Federal Court  Cour fédérale

Date: 20131001

Docket: T-1828-12

Citation: 2013 FC 1003

Ottawa, Ontario, October 1, 2013

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

MUHAMMAD ASAD CHAUDHARY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Muhammad Asad Chaudhary (the Applicant) appeals the decision of Citizenship Judge Joe Woodward (the Citizenship Judge) denying his application for citizenship. The basis of the decision was that the Applicant did not meet the knowledge requirement of subsection 5(1)(e) of the *Citizenship Act*, RSC, 1985, c C-29 (the Act) and the Citizenship Judge refused to recommend that the Minister exercise his discretion, pursuant to subsection 15(1) of the Act, to waive that requirement. This appeal is brought pursuant to subsection 14(5) of the Act.

Background

[2] The Applicant is a citizen of Pakistan who arrived in Canada on May 6, 2007 and became a permanent resident that same day.

[3] On July 26, 2012, the Applicant appeared at a hearing before the Citizenship Judge accompanied by his brother Muhammad Zahid Chaudhary who acted as his guardian. At that time, the Applicant submitted a Citizenship and Immigration (CIC) standard form, "Request for Medical Opinion" which had been completed by his psychiatrist on May 29, 2012. This indicated that the Applicant's medical condition, including schizophrenia with cognitive deficits, prevented him from acquiring a general understanding of Canada's political system, geography and history, and of the responsibilities and privileges of citizenship (the First Medical Opinion). Based on this, and pursuant to subsection 5(3) of the Act, the Applicant requested that the knowledge requirement contained in subsection 5(1)(e) of the Act be waived on compassionate grounds.

[4] The Citizenship Judge requested that the Applicant submit a more detailed medical opinion, which should include a comment on the permanence of the Applicant's medical condition, the details and side-effects of any prescribed medications, a Global Assessment of Function, a prognosis of his future schooling and career prospects and any other attending physicians.

[5] On August 9, 2013, the Applicant submitted a new standard form "Request for Medical Opinion", again prepared by his psychiatrist which provided further details of his condition (the Second Medical Opinion). By letter dated August 27, 2012, the Citizenship Judge refused the

Applicant's application for Canadian citizenship and refused to recommend a medical waiver (the Decision).

Decision Under Review

[6] In his Decision, the Citizenship Judge informed the Applicant that his application for Canadian Citizenship was not approved. He stated that:

> The Medical evidence provided for you was not sufficient for me to conclude that your medical condition is so permanently serious, that you are incapable of ever acquiring the knowledge of Canada required to satisfy Paragraph 5(1)(e) of the Act […]

[7] The Decision sets out the relevant provisions of the Act and the *Citizenship Regulations*, SOR/93/246, and states that the Applicant did not meet the requirements of subsection 5(1)(e) of the Act as, at the hearing, he failed the knowledge component of the citizenship test, scoring 2 out of 20. The Citizenship Judge stated that, in accordance with subsection 15(1) of the Act, he had considered whether to make a favourable recommendation under subsection 5(3) or 5(4) of the Act. While subsection 5(4) empowers the Governor in Council to direct the Minister to grant citizenship in cases of special or unusual hardship, the Citizenship Judge stated that he had been provided with no evidence of special circumstances to justify such a recommendation of citizenship.

[8] The Citizenship Judge acknowledged that the Applicant had applied for a medical waiver of the knowledge requirement stating that:

> […] Subsection 5(3) of the Act confers discretion to the Minister to waive on compassionate grounds the knowledge requirement that you failed to meet. Grants of such waivers presuppose however that the Claimant be incapable of **ever** satisfying the normal requirements

> of the Act, and it is here that your evidence falls short of justifying my recommending such a waiver […]
>
> [Emphasis in original]

[9] The Decision describes the evidence given at the hearing and the details of the First Medical Opinion of the Applicant's psychiatrist, Dr. Hirst. As to Dr. Hirst's Second Medical Opinion, the Citizenship Judge stated:

