Federal Court Cour fédérale

Date: 20141014

Docket: T-815-13

Citation: 2014 FC 971

Ottawa, Ontario, October 14, 2014

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

ASLAM SHER MOHAMMAD

Applicant

And

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Aslam Sher Mohammad appeals the decision of a Citizenship Judge refusing his application for Canadian citizenship on the ground that he had not satisfied the language requirements of the *Citizenship Act*.

[2] Mr. Mohammad submits that Rule 300(c) of the *Federal Courts Rules*, which governs the conduct of challenges to decisions of Citizenship Judges, is *ultra vires* the rule-making authority of the Federal Courts Rules Committee as established by section 45.1 of the *Federal Courts Act*.

This, he says, is because subsection 14(5) of the *Citizenship Act* specifically contemplates that such challenges are to be made by way of "appeals", and not by application.

[3] According to Mr. Mohammad, in the absence of properly enacted rules, he should be entitled to have his appeal of the Citizenship Judge's decision conducted by way of a *de novo* hearing in this Court, as was done prior to the 1998 amendments to the *Federal Courts Rules*.

[4] In the alternative, Mr. Mohammad submits that the Citizenship Judge erred in his assessment of Mr. Mohammad's English language skills.

[5] Mr. Mohammad has not persuaded me that Rule 300(c) of the *Federal Courts Rules* is *ultra vires* section 46 of the *Federal Courts Act*, nor has he persuaded me that the Citizenship Judge erred in his assessment of Mr. Mohammad's linguistic ability. Consequently, the appeal will be dismissed.

I. <u>Background</u>

[6] Mr. Mohammad is an Indian citizen who became a permanent resident of Canada in 2006. He applied for Canadian citizenship in 2009, and in February of 2011, a citizenship officer determined that Mr. Mohammad's application should be sent to a Citizenship Judge for language and knowledge testing.

[7] Mr. Mohammad appeared before a Citizenship Judge on March 6, 2013. He passed the knowledge test with the aid of an interpreter, but obtained a failing mark of 1 out of 6 with respect to his knowledge of English. In a March 11, 2013 decision letter, the Citizenship Judge denied Mr. Mohammad's application for Canadian citizenship on the basis that he did not have

adequate knowledge of one of Canada's official languages, as required by paragraph 5(1)(d) of the *Citizenship Act*, R.S.C. 1985, c. C-29.

[8] The Citizenship Judge noted that, according to section 14 of the *Citizenship Regulations*, S.O.R./93-246, an "adequate knowledge" of one of Canada's official languages means that an applicant must be able to comprehend basic spoken statements and questions, and convey orally or in writing basic information or answers to questions.

[9] In concluding that Mr. Mohammad had failed the language component of the citizenship requirements, the Citizenship Judge wrote that Mr. Mohammad "could not comprehend basic spoken statements and questions and (or) [he] could not comprehend basic information or answers to questions".

[10] The Citizenship Judge decided not to recommend a waiver of the language requirement on compassionate grounds, and also refused to grant citizenship on the basis of unusual hardship or services adding exceptional value to Canada, under subsection 5(4) of the *Citizenship Act*. No challenge has been brought to this latter aspect of the Citizenship Judge's decision.

II. Issues

[11] The issues raised by Mr. Mohammad may be summarized as follows:

1. Whether the Rules Committee of the Federal Court had the legal authority to change the process governing appeals under the *Citizenship Act* in 1998; and
2. Whether the Citizenship Judge's decision was reasonable.

III. *The Vires Issue*

[12] Mr. Mohammad points out that prior to the 1998 amendments to the *Federal Court Rules*, S.O.R./98-106, citizenship appeals were conducted as *de novo* hearings before judges of this Court or its predecessor, the Exchequer Court, sitting as judges of the Citizenship Appeal Court. Judges could receive new evidence in these appeals. Judges could, moreover, question applicants for Canadian citizenship and come to their own conclusions as to whether an applicant met the requirements of the *Citizenship Act* in force at the relevant time.

[13] According to Mr. Mohammad, this practice was consistent with the legislative intention of Parliament, as reflected in comments made to the House of Commons and a Parliamentary committee at the time of the enactment of the 1967 *Citizenship Act*, S.C. 1967-68, c. 4, and again at the time of the enactment of the 1976 *Citizenship Act*, S.C. 1974-75-76, c. 108.

