Federal Court  Cour fédérale

Date: 20110518

Docket: T-1617-10

Citation: 2011 FC 573

Ottawa, Ontario, May 18, 2011

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

LUCAS EMEKA OBI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an appeal under section 21 of the *Federal Courts Act*, RSC 1985, c F-7 and subsection 14(5) of the *Citizenship Act*, RSC 1985, c C-29 (the Act), of a decision dated September 9, 2010 of a Citizenship and Immigration Canada (CIC) citizenship judge, wherein the citizenship judge denied the applicant's application for Canadian citizenship.

[2] The applicant requests that the decision be set aside and the matter referred back to a different citizenship judge for redetermination.

Background

[3] Lucas Emeka Obi (the applicant) is a Nigerian citizen born on March 18, 1963. He became a permanent resident in Canada on July 24, 2000.

[4] The applicant appeared before a citizenship judge in April 2004. He was asked for and provided additional documents.

[5] In June 2004, CIC detained the applicant. In November 2005, he was issued a removal order for inadmissibility on the ground that he had not disclosed that he had a previous conviction in the United States. The applicant appealed this order to the Immigration Appeal Division (IAD) which granted a stay of his removal with terms and conditions until approximately June 23, 2011.

[6] The applicant appeared before the citizenship judge on November 21, 2008. The judge then called the applicant in July 2010 concerning the status of the removal order and issued a decision refusing the application for citizenship in September 2010.

Citizenship Judge's Decision

[7] The citizenship judge determined that the applicant was under a removal order dated November 24, 2005 which had not been quashed. The judge found that the applicant did not meet the requirements of paragraph 5(1)(f) of the Act that an individual applying for citizenship not be under a removal order.

[8] Further, the citizenship judge found that pursuant to paragraph 5(1)(c) of the Act, the applicant ceased to be a permanent resident under section 46 of the *Immigration and Refugee Protection Act*, RSC 2001, c 27 (IRPA).

[9] Finally, the citizenship judge also determined that there were no materials in support of making a favourable recommendation under subsection 5(4) of the Act.

Issues

[10] The applicant submitted the following issues for consideration:

1. What is the standard of review?
2. Did the citizenship judge err in law by making a determination while the applicant's stay of removal was still pending before the IAD?
3. Did the citizenship judge deny the applicant natural justice and fairness by failing to provide the applicant with notice and an opportunity to respond to his concerns prior to making his final decision with respect to the applicant's citizenship application?

4. Did the citizenship judge err in law by concluding that the applicant failed to meet the requirements of paragraph 5(1)(c) of the Act as he had ceased to be a permanent resident pursuant to section 46 of IRPA?

[11] I would rephrase the issues as follows:

1. What is the appropriate standard of review?

2. Did the citizenship judge err by finding that the applicant was under a removal order?

3. Did the citizenship judge breach the applicant's right to procedural fairness?

Applicant's Written Submissions

[12] The applicant submits that the citizenship judge erred in finding that he did not meet the requirements of paragraph 5(1)(f) of the Act because he was a person under a removal order. The applicant submits that this was an error because of the application of subsection 14(1.1) of the Act which states that a decision on citizenship should not be made until a final determination about a removal order against that applicant.

[13] The applicant submits that because the IAD stayed his removal order for a period of four years to be reconsidered on or about June 23, 2011, a final determination had not been made.

[14] The applicant also submits that the citizenship judge denied the applicant natural justice by failing to provide him with notice and an opportunity to respond prior to making his final decision.

[15] The judge provided no explanation for why he rendered his decision in September 2010 as opposed to the end of the applicant's IAD probationary period, as requested.

[16] Finally, the applicant submits that the citizenship judge erred in finding that the applicant had lost his permanent resident status. An individual appealing a removal order to the IAD does not lose his permanent residence until the appeal is finally determined. Consequently, section 46 of IRPA does not apply to the applicant.

Respondent's Written Submissions

[17] The respondent concedes that the citizenship judge erred in finding that the applicant had lost his permanent residence status under sections 46 and 49 of IRPA.

[18] However, the respondent submits that the citizenship judge correctly determined that the applicant is under a removal order and correctly denied the citizenship application.