> **When the new documentation arrived after the hearing, however, it was somewhat incomplete**. The same Dr. Clinton Hirst restated that the Claimant suffers from "schizophrenia with consequent deficits". The Claimant's verbal comprehension is in the 4th percentile, his working memory in the 18th percentile, and processing speed in the 5th percentile. He has a current Global Assessment of Functioning score of 65. The onset of symptoms was in 2007, at which time medication was initiated. His cognitive deficits "will affect his ability to support himself".
>
> **However, despite the fact that the psychiatrist checked off" yes" to the question, whether the condition is permanent, he did not "comment on permanence of the condition," as requested. No record of the medications was provided, as requested, nor any indication of any side-effects of that medication. There was no second opinion provided, and no discussion of causes. There was no long term prognosis for future schooling and career prospects, given a possible gradual stabilization of the Claimant's condition and fine-tuning of his medication.**
>
> **Decision**
>
> I can only conclude that the lack of conclusive evidence regarding the permanence of your condition is the consequence of the fact that only three years have passed since its onset. Certainly your family must hope that that your condition is not permanent, or that future developments with your medication will sufficiently alleviate your difficulties…
>
> [Emphasis in original]

Issues

[10] In my view, there is only one issue which arises in this matter being whether the Citizenship Judge's refusal to recommend a subsection 5(3) waiver was reasonable.

Standard of Review

[11] Where previous jurisprudence has satisfactorily determined the appropriate standard of review applicable to a particular issue, that standard may be adopted by a subsequent reviewing court (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paras 57, 62 [*Dunsmuir*]).

[12] In this case, prior jurisprudence has determined that the standard of review to be applied to a Citizenship Judge's discretionary determinations under subsections 5(3) and 5(4) of the Act, is reasonableness (*Chen v Canada (Minister of Citizenship and Immigration)*, 2012 FC 874 at para 10; *Amoah v Canada (Minister of Citizenship and Immigration)*, 2009 FC 775 at para 14). On a reasonableness standard, the Court will only intervene absent justification, transparency and intelligibility or an unacceptable outcome in light of the facts and law (*Dunsmuir*, above at para 47).

Analysis

[13] As a preliminary matter, the Respondent takes issue with the admissibility of the medical evidence filed by the Applicant in support of his appeal which was not before the Citizenship Judge. The Applicant, who is self represented and whose brother spoke on his behalf, explains that he did not understand that new medical evidence could not be submitted on appeal. Further, that he had provided the Citizenship Judge's request for further medical information to his psychiatrist and,

until the Decision was issued, had believed that his psychiatrist had caused all of the necessary information to be submitted.

[14] I agree that for the purposes of a subsection 14(5) appeal of the Decision, this Court can only consider the information contained in the Certified Tribunal Record that was before the Citizenship Judge when making the Decision (*Zhao v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1536 at paras 35-36 [*Zhao*]); *Navid Bhatti v Canada (Minister of Citizenship and Immigration)*, 2010 FC 25 at para 20 [*Navid Bhatti*]; *Woldemariam v Canada (Minister of Citizenship and Immigration)*, 2012 FC 621 at para 14 [*Woldemariam*]).

[15] As to the substantive issue before this Court, subsection 5(1) of the Act states that the Minister shall grant citizenship to any person who meets the requirements set out in subsection (a) to (f) of that provision. Subsection 5(1)(e) requires a person to have an adequate knowledge of Canada and the responsibilities and privileges of citizenship. However, subsection 5(3)(a) of the Act states that the Minister may, in his discretion, waive on compassionate grounds, the requirements of subsection 5(1)(d) or (e). Subsection 5(4) gives the Minister discretion to grant citizenship in order to alleviate cases of special and unusual hardship. Subsection 15(1) of the Act requires a Citizenship Judge to consider whether a recommendation to the Minister to exercise his or her discretion under subsection 5(3) or (4) is appropriate before refusing an application. The relevant provisions of legislation are included in the Annex of this decision.

[16] In this case, the Applicant submitted the required standard form, "Request for Medical Opinion" at his hearing before the Citizenship Judge in support of his request that the Citizenship

Judge exercise his discretion and recommend that the Applicant be granted a medical waiver of the knowledge requirement of subsection 5(1)(e) of the Act..