[14] In 1967, the Parliamentary Secretary to the Secretary of State confirmed in the House of Commons that the Government was proposing the creation of a Citizenship Appeal Court "to hear *appeals* from negative decisions of citizenship courts" [my emphasis].

[15] The 1967 *Citizenship Act* did not, however, specify any particular process that had to be followed for the conduct of citizenship appeals. Indeed, subsection 30A(7) of the Act left it to the judges of the Citizenship Appeal Court to make rules governing the conduct of appeals, subject to the approval of the Governor in Council. It is, however, noteworthy that subsection 30A(5) of the Act did give the Citizenship Appeal Court the power to confirm or reverse the decision of the Court appealed from.

[16] Rules subsequently created by the Citizenship Appeal Court provided that an appeal before the Citizenship Appeal Court would take the form of a new hearing: Rule 10(1). The Court was further empowered to receive evidence and conduct such examination of the appellant as it deemed appropriate: Rule 10(2).

[17] With the abolition of the Exchequer Court in 1970, the Trial Division of the Federal Court took over the role of hearing citizenship appeals. The *Citizenship Appeal Rules* were rescinded and were replaced with the *Federal Court Rules*. Citizenship appeals did, however, continue as hearings *de novo*, in accordance with the procedures then in effect in the *Federal Court Rules*.

[18] The *Citizenship Act* was amended again in 1976. Mr. Mohammad relies on a statement made to a Parliamentary Committee by a Justice Department lawyer at the time, where counsel explained that under the new legislation, "[t]he applicant will be given a trial *de novo* before the Federal Court judge because citizenship judges are not real judges …". That is not, however, what the legislation ultimately said.

[19] Subsection 13(5) of the 1976 *Citizenship Act* provided for appeals from citizenship decisions to the Federal Court. It is, however, important to note that other than providing a 30-day appeal period, the Act was once again silent as to the process to be followed in relation to such appeals, leaving the creation of the appeals process to the Rules Committee of the Federal Court.

[20] It is, however, noteworthy that the statute no longer gave judges the power to confirm or reverse the decision of the Court appealed from, and I do not agree with Mr. Mohammad that we should infer that this was merely “an oversight” by Parliament.

[21] In 1985, the *Citizenship Act* was revised and consolidated into the *Citizenship Act*, R.S.C. 1985, c. C-29. Although this legislation has recently been amended by Bill C-24, the *Strengthening Canadian Citizenship Act*, 2nd Sess., 41st Parl., 2014 (as passed by the House of Commons 19 June 2014), I understand the parties to agree that it is the 1985 version of the legislation that governs Mr. Mohammad’s case.

[22] The appeal provisions are found in section 14 of the 1985 *Citizenship Act*. Subsection 14(5) of this Act provides that an applicant may appeal to the Federal Court from the decision of a Citizenship Judge. Once again, other than providing for a 60-day appeal period, the Act is silent on the process governing appeals.

[23] In the mid-1990’s, the 1971 *Federal Court Rules* were subjected to a comprehensive review and modernization process by the Federal Court’s Rules Committee.

[24] The Rules Committee is a statutory committee, created under section 45.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7. Subject to the approval of the Governor in Council, the Committee is empowered to make rules “for the effectual execution and working of any Act by or under which jurisdiction is conferred on the Federal Court of Appeal or the Federal Court or on any judge of either court in respect of proceedings in that court and the attainment of the intention and objects of that Act”.

[25] Subsection 46(2) of the *Federal Courts Act* provides that rules made under this section may address "matters arising out of or in the course of proceedings under any Act involving practice and procedure or otherwise, for which no provision is made by that Act or any other Act but for which it is found necessary to provide in order to ensure the proper working of that Act and the better attainment of its objects".

[26] The 1990's review of the *Federal Court Rules* involved extensive study and consultation, and culminated in wholesale changes to the Rules. Amongst other things, these changes were designed to simplify procedures and increase efficiency.

