delay mentioned in the Manual. As there has been no breach to procedural fairness, I would have to be satisfied that the refusal to reopen the file is unreasonable. The applicant has not provided an affidavit and there are a lot of doubts with respect to the explanations purportedly provided by her counsel. Having closely examined the record, the refusal to reopen was certainly an acceptable outcome in light of the facts and the law.

[39] In short, no injustice has been done and although perhaps frustrating to her at this point, the applicant always has the option of re-applying for Canadian citizenship.

[40] For these reasons, this application shall be dismissed. I note that in the proposed order for dismissal mentioned in the respondent's memorandum of argument, the respondent has not sought costs against the applicant.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review be dismissed.

"Luc Martineau"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1984-11
STYLE OF CAUSE:	SEHER KHAN TAREEN v CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION)
PLACE OF HEARING:	Toronto, Ontario
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