[17] The form requires that the patient's physician answer six questions. In the First Medical Opinion, Dr. Hirst responded, in answer to question 1, that he had first examined the Applicant on October 22, 2009. In response to question 2, that he had last seen the Applicant on May 29, 2012. Question 3 asked "In your opinion does your patient's medical condition **prevent** him/her from a) acquiring enough knowledge of either English or French in order to be understood in the community?" Dr. Hirst checked off the "no" box. However, in response to the second part of that question, being whether the patient's medical condition prevented him/her from "b) acquiring a general understanding of Canada's political system, geography and history, and of the responsibilities and privileges of Canada," he checked the "yes" box.

[18] As he answered "yes" to question 3(b), question 4(a) asked him to describe the medical condition that prevented his patient from acquiring the knowledge described in that question. Dr. Hirst wrote in the provided space:

> Schizophrenia
>
> His cognitive deficits (ie IQ 73, auditory memory <3% + impaired visual memory) make it difficult for him to return written or auditory information. These deficits are exacerbated by schizophrenia.

[19] Question 4(b) asked "Is the condition permanent?" Dr. Hirst checked off the "yes" box. He was only required to further specify his response if he answered "no" to that question.

[20] Question 5 asked if in the opinion of the physician, his patient suffered from a mental disability that prevented him or her from a) appreciating the significance of the oath of citizenship and b) appreciating the consequences of acquiring Canadian citizenship to which Dr. Hirst checked the "no" box in each case. It was only if the answer was "yes" to question 5(a) or (b), was the physician required to respond to question 6. Accordingly, in this case Dr. Hirst did not complete question 6.

[21] At the hearing, the Citizenship Judge provided the Applicant with a form entitled Medical Opinion Requirements which he had annotated by hand. This required:

- a formal diagnosis
- when the condition developed. And, added by hand, onset and causes, cat scan? MRI's? any other attending physicians.
- when the condition caused the applicant to become disabled to the point that he/ she could not learn. Crossed out by hand were the words "or understand the oath" and inserted by hand was "Canadian political culture"
- a description of current treatment. Added by hand was records of prescription
- when the current treatment was initiated and
- whether the condition prevents the applicant from attending to his/her normal daily activities and work

If the condition is psychiatric or psychological in nature, a full report must be provided which includes both a clarifying report and a "Global Assessment of Functioning". Written in hand is "if not available, rough GAT assessment"

In hand at the top of the form was written by hand "please comment on the permanence of condition, side-effects of medication, prognosis on future schooling and career prospects".

[22] In response, Dr. Hirst submitted the Second Medical Opinion. This was the same standard form, completed in the same manner, but elaborated in response to question 4:

> Schizophrenia with consequent cognitive deficits:
> (ie verbal comprehension 4th percentile
> Working memory 18th "
> Processing speed 5th ")
>
> - onset of symptoms 2007
> - treatment includes medication initiated 2007
> - his cognitive deficits will affect his ability to support himself ie there has been a psychological decline
> - current GAF 65

[23] It is against this background that the Decision must be considered.

[24] In *Abdule v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 1524 (QL) (*Abdule*), Justice McGillis considered whether a citizenship judge erred in deciding not to recommend an exemption from the knowledge requirement under the Act. In granting the application, Justice McGillis wrote the following:

> [18] In outlining her reasons for refusing to make a recommendation for the exercise of discretion, the citizenship judge noted that the applicant had failed to provide "any evidence" to establish, among other things, that she had "a physical disability or disease severe enough to impair the learning process". However, to the contrary, the applicant had adduced two letters from a physician outlining medical reasons concerning her inability to learn. As a result, the statement of the citizenship judge that the applicant had not adduced "any evidence" establishes unequivocally that she either failed to consider relevant evidence or misapprehended the evidence before her. The citizenship judge therefore erred either by failing to consider the medical evidence or by misapprehending it.

