Federal Court  Cour fédérale

Date: 20140910

Docket: T-290-14

Citation: 2014 FC 846

Ottawa, Ontario, September 10, 2014

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

SHUO QIN (EVA QIN)

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of the November 26, 2013 decision of Citizenship Judge Babcock in which he found that the Applicant did not accumulate the requisite days of residence required for a grant of citizenship in accordance with s. 5(1)(c) of the *Citizenship Act*, RSC, 1985, c C-29 [*Act*].

[2] The Applicant is a permanent resident of Canada and citizen of China.

[3] For the reasons below, I would allow the application and send the matter back for redetermination by the same Citizenship Judge.

II. The Facts

[4] Shuo Qin became a permanent resident of Canada on August 24, 2005, and applied for Canadian citizenship on August 31, 2010. There are three different descriptions of her absences from Canada in the relevant period:

a) The Applicant declared 462 days of absence in her original citizenship application within the material period (physically present 998 days);

b) The Applicant declared 522 days of absence in her residence questionnaire (physically present 938 days);

c) A Citizenship and Immigration Canada officer determined 489 days of absence (physically present 971 days).

[5] Whatever the correct figure of days abroad, the Applicant was away for the vast majority of that time (343 days) on an exchange program in Germany, as part of her degree from the University of Toronto.

[6] The remainder of her time abroad was primarily spent visiting family in China, with a few days on vacation.

[7] There was significant evidence of attachment to Canada apart from her time spent in Canada and the degree obtained from the University of Toronto, including approximately one year spent in Canada as a permanent resident before the commencement of the four-year residency period in question.

[8] In August 2012, the Applicant appeared before Citizenship Judge Geronikolos who, in a May 13, 2013 decision, applied the *Koo* test [*Koo (Re),* [1993] 1 FC 286] and found that the Applicant was not "Canadianized" pursuant to the six-part test.

[9] The Applicant appealed that decision. However, after settlement discussions and with the consent of the Minister, Justice Zinn issued an Order on August 12, 2013, to have Citizenship Judge Geronikolos's decision set aside and the application sent back for redetermination by a different Citizenship Judge.

[10] On November 25, 2013, the Applicant appeared before Judge Babcock, who the new Judge seized with the citizenship application pursuant to the Court's Order of August 12, 2013.

[11] The evidence on the Record is that Judge Babcock advised the Applicant at the hearing, with her counsel present, that if he found that she was indeed in Canada for 938 days, then she would receive a positive decision.

III. The Impugned Decision

[12] On November 26, 2013, in brief reasons, Judge Babcock applied the *Pourghasemi* (strict residency) test [*Re Pourghasemi*, [1993] FCJ No 232] and found that the Applicant did not accumulate 1095 days of physical presence in the relevant material period to satisfy the requirements of s. 5(1)(c) of the *Act*, in spite of the fact that he had undertaken to issue a positive decision if she met his condition precedent of 938 days in Canada.

[13] According to Judge Babcock's written decision, the documentary and oral evidence is that, at minimum, the Applicant spent 938 days in Canada (or 522 days absent) in the relative material period.

[14] Judge Babcock declined to make a favourable recommendation for a discretionary grant of citizenship pursuant to s. 5(4) of the *Act*.

IV. Issues

[15] The first issue raised in this appeal is whether Judge Babcock created a legitimate expectation and in so doing breached procedural fairness requirements, in stating that the *Koo* test would be applied if a condition precedent was met.

[16] The second issue is whether it was reasonable for Judge Babcock to choose the *Pourghasemi* test given the facts.

V. Relevant Legislation

[17] The relevant provisions of the *Act* are reproduced in Annex A.

VI. Submissions

A. *Applicant's Submissions*

[18] The Applicant contends that Judge Babcock told her that as long as she was in Canada for 938 days in the relevant period, he would approve the application. Therefore, the decision applying *Pourghasemi*, instead of *Koo*, was one made in bad faith.

[19] Furthermore, the Applicant submits Judge Babcock should have applied *Koo* because this application is the result of consent to redetermine the result of a decision that had applied *Koo*. The Applicant further submits that the Minister consented to the redetermination on the basis that the original decision was unreasonable, which is implied in the Order of the Court dated August 12, 2013.