[27] Most importantly for our purposes, Rule 300(c) of the 1998 *Federal Court Rules* provided that appeals under subsection 14(5) of the *Citizenship Act* would henceforth proceed as applications under Part 5 of the Rules. Appeals would be based upon the record that was before the Citizenship Judge, and no longer by way of hearings *de novo*. These Rules were approved by the Governor in Council, and have the status of subordinate legislation.

[28] To succeed in his *vires* argument, Mr. Mohammad must show that Rule 300(c) of the 1998 *Federal Court Rules* was inconsistent with the objective of the enabling statute or the scope of the statutory mandate: *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, at para. 24, [2013] 3 S.C.R. 810.

[29] Regulations benefit from a presumption of validity. This "favours an interpretative approach that reconciles the regulation with its enabling statute so that, *where possible*, the regulation is construed in a manner which renders it *intra vires*": *Katz Group Canada Inc.*, above at para. 25, emphasis in the original.

[30] Nothing in either the *Federal Courts Act* or the 1985 *Citizenship Act* stipulated that appeals from decisions of Citizenship Judges had to proceed by way of *de novo* hearings. Since 1967, Parliament has clearly intended that decisions as to the process to be followed in relation to citizenship appeals be left to this Court (or its predecessors), and any comments that may have been made by a Justice Department lawyer in 1976 do not displace this clear intent.

[31] For a period of time, the process approved by the Governor in Council contemplated hearings *de novo*. Since 1998, when the Governor in Council approved the *Federal Courts Rules* now in effect, the process has been by way of application. Hearings are now conducted on the basis of the record that was before the Citizenship Judge, supplemented by new evidence where, for example, issues arise as to procedural fairness or jurisdiction. Both processes were the creation of Rules of Court, and neither process was inconsistent with the objectives of either the *Federal Courts Act* or the *Citizenship Act*.

[32] As a consequence, Mr. Mohammad has not persuaded me that Rule 300(c) of the *Federal Courts Rules* is *ultra vires* either the *Federal Courts Act* or the *Citizenship Act*.

IV. Was the Citizenship Judge's Decision Unreasonable?

[33] Mr. Mohammad conceded at the hearing that he did not have a strong argument that the Citizenship Judge's assessment of his English language skills was flawed, and I agree with that assessment.

[34] He does, however, suggest that as the *Citizenship Act* provides for an "appeal" to this Court, I should apply the appellate standard of "palpable and overriding error" to the decision of the Citizenship Judge. In support of this contention, he relies on the decision in *Huruglica v.*

Canada (Minister of Citizenship and Immigration), 2014 FC 799, [2014] F.C.J. No. 845, which dealt with the standard of review to be applied by the Refugee Appeal Division of the Immigration and Refugee Board in reviewing decisions of the Refugee Protection Division of the Board. There, Justice Phelan discussed the differences between the appellate standard of review and that used on judicial review.

[35] The respondent contends that this Court has repeatedly stated that the standard of review to be applied to decisions of Citizenship judges on questions relating to the qualifications of candidates for citizenship is that of reasonableness: see, for example, *Zhao v. Canada (Minister of Citizenship & Immigration)*, 2006 FC 1536 at para. 45, 306 F.T.R. 206; *Amoah v. Canada (Minister of Citizenship & Immigration),* 2009 FC 775 at para 14, [2009] F.C.J. No. 947; *Chen v. Canada (MCI),* 2006 FC 85 at para. 10, [2006] F.C.J. No. 119.

[36] I do not need to decide this issue in this case as the choice of standard of review would not be determinative of the outcome of Mr. Mohammad's appeal. Whether I apply the appellate standard of "palpable and overriding error" or the reasonableness standard established by the jurisprudence of this Court, no error in the assessment of Mr. Mohammad's English language skills on the part of the Citizenship Judge has been established.

[37] The Citizenship Judge's decision indicates the basis for concluding that Mr. Mohammad did not satisfy the language requirements under paragraph 5(1)(d) of the *Citizenship Act*, and there is no basis for this Court to intervene.

V. Conclusion

[38] For these reasons, Mr. Mohammad's appeal is dismissed. Given that the issue raised by Mr. Mohammad was of some importance to the system as a whole, and in the exercise of my discretion, no order will be made as to costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This appeal is dismissed.

"Anne L. Mactavish"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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