[25] In the present case, in addition to the Applicant's evidence given at the hearing as to his condition, there was also medical evidence before the Citizenship Judge. However, the Citizenship

Judge found the medical evidence to be insufficient to conclude that the Applicant's medical condition is "so permanently serious" that he was incapable of ever acquiring the required knowledge of Canada. The Citizenship Judge also stated that the granting of a waiver presupposes that the Applicant will be incapable of ever satisfying the normal requirements of the Act and, therefore, the waiver was not justified.

[26] In support of this finding, the Citizenship Judge acknowledged that Dr. Hirst answered "yes" to the question of whether the Applicant's condition is permanent. However, he found this answer to be insufficient as the psychiatrist did not, in addition, "comment on the permanence of the condition," as requested by the Citizenship Judge's hand annotation. In my view, this finding is perverse and unreasonable. Dr. Hirst twice indicated, on the standard forms that comprised his First Medical Opinion and his Second Medical Opinion, that the condition was permanent. That answer is self evident and complete. Permanent is defined in the Encarta Dictionary as "1. everlasting, lasting forever or for a very long time, especially without undergoing significant change 2. unchanging, never changing or not expected to change". *The Canadian Oxford Dictionary*, defines it as "1. lasting or intended to last or function, indefinitely without change. 2. persistent, enduring…"

[27] In my view, a condition is either permanent or it is not permanent. It cannot be more permanent or less permanent. Thus, it was reasonable for the psychiatrist not to further comment on the permanence of the Applicant's condition as he had already twice fully responded to the question. Therefore, nothing remained to be added nor was there anything missing in the response.

[28] The Citizenship Judge also noted that there was no record of medications as requested, or any indication of any side-effects of that medication. It is correct that Dr. Hirst only indicated that treatment included medication started in 2007 and did not specify those details. However, the relevant issue was whether the Applicant's medical condition prevented him from acquiring a general understanding of Canada's political system, geography and history and of the responsibilities and privileges of citizenship pursuant to subsection 5(1)(e). This was the exact question contained in the Medical Opinion to which Dr. Hirst twice answered "yes". Thus, it is not clear why the Citizenship Judge sought information as to the Applicant's medication and its side effects as it would not appear to be relevant nor would be Dr. Hirst's failure to provide that information.

[29] The Citizenship Judge also states that no second opinion was provided. However, in his hand annotations he does not require that a second opinion be obtained and submitted. He merely asks if there were any other attending physicians. Therefore, in my view, the absence of a second opinion is not a reasonable basis for concluding that the medical evidence, the credibility of which was not in question, was insufficient.

[30] The Citizenship Judge also complains that there was no discussion of causes as requested by his annotated request. The Applicant submits that to require an attending psychiatrist to speculate on the cause of schizophrenia is unreasonable. To my mind, the absence of an explanation of the cause of schizophrenia, even if Dr. Hirst could provide it, would add little of relevance to the medical evidence which sought to respond to the Applicant's ability to meet the requirements of subsection 5(1)(e) of the Act given that his condition is permanent.

[31] Finally, the Citizenship Judge states that there was no long term prognosis for future schooling and career prospects "given a possible, gradual stabilization of the Claimant's condition and fine-tuning of his medication". I have already found that Dr. Hirst clearly stated, twice, that the Applicant's condition was permanent. I would also note that there is nothing in the medical evidence that was before the Citizenship Judge that suggested a possible gradual stabilization of the Applicant's condition or of a "fine tuning" of his medication. This appears to be speculation on the part of the Citizenship Judge. The medical evidence was that the Applicant's condition was permanent, that he suffers from specified cognitive deficits, that these would affect his ability to support himself and that he has been in a state of psychological decline.

[32] As to the Citizenship Judge's conclusion that the lack of conclusive evidence regarding the permanence of the Applicant's condition is the consequence of the fact that only three years had passed since its onset, I repeat my comments above. I would further note that the Second Medical Opinion states the onset of symptoms was in 2007 predating the Decision by five years. There is no medical evidence that supports the Citizenship Judge's conclusion in this regard. I would also note that no supporting basis was advanced in the Decision or at the hearing before me for the Citizenship Judge's interpretation of subsection 5(3), as requiring that grants of waivers presuppose that a claimant will be incapable of "ever" satisfying the normal requirements of the Act.