[19] The respondent argues that subsection 14(1.1) applies where the applicant is a subject of an admissibility hearing. Subsection 14(1.1) operates as a bar to a decision by a citizenship judge until the outcome of an admissibility hearing is known. At the conclusion of an admissibility hearing where an individual is found inadmissible, a removal order is made. This is the only event that subsection 14(1.1) directs a citizenship judge to consider. The judge is not required to wait until an admissibility decision of the Immigration Division is upheld or overturned. Further, the right to

appeal a removal order to the IAD indicates that the Immigration Division decision was a final determination of the admissibility hearing.

[20] The respondent further submits that the citizenship judge was entitled to decide the application. Subsection 14(1) of the Act requires the judge to decide the application within sixty days. Even where the judge allowed the applicant to submit further documentation and asked the applicant to clarify his removal order, the judge remained bound by the duty to determine the application within sixty days. He was not authorized to defer the application under the reconsideration of the applicant's removal order by the IAD.

Analysis and Decision

[21] **Issue 1**

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard of review (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 57).

[22] This case involves questions of law in the interpretation and application of subsection 14(1.1) of the Act. While this might normally be within the area of expertise of a citizenship judge and therefore afforded some deference (see *Dunsmuir* at paragraph 56), in this case, the application of subsection 14(1.1) affects the jurisdiction or *vires* of the citizenship judge to determine the

citizenship application. As such, it will be reviewed on the correctness standard (see *Dunsmuir* at paragraph 59).

[23] Questions of procedural fairness are also evaluated on a standard of correctness (see *Sketchley v Canada (Attorney General)*, 2005 FCA 404, at paragraph 46, and *Dunsmuir* above, at paragraphs 126 and 129).

[24] **Issue 2**

Did the citizenship judge err by finding that the applicant was under a removal order?

An admissibility hearing involving the applicant resulted in the Immigration Division issuing a removal order against the applicant in November 2005. The applicant appealed the removal order to the IAD and received a stay of his removal for four years with terms and conditions. This stay decision is to be reconsidered by the IAD on or about June 23, 2011.

[25] The starting point of this issue is paragraph 5(1)(f) of the Act which states that the Minister shall not grant citizenship to any person who is under a removal order.

[26] The applicant is currently under a removal order as the stay of the removal was determinate and set at four years. However, I agree with the applicant that subsection 14(1.1) applies in this case.

[27] Subsection 14(1.1) states that:

14(1.1) Where an applicant is a permanent resident who is the subject of an admissibility hearing under the *Immigration and Refugee Protection Act*, the citizenship judge may not	14(1.1) Le juge de la citoyenneté ne peut toutefois statuer sur la demande émanant d'un résident permanent qui fait l'objet d'une enquête dans le cadre de la *Loi sur*

make a determination under subsection (1) until there has been a final determination whether, for the purposes of that Act, a removal order shall be made against that applicant.	*l'immigration et la protection des réfugiés* tant qu'il n'a pas été décidé en dernier ressort si une mesure de renvoi devrait être prise contre lui.

[Emphasis added]

[28] There has been no final determination on the removal order against the applicant because of the stay imposed by the IAD. The final determination of the appeal has yet to occur.

[29] While the respondent correctly notes that the citizenship judge is obligated by subsection 14(1) of the Act to determine the citizenship application within sixty days, this must be read in conjunction with the exception created by subsection 14(1.1).

[30] The respondent argues that the removal order issued by the Immigration Division was a final determination despite the right of appeal under subsection 63(3) of IRPA. However, this is not consistent with section 49 of IRPA. Paragraph 49(1)(c) states that where an applicant has the right to appeal, "a removal order comes into force … the day of the final determination of the appeal, if an appeal is made."

[31] This scheme of IRPA implies that the final determination concerning a removal order occurs at the appeal level, the IAD, where the right to an appeal exists. To consider the removal order of the Immigration Division to be a final determination, would not be consistent with section 49 of IRPA.