B. *Respondent's Submissions*

[20] The Respondent contends there is a presumption the decision-maker acted in good faith and there is a high threshold for establishing bad faith. The Respondent submits that the threshold has not been met in this instance. There is no evidence that an undertaking to apply the *Koo* test was made, aside from the Applicant's affidavit, which should not be admitted because it is hearsay.

[21] There was no legitimate expectation that the *Koo* test would have to be selected upon redetermination, given that there was no such direction in the Court's Order for redetermination, which certainly could have been required had it been negotiated though the settlement. The Respondent contends that even if such an undertaking had been made, the outcome would be the same, because procedural fairness does not guarantee substantive rights.

[22] The Respondent further argues that it was open to the Citizenship Judge to apply the citizenship test of his choice, and the decision, for this and the other reasons above, was entirely reasonable.

VII. Standard of Review

[23] Issues of procedural fairness are reviewed on a standard of correctness: See *Mission Institution v Khela*, 2014 SCC 24 at para 79; *Dembele v. Canada (Citizenship and Immigration)*, 2012 FC 1434 at para. 11.

[24] The standard of review of a judge's assessment of a citizenship application is that of reasonableness. This extends to the judge's selection of the citizenship test: *Gavriluta v Canada (Citizenship and Immigration)*, 2013 FC 705 at para 27.

VIII. Analysis

[25] With respect to the first issue of bad faith and/or legitimate expectations, the only evidence before the Court is that provided by the Applicant's affidavit. Nothing in the decision, notes of the Judge, or elsewhere in the Tribunal Record, provides a countervailing position.

[26] The basic rule of evidence is that all relevant evidence is admissible: *R v Khelawon*, 2006 SCC 57 [*Khelawon*] at para 2.

[27] As mentioned at paragraph 35 of *Khelawon*, the essential features of hearsay are that –

1) the statement is adduced to prove the truth of its contents; and

2) there is an absence of a contemporaneous opportunity to cross examine the declarant.

[28] Rule 83 of the *Federal Courts Rules* allows for an application to cross-examine the deponent of an affidavit served by an adverse party. Consequently, the Respondent had an opportunity to cross-examine the Applicant and chose not to test the veracity of Ms. Qin's claim. Nothing on the Record counters her rendition of the oral hearing, other than the application of the physical residency test by the Judge.

[29] Given the uncontradicted evidence, wherein Judge Babcock informed the Applicant that he would issue a positive decision if he found that she had been in Canada for 938 days in the four-year period at issue, we need to consider whether this reaches the level of bad faith, as the Applicant contends.

[30] To establish bad faith, the Applicant must overcome the presumption that decision-makers act in good faith: See *Freeman v Canada (Citizenship and Immigration)*, 2013 FC 1065 at para 25.

[31] Bad faith has been recognized to encompass malice or intention to harm, as well as recklessness or serious carelessness: See *Freeman*, above, at para, 29; *Finney v. Barreau du Québec*, 2004 SCC 36 at para 39.

[32] It is the Court's view that applying a different citizenship test than that which was promised at the hearing, when such decision is discretionary, would not reach the high threshold of bad faith. Likewise, the errant mailing of a document to the Applicant, rather than counsel, does not reach that threshold either (which was another point raised by the Applicant).

[33] However, related to the issue of bad faith, and one addressed in the Respondent's materials and in oral arguments by the Applicant, is whether the Applicant placed a legitimate expectation that Judge Babcock would apply the *Koo* test.

[34] In *Canada (Attorney General) v Mavi*, 2011 SCC 30 at para 68, Justice Binnie explained the foundational principles of the legitimate expectations' doctrine:

> Where a government official makes representations within the scope of his or her authority to an individual about an administrative process that the government will follow, and the representations said to give rise to the legitimate expectations are clear, unambiguous and unqualified, the government may be held to its word, provided the representations are procedural in nature and do not conflict with the decision maker's statutory duty. Proof of reliance is not a requisite.

[35] The legitimate expectation that would flow from the Judge's statement at the hearing regarding residency, in this case, was that if the 938 days of residence was found to be accurate,

the Judge would approve the application based on the qualitative *Koo* test, because applying a strict residency test could not have resulted in this conclusion.