[33] In my opinion, the evidence before the Citizenship Judge did not support his finding that the evidence was insufficient to conclude that the Applicant's condition was permanent. There was evidence which supported considering a recommendation to waive the subsection 5(1)(e)

knowledge requirement *(Al-Darawish v Canada (Minister of Citizenship and Immigration)*, 2011 FC 984 [*Al-Darawish*]; *Navid Bhatti*, above). Accordingly, the Decision is unreasonable as it lacks justification, transparency and intelligibility and is an unacceptable outcome in light of the facts and law.

[34] As regards to the remedy available to the Applicant, the Respondent relies on *Zhang v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 1943 at para 14 (QL) (TD) [*Zhang*], and submits that this Court does not have the jurisdiction to grant citizenship, recommend that citizenship be granted or direct a citizenship judge to make such a recommendation. In *Zhang*, Justice Nadon (as he then was) quotes Justice Strayer in *Re Khat* (1991), 49 FTR 252 in this regard:

> [12] Strayer J then went on to say, at page 253:
>
> > "Section 14(2) provides, however, that as a precondition to making a decision under that subsection, the citizenship judge must consider whether or not to make a recommendation under s. 15(1). While it is not for this court, sitting on appeal, to review the conclusion of the citizenship judge as to whether a recommendation should be made, in a proper case it may be open to this court to refer the matter back to the citizenship judge if this court is not satisfied that relevant factors have been taken into account in the exercise of that discretion".
>
> [13] […]
>
> [14] With respect to the first two orders sought by the appellant, I agree with Mr. Justice Strayer that this Court is without jurisdiction to recommend to the Minister that she grant citizenship to the appellant, I am further of the view that this Court cannot direct the Citizenship Judge to recommend to the Minister the granting of citizenship to the appellant.

[35] In *Abdule*, above, Justice McGillis allowed the applicant's appeal and remitted the matter to the citizenship judge with the direction that she reconsiders, under subsection 15(1) of the Act, whether to make such a recommendation.

[36] Given this and the decisions in *Al-Darawish* and *Navid Bhatti*, above, I agree with the Respondent that if, as it has done, the Court determines the Decision to be unreasonable, then the proper remedy is to remit the matter back to a different citizenship judge for reconsideration. While the Applicant did not frame the remedy sought as a request to remit this matter to a different citizenship judge in his written submissions, he did do so at the hearing. Further this Court has discretion in this regard (subsection 18.1(3), *Federal Courts Act*, RSC 1985, c F-7; *IMS Health Canada v Maheu*, 2003 FCA 462).

[37] The appeal is granted. The matter is to be remitted back to another citizenship judge to reconsider whether to make a recommendation that the Minister waive the knowledge test on compassionate grounds. The reconsideration should also take into consideration the inclusion of the medical evidence submitted by the Applicant in support of this appeal, which includes a letter from Dr. Hirst dated September 15, 2012 clarifying his First and Second Medical Opinions and the Applicant's medical records obtained from Alberta Health Services.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The appeal is granted;
2. The matter is to be remitted back to another citizenship judge to reconsider whether to make a recommendation that the Minister waive the knowledge test on compassionate grounds. The reconsideration should also take into consideration the inclusion of the medical evidence submitted by the Applicant in support of this appeal, which includes a letter from Dr. Hirst dated September 15, 2012 clarifying his First and Second Medical Opinions and the Applicant's medical records obtained from Alberta Health Services;
3. No order as to costs.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1828-12
STYLE OF CAUSE:	CHAUDHARY v MCI
PLACE OF HEARING:	Calgary, Alberta
DATE OF HEARING:	August 28, 2013
REASONS FOR JUDGMENT AND JUDGMENT BY:	STRICKLAND J.
DATED:	October 1, 2013

APPEARANCES:

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