[32] This is consistent with the jurisprudence of the Supreme Court of Canada stated in *Medovarski v Canada (Minister of Citizenship and Immigration)* 2005 SCC 51 at paragraph 8:

> The words of this statute, like any other, must be interpreted having regard to the object, text and context of the provision, considered together: E.A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87. In interpreting s. 196 to determine whether it eliminates appeals for permanent residents for whom a stay from an order for removal had been granted, I consider the purpose of the *IRPA* and its transitional provisions, the French and English text of s. 196, the legislative context of s. 196, and the need to interpret the provision to avoid an absurd, illogical or redundant result. Finally, I deal with concerns about unfairness to the appellants caused by the transition to the new *IRPA*.

[33] For these reasons, the citizenship judge was obliged not to make a determination of the citizenship application under subsection 14(1). Because of this error by the citizenship judge, the matter should be returned to a different citizenship judge for redetermination following a final determination of the applicant's admissibility by the IAD.

[34] I need not consider the issues of procedural fairness or the loss of permanent resident status.

JUDGMENT

[35] **IT IS ORDERED that** the appeal (application of the applicant) is allowed, the decision of the citizenship judge is set aside and the matter is referred to a different citizenship judge for redetermination.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

Citizenship Act, RSC 1985, c C-29

5. (1) The Minister shall grant citizenship to any person who . . .	5. (1) Le ministre attribue la citoyenneté à toute personne qui, à la fois : . . .
(f) is not under a removal order and is not the subject of a declaration by the Governor in Council made pursuant to section 20.	f) n'est pas sous le coup d'une mesure de renvoi et n'est pas visée par une déclaration du gouverneur en conseil faite en application de l'article 20.
14. (1) An application for	14. (1) Dans les soixante jours de sa saisine, le juge de la citoyenneté statue sur la conformité — avec les dispositions applicables en l'espèce de la présente loi et de ses règlements — des demandes déposées en vue de :
(a) a grant of citizenship under subsection 5(1) or (5), . . .	a) l'attribution de la citoyenneté, au titre des paragraphes 5(1) ou (5);
shall be considered by a citizenship judge who shall, within sixty days of the day the application was referred to the judge, determine whether or not the person who made the application meets the requirements of this Act and the regulations with respect to the application.	
14(1.1) Where an applicant is a permanent resident who is the subject of an admissibility hearing under the Immigration and Refugee Protection Act, the citizenship judge may not make a determination under subsection (1) until there has been a final determination whether, for the purposes of that Act, a removal order shall be made against that applicant.	14(1.1) Le juge de la citoyenneté ne peut toutefois statuer sur la demande émanant d'un résident permanent qui fait l'objet d'une enquête dans le cadre de la Loi sur l'immigration et la protection des réfugiés tant qu'il n'a pas été décidé en dernier ressort si une mesure de renvoi devrait être prise contre lui.

Immigration and Refugee Protection Act, RSC 2001, c 27

46.(1) A person loses permanent resident status . . .	46.(1) Emportent perte du statut de résident permanent les faits suivants : . . .
(c) when a removal order made against them comes into force; or	c) la prise d'effet de la mesure de renvoi;
. . .	. . .
49. (1) A removal order comes into force on the latest of the following dates: . . .	49. (1) La mesure de renvoi non susceptible d'appel prend effet immédiatement; celle susceptible d'appel prend effet à l'expiration du délai d'appel, s'il n'est pas formé, ou quand est rendue la décision qui a pour résultat le maintien définitif de la mesure. . . .
(c) the day of the final determination of the appeal, if an appeal is made.	c) quinze jours après la notification du rejet de sa demande par la Section de la protection des réfugiés ou, en cas d'appel, par la Section d'appel des réfugiés;
50. A removal order is stayed . . .	50. Il y a sursis de la mesure de renvoi dans les cas suivants : . . .
c) for the duration of a stay imposed by the Immigration Appeal Division or any other court of competent jurisdiction;	c) pour la durée prévue par la Section d'appel de l'immigration ou toute autre juridiction compétente;
63.(3) A permanent resident or a protected person may appeal to the Immigration Appeal Division against a decision at an examination or admissibility hearing to make a removal order against them.	63.(3) Le résident permanent ou la personne protégée peut interjeter appel de la mesure de renvoi prise au contrôle ou à l'enquête.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1617-10
STYLE OF CAUSE:	LUCAS EMEKA OBI - and - THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	May 9, 2011
REASONS FOR JUDGMENT AND JUDGMENT OF:	O'KEEFE J.
DATED:	May 18, 2011

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