[36] The Applicant stated that she relied on the undertaking in presenting her case regarding the extent of her significant "Canadianization". It was certainly reasonable to do so based on the hearing, and the entire history of the matter before both the Citizenship Commission and this Court. Case law supports this position, given the Applicant's attachment to Canada, and reason for her absences, under the qualitative *Koo* test: See *El-Kashef v Canada (Citizenship and Immigration)*, 2012 FC 1151 at para 30; *El Ocla v Canada (Citizenship and Immigration)*, 2011 FC 533.

[37] In this case, the switching of the test once the condition precedent had been met, resulted in a breach of the Applicant's legitimate expectations and therefore yielded a breach of procedural fairness: *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817 at para. 26.

[38] Finally, with respect to the second issue, suffice it to say that absent the undertaking to the Applicant at the hearing under review, it would have been completely open to Judge Babcock to use whatever test he chose. Therefore, in ordinary circumstances, the Applicant could have been properly refused citizenship due to the fact that she did not meet the strict residency standard required by *Pourghamesi,* as upheld in recent case law: *Huang v Canada (Citizenship and Immigration)*, 2013 FC 1074; *Martinez-Caro v Canada (Citizenship and Immigiration)*, 2011 FC 640.

[39] As has been pointed out numerous times by this Court, a Citizenship Judge should be provided with a measure of deference in choosing the test to adopt, and the Court should only intervene if the choice is unreasonable: See *Knezevic v. Canada (Citizenship and Immigration)*, 2014 FC 181 at para 1; *Gavriluta v Canada (Citizenship and Immigration)*, 2013 FC 705 at para 27.

[40] The Applicant finds herself in that unusual situation due to what transpired at her hearing. She understood that the *Koo* test would be applied and governed herself accordingly.

IX. Conclusion

[41] As a consequence of the breach of procedural fairness when the *Koo* test was not applied, the matter will be sent back for redetermination by the same Citizenship Judge.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is allowed and the matter is referred for redetermination by the same Citizenship Judge.

"Alan Diner"

Judge

ANNEX "A"

Citizenship Act, RSC, 1985, c. C-29

5. (1) The Minister shall grant citizenship to any person who

…

(*c*) is a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*, and has, within the four years immediately preceding the date of his or her application, accumulated at least three years of residence in Canada calculated in the following manner:

(i) for every day during which the person was resident in Canada before his lawful admission to Canada for permanent residence the person shall be deemed to have accumulated one-half of a day of residence, and

(ii) for every day during which the person was resident in Canada after his lawful admission to Canada for permanent residence the person shall be deemed to have accumulated one day of residence;

…

(4) In order to alleviate cases of special and unusual hardship or to reward services of an exceptional value to Canada, and notwithstanding any other provision of this Act, the Governor in Council may, in his discretion, direct the Minister to grant citizenship to any person and, where such a direction is made, the Minister shall forthwith grant citizenship to the person named in the direction.

Loi sur la citoyenneté (L.R.C. (1985), ch. C-29)

5. (1) Le ministre attribue la citoyenneté à toute personne qui, à la fois :

[…]

c) est un résident permanent au sens du paragraphe 2(1) de la *Loi sur l'immigration et la protection des réfugiés* et a, dans les quatre ans qui ont précédé la date de sa demande, résidé au Canada pendant au moins trois ans en tout, la durée de sa résidence étant calculée de la manière suivante :

(i) un demi-jour pour chaque jour de résidence au Canada avant son admission à titre de résident permanent,

(ii) un jour pour chaque jour de résidence au Canada après son admission à titre de résident permanent;

[…]

(4) Afin de remédier à une situation particulière et inhabituelle de détresse ou de récompenser des services exceptionnels rendus au Canada, le gouverneur en conseil a le pouvoir discrétionnaire, malgré les autres dispositions de la présente loi, d'ordonner au ministre d'attribuer la citoyenneté à toute personne qu'il désigne; le ministre procède alors sans délai à l'attribution.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-290-14
STYLE OF CAUSE:	SHUO QIN (EVA QIN) v MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	AUGUST 19, 2014
JUDGMENT AND REASONS:	DINER J.
DATED:	SEPTEMBER 10, 2014

APPEARANCES:

Phillip J. L. Trotter	FOR THE APPLICANT
Christopher Crighton	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Phillip J. L. Trotter Barrister & Solicitor Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT