

Federal Court



Cour fédérale

Date: 20160217

Docket: T-1161-15

Citation: 2016 FC 217

Ottawa, Ontario, February 17, 2016

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

TZU-TSEN LIM

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of a decision by a citizenship official [Official] to declare the Applicant's citizenship application abandoned due to the failure to respond to a letter from the Official dated April 13, 2015. The Applicant claims that she never received the letter.

[2] Despite the usual rule that there should only be one judicial review per decision, the Applicant also challenges the Official's decision not to re-open the citizenship application on the grounds that a re-opening is only available where there has been administrative error on the part of the Respondent.

[3] I indicated orally that the Applicant would be successful in this judicial review.

II. Background

[4] The relevant provisions of the *Citizenship Act*, RSC 1985, c C-29, are:

13.2 (1) The Minister may treat an application as abandoned

(a) if the applicant fails, without reasonable excuse, when required by the Minister under section 23.1,

(i) in the case where the Minister requires additional information or evidence without requiring an appearance, to provide the additional information or evidence by the date specified, or

(ii) in the case where the Minister requires an appearance for the purpose of providing additional information or evidence, to appear at the time and at the place — or at the time and by the means — specified or to provide the

13.2 (1) Le ministre peut considérer une demande comme abandonnée dans les cas suivants :

a) le demandeur omet, sans excuse légitime, alors que le ministre l'exige au titre de l'article 23.1 :

(i) de fournir, au plus tard à la date précisée, les renseignements ou les éléments de preuve supplémentaires, lorsqu'il n'est pas tenu de comparaître pour les présenter,

(ii) de comparaître aux moment et lieu — ou au moment et par le moyen — fixés, ou de fournir les renseignements ou les éléments de preuve supplémentaires lors de sa comparution, lorsqu'il est tenu de comparaître pour

additional information or evidence at his or her appearance; or

les présenter;

(b) in the case of an applicant who must take the oath of citizenship to become a citizen, if the applicant fails, without reasonable excuse, to appear and take the oath at the time and at the place — or at the time and by the means — specified in an invitation from the Minister.

b) le demandeur omet, sans excuse légitime, de se présenter aux moment et lieu — ou au moment et par le moyen — fixés et de prêter le serment alors qu'il a été invité à le faire par le ministre et qu'il est tenu de le faire pour avoir la qualité de citoyen.

(2) If the Minister treats an application as abandoned, no further action is to be taken with respect to it.

(2) Il n'est donné suite à aucune demande considérée comme abandonnée par le ministre.

...

...

23.1 The Minister may require an applicant to provide any additional information or evidence relevant to his or her application, specifying the date by which it is required. For that purpose, the Minister may require the applicant to appear in person or by any means of telecommunication to be examined before the Minister or before a citizenship judge, specifying the time and the place — or the time and the means — for the appearance.

23.1 Le ministre peut exiger que le demandeur fournisse des renseignements ou des éléments de preuve supplémentaires se rapportant à la demande et préciser la date limite pour le faire. Il peut exiger à cette fin que le demandeur comparaisse — devant lui ou devant le juge de la citoyenneté pour être interrogé — soit en personne et aux moment et lieu qu'il fixe, soit par le moyen de télécommunication et au moment qu'il fixe.

[5] The Applicant applied for citizenship in June 2010.

[6] On October 22, 2014, the Official sent a letter to the Applicant requesting additional information. The Applicant responded within the time limits imposed.

[7] On April 13, 2015, the Official purportedly sent another letter to the Applicant requesting more complete information and warning that failure to respond on time would result in the citizenship application being deemed abandoned.

It is this letter that is the source of the problem.

[8] On May 29, 2015, the Applicant having not responded, the application was deemed abandoned and the file closed. A letter to that effect was sent to the Applicant.

[9] The Applicant then responded that she had not received the April 13, 2015 letter and requested that the file be re-opened.

[10] The Official replied on July 2, 2015, confirming the deemed abandonment and refusing to re-open the file. The only reason cited for the refusal to re-open is:

Abandoned applications are only reactivated if there was an administrative error on the part of Citizenship officials.

[11] The parties agree that the judicial review covers both the deemed abandonment and the refusal to re-open.

III. Analysis

A. *Standard of Review*

[12] The deemed abandonment issue based on the failure to give notice is one of procedural fairness. It is subject to the correctness standard of review (*Halder v Canada (Citizenship and Immigration)*, 2012 FC 1346, 226 ACWS (3d) 551).

As held by the Court of Appeal in *Chopra v Canada (Attorney General)*, 2014 FCA 179, 245 ACWS (3d) 250, the refusal to re-open in respect of a non-adjudicative body's discretionary decision is governed by the standard of reasonableness.

B. *Abandonment*

[13] The Respondent's deemed abandonment decision is based on the assumption that the April 13, 2015 letter was sent. The difficulty is that the Respondent cannot prove that fact.

[14] The affidavit evidence of the Official, taken in its most favourable light for the Respondent, is that the letter was put into an outbox tray in the Official's work area. Where the letter went from there is not established. What is established is that the Applicant did not receive it.

[15] There is no notation in the GCMS system, as is the usual practice, that the letter was sent.

[16] In addition to not being able to actually prove the sending, the surrounding circumstances are inconsistent with the Respondent's assumption. The evidence is that the Applicant had a pattern of responding on time to letters from the Respondent. The evidence is that letters that were actually sent were received at the Applicant's address.

[17] Therefore, the Court must find that the April 13, 2015 letter was not sent.

[18] As a consequence, the Applicant had a "reasonable excuse" pursuant to s 13.2 for her failure to respond to the Minister.

[19] In addition to the common law requirement for notice, which was not given, the Minister did not have the statutory precondition to treat an application as abandoned.

[20] On this ground alone, the judicial review will be granted.

C. *Re-Opening*

[21] It is also necessary to address this second issue. The Official, having learned that the Applicant had not received the April 13, 2015 letter, refused to re-open the citizenship application. The sole grounds for the decision is that the Official does not re-open except for administrative error by departmental officials including, presumably, errors of this Official.

[22] Given the Court's finding that the letter was not sent as it should have been, this was the very type of administrative error that the Official cited.

[23] More importantly, the cited grounds to exercise discretion to re-open were arbitrary and unreasonable. The only basis upon which a case would be re-opened is if the department deemed themselves to be in error. That ground takes no account of other factors such as Acts of God, unforeseen circumstances and matters beyond anyone's control. It is a self-serving and ludicrous basis from which to reject a re-opening request and is hence arbitrary.

[24] It is an unreasonable basis because it lacks reality, common sense and fairness. As put to counsel, the Respondent would not re-open even if it knew that the letter was destroyed in a fire in the department's offices because officials had not set the fire. It is a breathtakingly unreasonable position.

[25] The refusal to re-open decision must be quashed.

IV. Conclusion

[26] For all of these reasons, this judicial review is granted. The decision to treat the citizenship application as abandoned and the decision to refuse to re-open the application are quashed.

[27] The Respondent is directed to continue to process the application in an expeditious (not in the ordinary course) manner.

JUDGMENT

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

The decision to treat the citizenship application as abandoned and the decision to refuse to re-open the application are quashed. The Respondent is directed to continue to process the application in an expeditious (not in the ordinary course) manner.

"Michael L. Phelan"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1161-15

STYLE OF CAUSE: TZU-TSEN LIM v THE MINISTER OF CITIZENSHIP
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